

REGULATION AS LANGUAGE: COMMUNICATING VALUES BY ALTERING THE CONTINGENCIES OF CHOICE¹

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1. The phrase in the title, "regulation as language," also appears as a section heading in MICHAEL H. SHAPIRO & ROY G. SPECE, JR., *BIOETHICS AND LAW* 3 (Supp. 1991), and is discussed briefly in Michael H. Shapiro, *On Not Watering All the Flowers: Regulatory Theory and the Funding of Heart Transplantation*, 28 *JURIMETRICS J.* 21, 24 (1987) [hereinafter Shapiro, *Heart Transplantation*].

There is a parallel usage in theory of punishment: several authors have referred to "punishment as language." See, e.g., Igor Primoratz, *Punishment as Language*, 64 *PHIL.* 187 (1989) and works cited therein. The general idea applies in theory to any institutional practice, and to some forms of nonverbal behavior by individuals. Nothing here turns on whether "language" or "communication" is the term used, though they are of course not synonymous. Various problems concerning the use of the terms "communication" and "language" will be addressed later. See *infra* notes 139-80 and accompanying text.

The first draft of this article was written in 1987. Both before and since that time, many observers have discussed the idea that regulatory systems and other social institutions produce cognitive, emotional and learning effects. See, e.g., Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 *MICH. L. REV.* 936, 940-41 (1991):

On [one] view, structures of distribution are important primarily in terms of their capacity to deliver the relevant goods. Yet the choice among alternative structures of distribution is meaningful for other reasons. Like many policies, this choice is of consequence not only instrumentally, but culturally: such structures play a role in creating social understandings and fostering particular types of social relationships. . . . By expressing and embodying such norms, policy outcomes necessarily consecrate certain values and exclude others. The public validation of certain norms contributes to a broader political culture characterized by those particular understandings and commitments.

Id. (footnotes omitted). See also GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW* 84 (1985); MURRAY J. EDELMAN, *POLITICS AS SYMBOLIC ACTIONS: MASS AROUSAL AND QUIESCENCE* 180 (1971) [hereinafter EDELMAN I] ("[p]olicymakers should always be alert to both the physical and the cognitive impacts of their contemplated acts . . ."); MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 68 (1964) [hereinafter EDELMAN II]; Thomas Beauchamp, *Community: The Neglected Tradition of Public Health*, *HASTINGS CENTER REP.*, Dec. 1985, at 28, 34; James F. Childress, *Ensuring Care, Respect, and Fairness for the Elderly*, *HASTINGS CENTER REP.*, Nov. 1984, at 27, 29; Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779, 820-21 (1994) ("If the law wrongly treats something—say, reproductive capacities—as a commodity, the social kind of valuation may be adversely affected. [Sunstein suggests examples of "healthy effects on social valuation."] It is appropriate to evaluate the law on

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this ground."); *id.* at 824 ("I do suggest that the expressive function [of law] is part of political and legal debate."); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL ED. 505, 508 (1986); *cf.* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution*, 67 N.Y.U. L. REV. 961, 964 (1992) (Supreme Court must be understood as institution with educative responsibilities).

This article deals with some mechanisms and contexts for "regulation as communication" that bear special attention. There is an emphasis on the possible learning effects of perceiving that important transactions (lifesaving, for example) and the recognition of social duties may be contingent on certain factors (ability to pay, membership in a community, and so on). Health care is the primary target, and there are connected remarks on surrogate motherhood and innovative biological technologies.

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“You speak when you not know you speak.”²

I. INTRODUCTION

A. *The Subject*

Government regulation sometimes seems to transform contingent transactions into noncontingent ones. In a free market, for example, whether health care providers supply lifesaving services³ to those who need them may be contingent on the latter's ability to pay. If, instead, the law requires such providers to offer such care (e.g., in emergency

2. JEAN AUÉL, *THE MAMMOTH HUNTERS* 111 (1985) (Ayla speaking).

3. “Lifesaving services” is left undefined here. Obviously, there are difficulties in distinguishing lifesaving from possibly unreasonable forms of life-prolongation. There are more general problems of defining a concept of “medical needs.” On the latter, see generally NORMAN DANIELS, *JUST HEALTH CARE* 19-35 (1985) (health-care needs). On comparing lifesaving, prolonging life, and prolonging death, see MICHAEL H. SHAPIRO & ROY G. SPECE, JR., *BIOETHICS AND LAW* 572-74 (1981).

rooms or as part of a larger health care scheme), then the offer of lifesaving care may *appear* to be noncontingent: one has an "absolute" right, independent of ability to pay. (Of course, contingencies may have been altered, not eliminated, depending on how one defines the transaction in question.)⁴

So what? So this: in a system where the offer of lifesaving services is contingent on ability to pay (or other criteria apparently unconnected with need, such as kinship or friendship), the value⁵ placed on life may seem called into question, at least in some eyes. It is, at any rate, not reinforced. In a system where the offer is noncontingent (and resources are known to be adequate), there is an appearance of community commitment to life and an assertion of its value. These differing appearances—the "absolute" versus the "contingent"—may have different effects on preference formation and may affect behavior in the long run.⁶ Government regulation can thus be a means of cultural expression that reinforces values and influences conduct through the perceived reduction of contingencies in the distribution of valued goods and services.⁷ In certain cases, then, free market choices may impair values⁸ that can be promoted by certain forms of regulation.

Think also of government regulation forbidding the enforcement of

4. See *infra* notes 166-75 and accompanying text.

5. There are major differences in meaning among terms such as "values," "preferences," "attitudes," "beliefs," and "dispositions." For present purposes, however, it is enough to say that "preference" or "value" will often be used as proxies for the other terms. For a discussion of these terms, see Kurt Baier, *What is Value? An Analysis of the Concept*, in *VALUES AND THE FUTURE* 33 (Kurt Baier and Nicholas Rescher eds., 1969); Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 *J. LEGAL STUD.* 217, 222-23 (1993). Note particularly that no effort is made here to define phrases such as "life-affirming ethic."

6. These effects of the operation of public and private institutions include both learning and nonlearning effects, some occurring through communicative mechanisms and some not; and the learning effects are of course not limited to value reinforcement or attenuation. See *infra* text accompanying notes 28-39. Some regulation bears little moral freight except, perhaps, for suggesting a need for order (rules about the official time of day), and so produces insignificant value learning. Suggesting a need for order, however, may in some contexts reinforce important values (rules of the road to preserve life).

Cf. Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 *J. ECON. LITERATURE* 671, 679 (1993) (referring to a line of inquiry which "involves attempts by economists to take account empirically of the influence of moral norms on people's behavior. This approach starts from the apparent fact that people's economic behavior is influenced by their moral beliefs, and it looks to see what impact these beliefs have on economic outcomes.").

7. It is more accurate to speak of substituting one set of contingencies or uncertainties for another. The moral significance of the substitution lies in the nature of the contingencies involved before and after the shift. See *infra* note 170.

8. See *infra* note 176 (discussing the meaning of "impairs a value").

surrogate motherhood transactions. Those transactions, on some views, present the image of parental bonds of love and duty being contingent because they can be annulled by an offer of money, or by a child's condition or personal characteristics (as where the child is rejected by an intended parent). Bans on surrogacy may thus reinforce the idea of noncontingent parental bonds. This reinforcement comes, however, at the high price of making it difficult for some persons to create new nuclear families bearing the traditional noncontingent bonds—a matter often ignored in the surrogacy debate.

These examples suggest that theories of regulation offered to explain and justify why we regulate the way we do are incomplete unless they attend to the “communicative impacts” and learning effects of regulatory systems. In so attending, the theories must focus, where appropriate, on the effects of transforming perceived contingencies into perceived noncontingencies (and vice versa) in the distribution of certain commodities or in the creation of interpersonal bonds.

In short, investigation solely into the production and distribution of goods and services and the related background rules of contract, property, and so on, are not enough fully to evaluate regulation. One must also ask whether the production and distribution systems affect preferences that may influence behavior that in turn alters distribution patterns and/or even redefines the community itself. Only a comprehensive view that considers endogenous change of preferences arising from the distribution system's communicative impacts and learning effects can adequately assess a regulatory scheme—either by way of explaining it, or by normatively evaluating it.

We deal broadly, then, with the “learning effects” of regulation (thus the metaphor of regulation as language or communication). In particular, the emphasis is on learning effects mediated by perceptions of contingency or non-contingency in the distribution of certain benefits and burdens. The reason for dealing with this subcategory of the learning effects of regulation arises from the focus here on biological technologies and on health care generally. In these fields, the perceived transformation of contingencies seems a particularly useful target for analysis.

There is also a brief reference to the argument that in pursuing certain forms of regulation we are being contaminated by and promoting evil. This issue has no special connection with contingency, but it too is often connected with biological technology and health care. The idea is that under certain conditions, either regulation or nonregulation

may embody a link to morally questionable or evil activities and thus reinforce dispositions toward those activities. Much of biological technology involves "artificial" creation, destruction and manipulation of life processes, and thus many of its applications seem to some to be tainted—the use of fetal tissue, for example. Other familiar examples include use of improperly acquired research data and distribution of safety devices to be used in illegal or questionable activities (e.g., clean needles for drug users, condoms for teenagers).

The views offered here do not necessarily reflect a departure from the use of efficiency standards as usually defined. It is assumed they have some normative pull.⁹ To the extent that value learning, preference formation and certain forms of behavior are considered societal goals, the efficiency of a regulatory system cannot be assessed solely by considering its direct economic effects.¹⁰ The operation of a regulatory system may shift preferences and so shift efficiency assessments. Moreover, if one considers preferences concerning preferences (e.g., second-order preferences about what attitudes and behaviors to promote), complete efficiency analysis *must* consider changes of preferences induced by the systems in question. If they are the very changes or reinforcements intended by the community, then the supposedly economically inefficient system—viewed from a short-term perspective—may in fact be efficient.¹¹ Reductions in the availability of specific commodities

9. On distinguishing positive and normative economics, see Hausman & McPherson, *supra* note 6, at 671-78. The authors review some explications of "efficiency." *Id.* at 702-03.

10. Cf. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *ETHICS, ECONOMICS AND THE LAW* 3, 4 (J. Roland Pennock & John W. Chapman eds., 1982) ("The efficiency of private property is a hypothesis dependent, not only on behavior rationally directed toward satisfying individual wants, but on questions about the contents of the wants and the social propensities of their bearers . . ."). One is not bound to talk the language of efficiency. See *id.* at 6-7. "[C]oncerns [such as distributional outcomes or noneconomic ideas of rights] might immediately dictate the choice among regimes without regard to efficiency comparisons; or efficiency comparisons might be relevant but not necessarily controlling." *Id.* at 6. Still, one may well speak in terms of efficiency with respect to furthering the full set of social goals, including those concerning distributional equity, recognition of rights, and the promotion of various attitudes, beliefs and values.

One might also discuss the matter in terms of "production functions," in which the output includes changes in preferences and attitudes and resulting behavioral changes and the input is taken to include not just the state of technology and engineering, but the regulatory and cultural frameworks in which the factors of production are arranged. For a definition of "production function," see PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 107 (14th ed. 1992).

11. Cf. Hausman & McPherson, *supra* note 6, at 686 ("[U]tility theory places no constraints on the objects of preferences."). The authors go on to state that "[d]espite the flexibility of utility theory, it is questionable whether the full range of familiar moral phenomena can be accommodated within it." *Id.* But not that much is being packed into utility theory here. Prefer-

would be consistent with the ordering often entailed in having multiple goals. (Whether the preference shifts themselves are morally sound because the preferences are seen as intrinsically or instrumentally valuable, of course, represents another layer of analysis. There will be no analysis here of the nature of the moral duties we indeed owe each other, nor of issues concerning the community's right to educate itself through its regulatory institutions.)

Preference formation is thus a topic that must be considered by anyone who takes normative theory seriously. If society wishes to maintain certain preferences, attitudes, beliefs and dispositions, and if the creation and operation of particular regulatory or non-regulatory systems reinforces or attenuates them, then the ultimate justification or condemnation of regulation requires a perspective that sees regulation as the "communication" of basic societal ideas.¹²

This article, then, is not meant as a radical critique of markets or of liberal philosophies that inform them. It is meant to display some of the properties of markets and to examine areas in which markets are tempered for various plausible purposes. In many cases, taking such matters into account may vindicate market solutions to distributive issues. (Note well that markets may erode kinship and personal relationships as the main criteria for distribution. *Compared to some kinship systems*, then, markets may generate some preferred learning effects, though kinship systems may also usefully instruct us.) In other cases, modified markets may be preferable to nonmarket solutions.¹³ Yet the possibility remains that in some categories of exchange, the contingencies of the market should be transformed in significant ways.

The rest of this article is an elaboration of these points, with spe-

ences about other person's preferences can be modeled, though there are many difficulties. See *id.* at 687 (discussing the inclusion of either the utility or consumption levels of other persons in one's own utility function).

12. For brief earlier statements of this point, see Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1559-60 (1988) [hereinafter *Clumsy Institutions*] and Shapiro, *Heart Transplantation*, *supra* note 1, at 24. *Cf.* Primoratz, *supra* note 1, at 190 ("[T]he main function of punishment is not so much to reform or deter, but rather to maintain social cohesion by safeguarding a vigorous collective conscience."); EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 108-110 (George Simpson trans., 1933) (the "true function [of criminal punishment] is to maintain social cohesion intact"; link between social solidarity and repressive law). The idea of social solidarity bears some affinity to the idea of noncontingent bonds, discussed *infra* notes 100-03 and accompanying text.

13. *But cf.* RICHARD A. EPSTEIN, *ORGAN TRANSPLANTATION: OR, ALTRUISM RUN AMUCK* 13 (1993) ("If there are abuses in the market, first try to correct these without closing down the entire market. But I suspect that this note of pessimism is misplaced, for the enormous gains from trade should lead to flourishing markets that are free of most of these problems.").

cial (though not exclusive) focus on illustrations from the health care and bioethics domains. Those fields offer illustrations of the idea that use of certain technologies might “replace absoluteness with contingency,” and that certain regulatory schemes may seek to reverse this—that is, to implant absoluteness in place of contingency as a tool of preference formation or maintenance.¹⁴ These contingencies arise because biological technologies, by enabling us to separate and recombine the elements of physiological processes,¹⁵ may suggest that traits, persons and relationships are being “manipulated,” and that interpersonal bonds are becoming “contingent” on the success of these manipulations.¹⁶ Thus, surrogates transfer children for money, fetuses are aborted to serve as medicine cabinets, and persons are kept alive only to serve as tissue sources. In the next century, early embryos and even gametes may be restructured either to prevent certain conditions or traits from developing or to promote them. And performance enhancement measures can even now be initiated upon living persons—as with steroids and human growth hormone. If the transferred children do not please, or engineered children fail or are incompletely successful, what might be the impact on the parent-child relationship, in particular cases and in general? Moreover, even if the plans do not fail, the very practice of placing massive expectations upon the performance of the engineered may have untoward effects.¹⁷

Concerns about these prospects may inspire an image of devolution of persons into objects. The fear is that our attachments to persons will come to resemble the contingent attachments we have to objects, rather than the absolute attachments we have to (at least some) persons.

We are of course not obliged to accept such images uncritically in

14. This parallels in many ways the question of whether substantive rules should be—and/or should *appear* to be—absolute or qualified. Much of course depends on the verbal formulation of the rule. See, e.g., CALABRESI, *supra* note 1, at 167 n.240:

Whom, [Charles] Black asks, would you prefer to have decide torture cases generally: A judge who in easy as well as hard cases declares that we must balance the costs and benefits of torture or a judge who announces an absolute prohibition on torture. Black suggests quite convincingly that it is the latter judge who is to be preferred.

Id. The example concerns a prisoner who has hidden a hydrogen bomb soon to explode. The discussion is based upon Charles L. Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63.

15. See generally Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331 (1990).

16. See *infra* text accompanying notes 101-09, 117-28, 165-75, 185-213 (discussing contingency).

17. See Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 32-33, 89-93 (1991).

formulating policy. One can urge that perceptions be revised in light of new insights, nor merely accepted as given. Thus, although a learning theory perspective offers good reasons for making certain transactions noncontingent, that very perspective suggests that many of the global objections to applications of new biological technologies are overstated.

These issues take on increasing importance with the possibility of sharp changes in the health care terrain. The Clinton administration's proposals and their rivals, however, are not dealt with specifically here. It is enough to say that the health care debate reinforces the point of asking why we regulate as we do.¹⁸

Finally, there is no claim made that regulation and legal ordering are generally the most significant factors in major societal changes in preferences and behaviors. Professor Larry Barnett argues against the view "that law significantly influences the character and course of society . . .," and concludes that the empirical evidence "leaves little doubt—that the legal institution does not generally alter social behavior and remedy social problems."¹⁹

18. The literature on the new proposals is already voluminous. For brief reviews, see, e.g., Marcia Angell, *The Beginning of Health Care Reform: The Clinton Plan*, 329 NEW ENG. J. MED. 1569 (1993); Arnold Relman, *Sounding Board: Medical Practice Under the Clinton Reforms—Avoiding Domination by Business*, 329 NEW ENG. J. MED. 1574 (1993); see also Paul Starr, *The Framework of Health Care Reform*, 329 NEW ENG. J. MED. 1666 (1993).

Oregon's plan is worth special mention. It originally structured a fairly open rationing plan of sorts, but it received much criticism and was altered in various ways. The proper characterization of its current program is not clear. Compare Michael Janofsky, *Oregon Starts to Extend Health Care, Oregon Starts to Extend Health Care*, N.Y. TIMES, Feb. 19, 1994, § 1, at 6 with Stephen Green, *Rationed Health Care for Poor Looms*, SACRAMENTO BEE, Dec. 19, 1993, at D7. See also John La Puma, *Quality-Adjusted Life Years: Ethical Implications and the Oregon Plan*, 7 ISSUES IN LAW & MED. 429 (1992).

19. LARRY D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT: A MACROSOCIOLOGICAL PERSPECTIVE ON LAW IX (1993); see also *id.* at 161 ("[T]he thesis I have outlined is supported by a substantial body of credible evidence . . ."). Barnett states, however, that "we simply do not know enough to write a macrosociological theory of law." *Id.* at 161. Perhaps the variables here are so complex that confirmation of any complex social thesis about causation is impossible, but this is for others to deal with.

The intended function of changes in law is often to recognize and cement social changes already in place, say, by removing burdens on certain conduct (e.g., abortion, contraception) or inserting incentives to act in a certain manner (e.g., to desegregate). It is no small thing to alter the terms of personal decision making by removing the possibility of criminal penalties, even if the action in question would have been taken anyway. See *id.* at 166 (removing barriers to social needs); *id.* at 118 (viewing *Roe v. Wade*, 410 U.S. 113 (1973) more as "a response to social conditions rather than an important influence on them"); *id.* at 25 (modifying social patterns through incentives rather than penalties; dispute resolution function of law). It is not clear that anything else is ordinarily expected of law, and in any event the possibility of exceptions exists. *Id.* at 28, 165-66 (noting that broad social patterns might occasionally be influenced by law); *cf. id.* at 164 (arguing that technological improvements required by law may produce desirable re-

It is not clear to what extent these claims are inconsistent with what this article suggests (and for which no empirical studies are offered—just hypotheses). Again, nothing in this article purports to explain the origin of preferences and attitudes. The suggestion here is that when social pressures result in regulation of one form or another, observed institutional practices can reinforce or attenuate norms. Indeed, Barnett offers similar suggestions—that “regulation promotes social cohesiveness in part by providing a symbol that increases identification with the social system.”²⁰ Nothing in this article claims that law’s operations routinely revolutionize social thought (or that this would be desirable).²¹ The communicative impact of regulation may not transform the social order, but it may well have important “cementing” (or disintegrating) behavioral effects, and may indeed “alter social behavior.” “Symbolic effects” are not necessarily dissipated into the air. We often teach ourselves through symbols. Whatever mechanisms are at work in more revolutionary social changes, when these changes are captured in law, the causal effects can continue and be amplified; causality does not run *exclusively* in one direction. Perhaps these efforts more often serve a “maintenance” function than a creative one, but avoiding disrepair is something. This article, in a sense, tries to analyze the maintenance processes.

B. The Reciprocal Claims of Choice and No-Choice: An Example of Regulatory Communication

Regulation interferes with autonomy.²² But autonomy interferes with regulation. This reciprocity²³ is mentioned to emphasize that *visi-*

sults, as with promotion of safety through regulation of automobile design).

20. *Id.* at 165; *see also id.* at 63 (law helps bond people to society; symbolic function of legal ideas in “creating” commitment to social system). *See generally* DONALD BLACK, *THE BEHAVIOR OF LAW* (1976).

21. *See* BARNETT, *supra* note 19, at 90 (suggesting that the “inability of law to modify social patterns can also be considered an asset.”). One might ask what sort of political system we would have if indeed legal doctrine did not “conform generally to dominant values,” *id.* at 141.

22. This statement depends on the sense of “autonomy” in use and on the circumstances involved; the claim is thus overbroad. Regulation may promote autonomy in various cases, as when incompetent psychotic persons are given antipsychotic drugs. On various senses of “autonomy,” *see generally* Michael H. Shapiro, *Is Autonomy Broke?*, 12 *LAW & HUMAN BEHAV.* 353, 383-86 (1988) (reviewing CHARLES W. LIDZ ET AL., *INFORMED CONSENT* (1983)). *See generally* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 67-119 (3d ed. 1989); GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988). Whenever autonomy is referred to in the text, it should be understood that the remarks may be limited to certain senses or theories of “autonomy.”

23. A well-known example of illuminating issues by noticing the reciprocity of competing

bly shielding certain matters from the fortuities of private choice may have useful learning effects. The discussion here is not about protection against particular adverse consequences of choice (e.g., pollution or crime) or the need for directed cooperation (moving a mountain). The focus is on the fact that *having a choice itself* leaves certain matters *contingent* (e.g., lifesaving, attachment to children, product safety) and that the *communicative impact* of the community's *allowing* such contingencies may impair some values.²⁴ Autonomy in the sense of having a choice is thus itself the culprit or at least a major contributor to mischief, or so one might claim. If so, impairing choice may cause desired learning effects by reducing the uncertainties entailed by unimpaired choice. (The actual form a choice-impairing regulation takes may be less important than the bare fact that choice has deliberately been constrained.) The content of the "regulatory message" depends, in part, on the aura of noncontingency created by the constraint on choice. It is

claims is Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

24. See Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 897 (1976) (focusing on the role of contingency in interfering with communitarian ideals):

The ideal of community or fraternity cannot be fully realized in the context of genuinely voluntary associations. Such group must by their nature be based upon the calculations of the reciprocal advantages of association that underlie all contractual arrangements. If there were no family ties and no bonds of social obligation transcending contract, human beings would depend for their support and fellowship entirely on the contingency of their ability to offer corresponding advantages to others—on their salable assets of productivity or personality. But who would want the weak, the unattractive, the unproductive? . . . The metaphors of 'ties' and 'bonds' carry their own suggestion of restriction on personal freedom.

All obligations are in this sense diminutions of freedom. . . . It is the thrust of the argument from fraternity [for material guarantees beyond subsistence] that the need to be protected against the contingency of *not* being chosen by others as an associate in a voluntary mutual aid arrangement or even as an object of charity by others is fundamental to human beings, while the protection of property against moderate and fair taxation for the purpose of meeting this need is not.

Id.; see also Nancy (Ann) Davis, *Manufactured Motherhood: Ethics of the New Reproductive Technologies*, 9 LOGOS 51, 59-60, 61, 70, 91 (1988) (emphasizing challenges to noncontingent associations with our children arising from reproductive technologies and referring to the view that "children are entitled to non-contingent and unselfish parental love").

The connection between contingency and "impairment of values" will be investigated as we proceed. See *infra* notes 101-09, 117-28, 165-75, 185-213 and accompanying text.

There are other contexts in which having a choice in a sense "communicates" a particular idea. See, e.g., Thomas M. Scanlon, Jr., *The Significance of Choice*, in THE TANNER LECTURES ON HUMAN VALUES 149, 180 (1988) (discussing symbolic value of having a choice, as in domains where people are expected to determine outcomes by their own choices unless incompetent; not having the choice suggests the subject's incompetence in someone's view). In many cases, however, it may be more accurate to refer to "inference," rather than to literal communication.

this repeated communication that promotes social learning of certain sorts.

C. *The Thesis: A Call for Taking Things Into Account*

The sole normative claim in this paper is that the learning effects of regulation—whether arising from communicative or noncommunicative modes of perception—are relevant in assessing its justification, and so should be more carefully noted by lawmakers, law-appliers, and citizens.²⁵ The underlying descriptive thesis is that explanations of why regulation occurs at all (and in certain forms) must refer to its full range of effects, including effects on attitudes, beliefs, mood, and the molding of behavior. These explanations, in short, must consider the possibility that the mechanisms we use to pursue our preferences in turn affect those very preferences in a feedback cycle: how we get what we want influences what we want.²⁶

What follows, however, is not a report from the field about whether particular regulations really do have certain confirmable learning effects, or discussion of which values ought to be reinforced or how, or a normative analysis of what lawmakers and law-appliers ought to

25. Cf. Aaron Wildavsky, *Choosing Preferences By Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3, 18 (1987) (suggesting that we “test the general hypothesis that how people organize their institutions has a more powerful effect on their preferences than any rival explanation—wealth, technology, class, self-interest, tradition”); *id.* at 5 (“When choices are not completely controlled by conditions (cultural theory holds), people discover their preferences by evaluating how their past choices have strengthened or weakened (and their future choices might strengthen or weaken) their way of life. . . . They construct their culture in the process of decision making.”). See Sunstein, *supra* note 5, at 234-35:

[T]he preference-shaping effects of legal rules cast doubt on the idea that environmental regulation should attempt to satisfy or follow some aggregation of private preferences. If legal rules have inevitable effects on preferences, it is hard to see how a government might even attempt to take preferences “as given” in any global sense. When preferences are a function of legal rules, the rules cannot be justified by reference to the preferences. Social rules and practices cannot be justified by practices that they have produced. Sometimes there is no such thing as a prelegal or prepolitical ‘preference’ that can be used as the basis for decision. If this is so, government is not quite faced with a choice between respecting and rejecting private preferences.

Id.

It is possible, however, that investigation of such self-instruction would affect the learning process—perhaps even teaching somewhat disfavored ideas, such as manipulability of preferences on a large scale.

26. This may be an important element in a “slippery slope” argument. On such arguments generally, see Wibren van der Burg, *The Slippery Slope Argument*, 102 ETHICS 42 (1991). There is no attempt here, however, to construct a complete slippery slope argument concerning any form of regulation or non-regulation.

decide about specific problems in light of estimates about regulatory effects. Nor, once again, is it a commentary on the threshold question of whether the state ought to be engaged in moral education.²⁷ It is a call for further inquiry into the range of regulatory effects and the normative significance of these effects—the *possibility* that what explains regulation might also justify it, or condemn it.

In many cases, trying to find and evaluate the full range of regulatory effects may yield no determinate empirical or value conclusions. This is abundantly illustrated by several of the problems discussed below. In those cases, then, the taking-into-account project might be a failure, though the effort might yield some illumination as a side benefit. We generally cannot know this in advance, however, and even if only a modest proportion of investigations yields some guidance the effort may be worth it. If it turns out after investigation that this is not so, that too is useful information. We are then, as often so, faced with making decisions under deep uncertainty.

D. “Regulation” and “Regulatory Message”

There are several senses of “regulation,” as many have noted.²⁸ To use it in the sense of “social control” or “law” or “ordering” may seem a bit bloated, but it should not be confined solely to matters concerning

27. Cf. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 206-07 (1989) (communitarian states “should encourage people to adopt conceptions of the good that conform to the community’s way of life while discouraging conceptions of the good that conflict with it. . . . On the liberal view of the self, individuals are considered free to question their participation in existing social practices, and opt out of them . . .”). See also Stephen A. Gardbaum, *Commentary: Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV L REV 1350 (1991). See generally Board of Education v. Pico, 457 U.S. 853, 864 (1981) (discussing public schools as “vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’” Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).”). Questions about the shaping of values within a political or other community may be linked to matters of inclusion and exclusion from the community, but there is no need to pursue this here.

28. See, e.g., Lawrence Friedman, *On Regulation and Legal Process*, in REGULATORY POLICY AND THE SOCIAL SCIENCES 111 (Roger G. Noll ed., 1985) [hereinafter SOCIAL SCIENCES]; Laura Nader & Claire Nader, *A Wide Angle on Regulation: An Anthropological Perspective*, in SOCIAL SCIENCES, *supra*, at 141, 142.

The idea of regulation as cultural transmission need not be confined to government activity. Nongovernmental, nonformal “community” activity—social and business practices, general customs, rituals—can serve similar functions. Cf. Carol MacLennan, *Comment*, in SOCIAL SCIENCES, *supra*, at 160, 161 (discussing multiple systems of regulation—government, business, technical/scientific societies). Although the public-private distinction is important for several of the ideas offered here, it does not mark the presence or absence of cultural transmission as an all-or-nothing matter. It may, however, account for different messages, depending on the circumstances. See *infra* text accompanying notes 117-20.

the rules of business activity. Moreover, the term “deregulation” is often used, and it presumably applies not just to business regulation, but to matters such as partial or full “privatization,” “removing issues from the courts,” and so on. Thus, the use of “regulation” seems an appropriate contrast. Perhaps, then, “legal control in the form of rule-making, implementing, enforcing, and adjudicating” would be reasonably accurate for present purposes. (Formal adjudication is dealt with only in passing in this paper, though it is classifiable as regulation under the broad usage here.) This description forms a large net, but it is meant to exclude conduct that is plainly and predominantly communicative in a more literal sense—speeches, pronouncements, ceremonies. (Of course, such overt communication is inevitably involved in operating any system.) The main target for analysis here is systematic government conduct (or omission to act) in certain fields. (To a lesser extent, the analysis may apply to large scale and/or highly visible “private” operations; sharp borders do not reign here.²⁹) The *system* of government binding itself to provide medical care for patients with kidney disease and then in fact doing so is an example of an object of inquiry. A speech about the system is not. There is no sharp gulf between these illustrations—quite the reverse in light of the topic: the communicative and learning effects of government action. If the topic for investigation includes learning effects, it seems counterproductive to limit attention only to certain categories of government conduct, for any such conduct may cause social learning. (It may, in fact, be unavoidable.)

For present purposes, then, “regulation” means more than what is ordinarily emphasized in administrative law courses—the role of administrative agencies in control of business and professional conduct by specifying conditions for entry or practice, controlling prices and other terms of trade, requiring certain forms of transacting, and the like.³⁰ Indeed, one purpose of this paper is to apply the insights already in place in other largely noncommercial areas of legal governance (e.g., criminal law) to the fields dealt with here. There is nothing novel about

29. Certain private institutional operations of course may be immune from serious government revision, even if one can identify major risks. The constitutional limits on such regulation are not addressed here.

30. See generally STEPHEN BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 3-5, 11-13 (3d ed. 1992) (describing administrative law as focusing on administrative agencies, and on reviewing courts and other governmental organs as they relate to administrative agencies; describing classic forms of regulation).

the idea of social reinforcement of values through regulation,³¹ or, more generally, *of regulation as a form of social and cultural activity*.³² The present project is simply to give this notion more body and to apply it where it has been underemphasized.³³

The term "regulatory message" of course does not refer here simply to what is communicated by specific texts in statutes, regulations, judicial pronouncements, or comments of participants in the regulatory process. It refers mainly to the learning effects of perceiving the general purpose, nature and operation of the regulatory scheme.³⁴ A statute or judicial decision requiring hospitals to provide emergency care may "communicate a message" about the value of life and life's quality without even mentioning life or health.³⁵ The message is perceived

31. See e.g., CALABRESI, *supra* note 1, at 84:

Law, unlike economics, is not concerned only, or even primarily, with reduction of costs, 'given tastes.' It is fundamentally concerned with *shaping* tastes. . . . We make these rules of law because we know our tastes are in part shaped by our laws. We therefore try to pick rules of law which will help us become the society most of us wish to be years hence, even though they may seem more costly today.

Id. (footnote omitted); see also Robert E. Lane, *Market Choice and Human Choice*, in *MARKETS AND JUSTICE* 226, 231, 232 (John W. Chapman & J. Roland Pennock eds., 1989) (urging specification of markets that "shape[] the pernicious learning experience" and referring to "importance of the market in shaping our consciousness"); Tushnet, *supra* note 1, at 508 (describing the Critical Legal Studies attack on "law-and economics" and stating the view that "[l]egal rules, and the distribution of wealth, do not merely *reflect* individual preferences. Decision-makers must therefore ask not only 'What can we do to provide what people want' but, 'How will what we do affect what people want?'"). The learning effects of first amendment protections are suggested in LEE BOLLINGER, *THE TOLERANT SOCIETY* 120-21 (1986) ("[W]e can see free speech as a limited, or partial, area in which an extraordinary position of self-restraint is adopted by the society as one means of developing a more general capacity with respect to that impulse").

32. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 30 (1973); cf. KYMLICKA, *supra* note 27, at 206-07, 217-19 (discussing "[d]uties to protect the cultural structure").

33. See *supra* note 1.

34. Cf. EDELMAN II, *supra* note 1, at 68 (referring to "[t]he administrative system[] as symbol and ritual"); Beauchamp, *supra* note 1, at 34 ("The constitutional tradition for public health constitutes one of those 'second languages' of republicanism that Robert Bellah and his coauthors speak of in their recent book, *Habits of the Heart* [(1986)]. . . . [T]he first language (or tradition of moral discourse) of American politics is political individualism."); Childress, *supra* note 1, at 29 ("One version of the argument from beneficence holds that through establishing a political-legal right to health care, the society expresses, symbolizes, and conveys certain values, such as care and compassion for the victims of the natural lottery. There is an important distinction between realizing a goal and expressing a value . . .").

35. See 42 U.S.C. § 1395dd (1988 & Supp. 1992) (Emergency Treatment Act, requiring that hospitals participating in Medicare and having emergency departments must provide appropriate screening and treatment). See generally Christine A. Fedas et al., *Emergency Treatment Act: A Federal Response to Patient Dumping*, 76 MASS. L. REV. 110 (1991).

For an example of state regulation of emergency care, see CAL. HEALTH & SAFETY CODE §§ 1317-1317.5 (West 1990), which requires licensed health care facilities with emergency de-

largely because of the apparent displacement of the contingency of life-saving transactions: such transactions it appears, are no longer dependent on, for instance, funds, personal relationships with health care providers, or individual altruism.³⁶

Such considerations are not confined to health care regulation. Certain antitrust measures, for example, may communicate a message about individual worth by helping to assure that individuals and "small" firms survive as autonomous economic units, avoiding annihilation or absorption by larger arrays of power.³⁷ Moreover, rigorously enforcing housing codes, rather than leaving the matter to private bargaining, helps avoid perceiving an association between ethnicity and squalor—or, worse, a preference for squalor.³⁸ Such examples suggest that a full investigation of the learning effects of regulation may help fill in the gaps in regulatory theory.³⁹

E. The Range of Regulatory Effects

What does regulation do? Take any field of regulation—health care, family arrangements, antitrust. There are the familiar sorts of economic effects of regulation—the impact on supply and demand, product quality, the terms of trade, and on practices and institutions associated with production and distribution. Some of these effects are intended and thought to justify the regulation. Some may be intended by certain parties but do not justify the regulation—e.g., a wish to mo-

partments to provide care without regard to "insurance status, economic status, or ability to pay." § 1317(b). The statute also forbids exclusion on various other grounds—race, sex, age—"except to the extent that a circumstance . . . is medically significant to the provision of appropriate care to the patient." § 1317.3(c). There is no liability if care is refused where "the person is not suffering from an emergency medical condition" or the institution "does not have the appropriate facilities or qualified personnel available to render those services." § 1317(b). Obviously, contingencies of care are not eliminated, but shifted.

The term "life-affirming" and its cognates may, depending on the context, embrace considerations of "quality of life." In certain circumstances, as where termination of medical care is in question, one may question the link.

36. See *infra* text accompanying notes 189-213.

37. Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1533 n.30 (1982). Note that it is both the process (enactment and enforcement) and product (atomic competition) that communicate whatever messages there are.

38. On the other hand, visible enforcement can also suggest such an association. Compare this to an asserted risk of affirmative action—that it conveys doubts about a person's qualifications. Moreover, any association between substandard conditions and ethnicity may suggest the need for some redistribution of wealth. On "mixed messages," see *infra* notes 156-64 and accompanying text.

39. See *infra* notes 63-82 and accompanying text.

nopolize a trade or profession simply to increase income. Some may be foreseen but unintended, others may be unanticipated altogether. And some, at first unseen or obscure, may become known and form a purpose for regulation.

Public observation of the regulatory network may have effects on, among other things, (1) values, attitudes, beliefs and preferences; (2) one's sense of self or identity, or of association with various communities; (3) one's sense of comfort or security within these communities, with respect both to one's standing and to the provision of goods and services; (4) the very identities and structures of various communities; and (5) mood, happiness or satisfaction generally.

These effects are interconnected. For example, learning effects may condition other kinds of effects, such as a change in mood; and one's affective state, sense of self, and sense of relation to a community may condition future perception and learning.

The learning mechanisms are varied. Some learning is generated by the communication of direct instructions or threats. Some arises from observation of the regulatory network, or at least from knowing of it. Some "communication" in the customary sense may be involved, with nonverbal as well as verbal behavior by regulators being used to set examples or reinforce values. Other aspects of producing regulatory effects are communication only in a metaphoric sense. And still other aspects are in some hazy in-between.⁴⁰

The reinforcement or impairing of values, whether by communicative or other means, may have confirmable influences on behavior. It is not argued here that only those effects that are eventually reflected in significant behavior are worth considering. Nevertheless, if a regulatory system that seems inefficient is really more efficient than first appears *because the learning effects of the system promote desired behaviors*, this is a powerful reason for maintaining the system, particularly if the behaviors are of the sort generally addressed by the regulatory system (e.g., lifesaving values promoted by systems of government health care).

To be sure, if we find unfortunate learning effects, the argument against regulation is strengthened.⁴¹ Examples are not hard to find: a welfare system communicates the idea of rewards for nonproductivity

40. See *infra* notes 139-80 and accompanying text.

41. Cf. CALABRESI, *supra* note 1, at 84: "We always must be on guard that those allocations which lessen short run costs by reducing moralisms or offense do not *mindlessly* lead us, in the long run, to tastes and values which today we would find appalling."

as well as that of caring for the unfortunate, and so may promote excessive dependence as well as beneficent attitudes.

“Communication,” “inference” and “learning” are of course not synonymous. The loose use of “communication” here, however, arises from the focus on learning effects, even though there may be no literal communication in any given case. There are structural similarities in communicative and noncommunicative routes of learning, and these are captured by the broad usage.⁴²

What terms such as “impairs (or promotes) some values,” “communicative impact,” and “contingent” might mean is discussed below.⁴³ The values in question include not only substantive values of various degrees of generality and normative status (life, fairness, equality, autonomy, personhood), but also rationality values that may be promoted by displacing private choice through centralized collective action. Such action *may* suggest the very idea of coherent thought.⁴⁴ Its exact nature *may* thus be of secondary importance.

F. The Effects of Nonregulation

The same considerations that suggest learning effects from regulation also suggest learning effects from nonregulation, at least in certain contexts. Learning may arise from observing any behavior, government or private. One may thus learn from observing unregulated private behavior, and from the perception that it is indeed unregulated. In a

42. Cf. RONALD DWORKIN, *LAW'S EMPIRE* 50 (1986) (using the phrase, “[i]nterpreting a social practice”). *But cf.* *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468 (1991) (Souter, J., concurring) (“But every voluntary act implies some such idea [drawing a comparison to nudity], and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless.”); Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of “Speech”*, 1993 *Wis. L. Rev.* 1525, 1549-69 (discussing, among other things, the meaning of “communication”; contrasting “communication and inference”; analyzing the “meaning of conduct”; and discussing intent to communicate). As stated, “regulation as communication” is not meant to be taken literally; still less so, the reference to regulation as “language.”

43. See *infra* notes 139-80 and accompanying text. See also *infra* part III (discussing change or reinforcement of preferences resulting from the communicative impact of regulatory networks).

44. Collective action may suggest that there are discoverable substantive or procedural principles that tell us what decisions to make—thus reflecting the reign of reason. On the other hand, it may also suggest that if reason really showed the way, collective action would be unnecessary—a “principles” maven could give us the answers. Some collective processes (say, democratic voting, whether by large populations or representative bodies) often convey an aura of arbitrariness or lack of principle and suggest that the outcomes derive from power struggles and political manipulation. What the dominant aura is depends on the circumstances.

world in which many areas of behavior are heavily controlled by government, the absence of regulation may be particularly noticeable. Consider, for example, failure to take steps to assure access by low-income groups to certain forms of health care,⁴⁵ or the failure to fund one form of health care as opposed to another.⁴⁶ People may learn to think of the undeserving poor, or of the relative unimportance of certain forms of suffering, or of the arbitrariness of governmental decision-making, and so on. The scope of learning is constrained only by the limits of our capacities to generalize and discriminate.

Consider also the FCC's repeal of the "fairness doctrine,"⁴⁷ which generally tried to provide for fair and balanced coverage of controversies of public importance. Although the costs of such a fairness doctrine may outweigh the benefits, it is important to see the full range of these benefits. The idea that important claims aired by powerful media entities can go without answer sits uneasily with some people's notion of our free expression ideal of rational analysis through debate—charge and riposte. Requiring an answer reinforces our disapproval of dogma, of intolerance, of arbitrary, uninformed decisionmaking. (Notice that there is no *necessary* reference to equality ideals in this argument.)

Of course, *forcing* a response doesn't sit well with our notions of protecting speaker autonomy against content regulation either—a familiar First Amendment idea.⁴⁸ Nevertheless, the continuing objections

45. On distribution of medical resources, see generally DANIELS, *supra* note 3.

46. Shapiro, *Heart Transplantation*, *supra* note 1, at 1-2, 28-31 (discussing the expansion of government funding to cover heart transplantation and examining the role of prior funding of kidney dialysis and transplantation as a "precedent").

47. The repeal is reported in 52 Fed. Reg. 31,768 (1987). It was effective on Aug. 7, 1987. *Id.*; see Robert D. Hershey, Jr., *F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision*, N.Y. TIMES, Aug. 5, 1987, at A1. See generally DWIGHT L. TEETER, JR. & DON R. LE DUC, LAW OF MASS COMMUNICATIONS 392-97 (1992).

48. See generally *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Consider also the pornography problem as an illustration of the problems of nonregulation. Many claim that pornography creates and reinforces objectionable attitudes and that failure of government to suppress such material suggests official endorsement. See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985):

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. . . . It works by socializing, by establishing the expected and the permissible. . . . There is much to this perspective. People often act in accordance with the images and patterns they find around them. . . . Words and images act at the level of subconscious before they persuade at the level of the conscious. . . . [W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination.

Id. at 328-29. The court, however, held the ordinance invalid under the first amendment. *Id.* at 333-34.

to repeal of the fairness doctrine suggest the power of the "unanswered claim" image.

G. *The Design of Institutions*

A rational normative theorist would prefer institutions that increase the likelihood of right actions and reduce the likelihood of wrong ones.⁴⁹ Nevertheless, such institutions might produce some particular actions that are wrong or at least anomalous under reigning normative premises. Suppose, for example, a problem involves an apparent conflict of important principles or preferences: sanctity of life vs. nonsuffering (e.g., termination of medical care, or "active" euthanasia or assisted suicide); liberty vs. equality (e.g., affirmative action—one can also see this in part as "equality" in one sense vs. "equality" in another sense); democracy vs. rule of law (e.g., judicial elections). To resolve the conflict in a particular way does not annihilate the losing value, and we do not wish to convey the idea that it is unimportant: we may need it another day. So, we might design the "resolution" in a clumsy, even hypocritical way, by allowing both sides to "win," or at least score points. Thus, we maintain homicide laws against killing persons to relieve their suffering, but we do not often inflict serious punishment on the perpetrators; we do not ordinarily fill judicial posts through traditional political campaigns, but we subject judges to retention elections.⁵⁰

See also MATTHEW L. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* 74-118 (1986) (discussing evidence concerning the effects of sexually explicit material on aggressive behavior, and of television violence on children's behavior).

49. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-29 (1974) (discussing "utilitarianism of rights"); see also Shapiro, *Clumsy Institutions*, *supra* note 12, at 1559-60.

50. This sort of argument is urged in CALABRESI, *supra* note 1, at 87-114; his euthanasia discussion is at 88-89.

The idea of designing institutions in order to reinforce the holding of certain values within a normative system is also reflected in DURKHEIM, *supra* note 12, at 109. In discussing criminal punishment, Durkheim states generally:

[T]here exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society. This is what repressive law materially represents, at least in so far as it is essential. The part that it plays in the general integration of society evidently depends upon the greater or lesser extent of the social life which the common conscience embraces and regulates.

Id. at 109.

Although the comparison can be pushed too far, there is an affinity between Durkheim's idea of social solidarity/cohesion and that of reinforcing noncontingent bonds and duties through public or private institutions. See *id.* at 49-69 (explication of "social solidarity"); cf. David M. Frankford, *Neoclassical Health Economics and the Debate over National Health Insurance*, 18 J. LAW

When we notice these maneuvers, they may seem morally odd, even wrong, because of their awkward “compromises” or their apparent dishonesty in feigning principled resolution or even masking the conflict. But the overall institutional design helps keep the “persisting oughts”⁵¹ alive, precisely because of the compromise or the pretense. Of course, a clear perception of clumsiness or hypocrisy results in moral costs also, grating on rationality/honesty values, and thus might outweigh the gains of reinforcing other values. Nevertheless, the point remains: we may wish to design institutions that reinforce all parts of a value system, although this will generate conduct that seems incoherent and thus morally questionable.⁵²

H. Costs and Benefits

It is entirely possible that value gains from regulatory messages are outweighed by value losses from conflicting messages arising from the same regulatory scheme and by other efficiency losses.⁵³ It may also

& SOC. INQUIRY 351, 382 (1993) (reviewing WILLIAM A. GLASER, *HEALTH INSURANCE IN PRACTICE* (1991) and MARK V. PAULY ET AL., *RESPONSIBLE NATIONAL HEALTH INSURANCE* (1992)) (mentioning “social solidarity” and “commitment to the polis” in characterizing health insurance in other nations); DANIELS, *supra* note 3, at 49 (“the solidarity we show with the ill by caring for them”).

51. The idea behind the phrase is that an “ought” that is outweighed continues to have normative pull. See BERNARD WILLIAMS, *MORAL LUCK* 73-74 (1981) (“The [obligation] that outweighs has greater stringency, but the one that is outweighed also possesses some stringency”; regret after decision); BERNARD WILLIAMS, *PROBLEMS OF THE SELF* 172 (1973) (“I think . . . in terms of acting for the best, and this is a frame of mind that *acknowledges* the presence of both the two *ought’s*.”).

52. Endorsing the design of institutions to reinforce values does not presuppose a pluralist view that there are incommensurate values. One might posit a “single value” normative system that is likely to involve a complex network of concepts. Many apparent conflicts may thus occur, and care will be needed to reinforce various aspects of the single value. One may of course challenge the idea that there is indeed a “single value” that bears “internal conflicts.” For descriptions of utilitarian and deontological pluralism, see BEAUCHAMP & CHILDRESS, *supra* note 22, at 27-30, 37-39.

53. The comparison of value gains with value losses is not exclusively associated with consequentialist analysis. Noticing the communicative aspects of regulation might be associated with promoting ideas of (say) justice or fairness as they appear in deontological theories. On some views, they may be “balanced” against each other. See NOZICK, *supra* note 49, at 28-29. There is no reason to discuss the status of the distinction between consequentialist and nonconsequentialist analysis, but it is important to note the idea that “[i]n principle, any feature that can be embedded in a description of a state of affairs can be an object of consequential moral evaluation. Consequences can include such items as rights violations . . . and numbers and distribution of functionings achieved by members of society.” Hausman & McPherson, *supra* note 6, at 707 (discussing Amartya Sen, *Evaluator Relativity and Consequential Evaluation*, 12 *PHILOS. & PUB. AFF.* 113 (1983) and Amartya Sen, *Rights and Agency*, 11 *PHILOS. & PUB. AFF.* 3 (1982)). See generally BEAUCHAMP & CHILDRESS, *supra* note 22, at 41-44 (comparing deontological and utilitarian

be that the search costs to confirm these value effects are not worth it. The concern here is not to settle the question of whether transmitting such messages is worth it given the problems of conflicting messages or other supposed inefficiencies, but to get a better idea of what should go into evaluating the merits of impairing autonomy through regulation. In particular, if value systems are maintained in part by social learning mechanisms, then it is appropriate to determine what people believe and learn from their perceptions of specific regulatory networks, whether such learning is a consciously intended or observed feature of the regulation. As was said, it may turn out that some systems of regulation promote efficiency because of their learning effects.

Normative arguments about regulation are thus incomplete unless they address the possibility that regulation reinforces favored or disfavored attitudes, values, preferences and behaviors. And normative conclusions may indeed follow when findings about social learning are combined with premises about the value of what is learned, the obligation to promote certain values, the unavailability of superior alternatives, and the costs of the regulatory scheme, including the costs of messages that may teach the wrong things. As suggested later, however, "inconsistent" messages may be desirable because they reflect values that should not be suppressed.⁵⁴

The fact that desirable learning occurs in certain ways does not mean that these ways are the best learning mechanisms, all things considered. Regulation is not defensible simply because it reinforces some preferred values or offers some comfort. Such benefits are often inextricably connected with costs,⁵⁵ and regulation-as-communication must thus be "deconstructed." There may be better and worse ways of teaching, using regulatory modes or otherwise.

I. Topics

Fortunately, this article cannot cover the whole arena of government regulation, so the focus will be on distributing certain health care resources and on surrogate motherhood—a remedy of sorts for infertility. Other fields will be referred to briefly. Inferences concerning these

theories).

54. See *supra* notes 49-50 and *infra* notes 186-87 and accompanying text.

55. Note the parallel to actions designed to promote a value (say, health) by trying to make safe a forbidden or disapproved activity (say, encouraging drug abusers to use clean needles or sexual partners to use condoms). Such activity is at least obliquely reinforced. This is the "problem of evil" discussed *supra* note 9 and accompanying text.

other fields will be shaky, but worth mentioning. Regulation in “business” areas also reinforces certain values, and the debates about regulation or deregulation ought to note this, whether we talk of airlines,⁵⁶ antitrust,⁵⁷ assisting small-scale farming, punishment of crime, or other subjects.⁵⁸ The emphasis here is on actions by the community as such, not by individuals acting as such.⁵⁹ This distinction cannot be a sharp one, but it will do here.

II. EXPLAINING REGULATION: INCOMPLETENESS IN DETERMINING WHY WE ENGAGE IN CENTRALIZED COLLECTIVE ACTION

There is room for better explanation of certain forms of regulation.

56. See generally Michael E. Levine, *Revisionism Revised?: Airline Deregulation and the Public Interest*, 44 L. & CONTEMP. PROBS. 179 (1981).

57. See generally Brodley, *supra* note 37.

58. Other fields of government activity may suggest even more clearly the broad range of regulatory effects and purposes described here, and many have been extensively described. See, e.g., JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d ed. 1966); DAVID ZAREFSKY, *PRESIDENT JOHNSON’S WAR ON POVERTY: RHETORIC AND HISTORY* (1986).

Consider also the possible educative effects of criminal sanctions (not its deterrent effects). See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370 (1981) (“[r]etributive punishment is an act of communicative behavior”); Joel Feinberg, *The Expressive Function of Punishment*, in SENTENCING 23 (Hyman Gross & Andrew von Hirsch eds., 1981); Charles H. Logan & Gerald D. Gaes, *Meta-Analysis and the Rehabilitation of Punishment*, 10 JUST. Q. 245, 253-55, 258 (1993) (punishment as a “significant aspect of culture” that “constructs and communicates some of the most important shared meanings, values, and beliefs that define the character of a culture.”; “. . . if the official mission of a prison is defined simultaneously as both punishment and rehabilitation[,] conflicting and confusing messages are transmitted both inside and outside the prison walls.”); Primoratz, *supra* note 1, at 187 (arguing as one possible justification for punishment that “evil inflicted on the person punished is not an evil *simpliciter*, but rather the expression of an important social message—that punishment is a kind of language.”). See also A.J. Skillen, *How to Say Things with Walls*, 55 PHIL. 509, 509 (1980) (discussing “a view of punishment which stresses its ‘expressive’ character and seeks in that its justification.”).

One can press the comparison to criminal punishment too far; this form of regulation may well be consciously intended as expressive.

59. Cf. Beauchamp, *supra* note 1, at 34 (“public health paternalism” contrasted with “personal paternalism” of doctor-patient and lawyer-client relationships). In many cases, government action may be perceived as action by the community, and so may various forms of “private” action (say, very extensive and organized private charitable practices).

No effort is made here to define “the community” or distinguish kinds or levels of community—though it is crucial to note these varieties. Different communities may speak through any given regulatory medium, perhaps with different communicative impacts on different communities in the audience. On the idea of community, see BARBARA HERRNSTEIN SMITH, *CONTINGENCIES OF VALUE* 168 (1988) (observing that we are members of “many, shifting communities,” entailing “multiple social identities” and varying allegiances and beliefs). See generally JOSEPH GUSFIELD, *COMMUNITY: A CRITICAL RESPONSE* (1975).

It has long been thought, for example, that much government regulation of exchange transactions seems senseless when tested against either the stated goals of the regulatory scheme or simple models of rationality.⁶⁰ Investigators continue to try to account for this.⁶¹ One can show theoretically that decentralized private ordering, with appropriate legal enforcement, is likely to produce at least as much professional competence and product safety—and relevant consumer information about these things—as government regulation, and to do it more efficiently.⁶² Many policymakers know this. “Market failure” theories⁶³—which might support a “public interest” explanation—leave many forms of regulation unaccounted for. Goals such as ameliorating the harms of monopoly or avoiding the free rider problem in producing public goods will explain some forms of regulation but not others.

Yet we regulate. But regulation seriously constrains private choice, and we do not always need sophisticated autonomy theory to understand this. In the United States, we cannot consult just anyone for medical care; we cannot educate ourselves on health care and then go about treating others unless we get official permission to do so; airline companies cannot alone decide how to promote safety; manufacturers cannot market anything they want whenever they want; and so on. Even if one firmly believes that much of this is irrational, the persistence of “irrational” behavior itself calls for explanation.⁶⁴

60. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 137-160 (1962) (discussing occupational licensure). See generally THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

61. See, e.g., Victor R. Fuchs, *From Bismarck to Woodcock: The “Irrational” Pursuit of National Health Insurance*, 19 J.L. & ECON. 347 (1976); MacLennan, *supra* note 28, at 167-168.

62. GERARD DEBREU, *THEORY OF VALUE* (1959) (rigorous axiomatic analysis, specifying assumptions). For debates, compare Kenneth Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343 (1972) and Reuben Kessel, *Transfused Blood, Serum Hepatitis, and the Coase Theorem*, 17 J. LAW & ECON. 265 (1974) with RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971) and Peter Singer, *Altruism and Commerce: A Defense of Titmuss Against Arrow*, 2 PHIL. & PUB. AFF. 312 (1973). See also DOUGLAS E. HOUGH, *THE MARKET FOR HUMAN BLOOD* (1978).

63. See JACK HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 249-252, 512-17 (3d ed. 1984) (monopoly and free riders); STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 15-35 (1982) (“typical justifications for regulation,” economic and noneconomic). “Theories” refers here to explanations of why regulation occurs, not to justifications. Of course, descriptive explanations will often include what people claim to be justifications; what they believe is a partial explanation of what they do.

64. Cf. ALLEN BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* 21 (1985):

Whether or not these or rival theories [that purport to explain regulation of monopolies] are in fact correct, the crucial point is that those who attempt to rebut criticisms of the market by showing that all significant monopolies depend upon government intervention and would not occur in a “free” market owe us an explanation of the pervasive phenome-

This is not the place for an account of the meaning of “theory” or “explanation” in science generally, or social science in particular. All we need to know is that an ideal theory of regulation should explain why there is regulation at all, why at any given time some fields are regulated and others are not, why regulation takes certain forms in some cases and other forms in other cases, why deregulation occurs when and as it does, and why regulators, the regulated, the courts, the government and the public deal with existing regulatory schemes as they do.⁶⁵ (Some of these explanations may of course provide insights useful for theories of justification.) This is a lot to ask, and the ideal is not likely to be reached, but one can at least push toward a better understanding of regulation.

One explanation for regulation is that it is intended to promote the public interest.⁶⁶ When it was discovered that regulation in fact often seems to promote mainly the interests of the regulated groups, the regulators and the legislatures, this traditional explanation was revised. The revision might have posited that legislators were simply mistaken about what regulation would do. But the new explanations instead dealt mainly with theories of self-gain on the part of the businesses and professions in question,⁶⁷ reinforced by similar theories of gain on the part of elected officials and the regulators. Thus, we are told that although regulation rarely serves the public interest, it protects the regulated enterprises by conferring monopolies. We are also told that it confers benefits on “managers,” “bureaucrats” and politicians who maximize their gains by regulating (through being hired by regulated businesses after leaving office, being reelected, etc.).⁶⁸ Commentators view these effects as secret goals, not as unintended by-products, and the existence of such effects is thus cited to help explain the original enactment of the regulation.

non of government-supported monopoly.

Id.

65. What seem to be wholly separate theories may not be. They may overlap (the data underdetermine the theories), or be different aspects of some larger unified theory. BRUCE M OWEN & RONALD BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF ADMINISTRATIVE PROCESS* 18 (1978). Note that several causes may work concurrently in explaining regulation or some aspects of it. The notion of regulation as transmission of cultural values is not necessarily inconsistent with existing theories; it may complement them.

66. Levine, *supra* note 56, at 181-82. For analysis of the meaning of “the public interest,” see Theodore Benditt, *The Public Interest*, 2 *PHIL. & PUB. AFF.* 291 (1973).

67. See OWEN & BRAEUTIGAM, *supra* note 65, at 1-36.

68. See generally Levine, *supra* note 56 (explaining “revisionist” theories and modifications of the traditional public interest theory).

These "revisionist" theories posited various complementary maneuvers leading to regulation, including the "capture" of the legislature by the industry or profession to be favored (or at least the takeover of existing regulatory systems).⁶⁹ Many observers, however, are dissatisfied with these theories too.⁷⁰ It is not that they do not describe relevant "predisposing conditions" to regulation. It is that they seem incomplete: they do not explain why some areas of life are regulated more, less, or not at all; nor do they explain why the regulation is of one sort or another; nor why regulation persists—at least in given forms—when it is well known to influential groups that the regulated parties may be benefiting more than the public; nor why some groups trying to get regulation for themselves succeed and others fail; nor why some fields get deregulated even without wide publicity about the failures of regulation; nor why other fields don't get deregulated.⁷¹ If deregulation occurs in one field, why not across the board? Why does it occur at all? Perhaps in some cases knowledgeable citizens somehow form a critical mass that leads to exposure of mistaken beliefs and to legislative and administrative action. This may be what happened with airlines.⁷² Full-

69. See OWEN & BRAEUTIGAM, *supra* note 65, at 11; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 22-25 (1971); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4 (1971).

There is a problem in defining different forms of "capture" and in distinguishing them from other ways of influencing legislative activity. Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1294 (1988). Some care is thus required in referring to capture as an explanation for any given regulatory system. Also, as the text suggests, a distinction should be drawn between capture that creates a regulatory system from capture that takes over an existing one.

70. See, e.g., OWEN & BRAEUTIGAM, *supra* note 65, at 18; Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theories of Politics*, 74 AMER. ECON. REV. 279 (1984); Levine, *supra* note 56, at 185-86. Levine briefly describes the views of some notables in regulatory theory—e.g., Anthony Downs, George Stigler, Sam Peltzman, and Richard Posner. *Id.*

71. OWEN & BRAEUTIGAM, *supra* note 65, at 18:

It should be clear at once that these approaches need not be mutually exclusive. A really general theory of regulation would include elements from each. But all of these theories fail to explain some regulatory phenomena and, in particular, they fail to explain why administrative regulation takes the special form that it does. Why should the benefit-distributing regulators of Peltzman's model bother with the forms and awkwardness of due process? Why not redistribute by fiat? Why do some powerful interest groups sometimes not get their way in regulatory proceedings?

Id. (A sense of fidelity to constitutional constraints might help explain some of this.) See also MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 18-27, 91-92 (1985); Levine, *supra* note 56, at 180; cf. Sunstein, *supra* note 5, at 221 (discussing various ways in which law has dealt with environmental issues).

72. See Levine, *supra* note 56, at 189-195.

scale deregulation, however, does not seem to be in sight in medical licensure or health care distribution⁷³ or various other areas, and these non-events seem worth investigating. The explanatory theories that may arise from such an investigation are not necessarily inconsistent with prior theories: they may complement them by adding new predisposing conditions to regulation, and may describe mechanisms that operate concurrently with those previously suggested.

“Modified” theories have indeed been suggested. The mistake theory just mentioned is simply that in some cases legislatures were neither captured nor acting in dishonest collusion with regulated groups; they were acting in good faith—even if others were not—and were simply in error in believing that their work-product would benefit the public interest.⁷⁴ This good faith mistake theory seems plausible to some for airline regulation. But it is unclear whether, taken together as a set of alternative explanations for different fields, the traditional, revisionist, and modified-traditional theories are sufficient to explain most regulation. They do not seem clearly to answer all the questions raised about the persistence of regulation and the uncertain patterns of deregulation, but this may be because we have not had enough time for confirmation. While we are waiting for such confirmation, then, it may be worth looking for additional hypotheses about why we act collectively⁷⁵—and coercively—when acting privately—and more freely⁷⁶ would seem to further our goals at least as well. Why is there, in effect, a demand for coercion? Some answers may lie in investigating further the learning effects of regulation, as some have done, and in considering whether these effects were—and remain—regulatory goals, though perhaps only dimly seen.

Perhaps terms such as “goals” and “reasons” are not quite appropriate, given the possibility that many regulatory effects are unintended and unforeseen. Nevertheless, if regulation reflects and reinforces cer-

73. There are, however, some deregulatory efforts in health care. They might continue after health care reform is implemented, particularly if their goals are believed to be consistent with the goals of access and efficiency. Consider, for example, the move to permit advertising of prescription drugs. See Gina Kolata, *Prescription Drug Ads Put FDA on the Spot*, 220 *Sci* 387 (1983).

74. Levine, *supra* note 56, at 192. If the “mistake” is not just about facts but about what constitutes the public interest, then we are dealing with conceptual and value issues.

75. The “why do we regulate?” and “why do we act collectively?” questions are not synonymous. Not all collective actions are forms of regulation (non-staged riots, for example) or even government action (though for present purposes all regulation will be viewed as collective action). The questions seem closely connected, however.

76. This is not to suggest that private arrangements are always noncoercive, or that collective action is always coercive.

tain values, this may count as a reason for regulation even if this educative result was not clearly in anyone's mind.⁷⁷ Much the same has been suggested from time to time by various observers, but these views have not been fully integrated into the various regulation literatures. (More has been done in other fields—the "bioethics" area of health care, for example.)⁷⁸

III. REGULATION AND "COMMUNICATION"⁷⁹ OF VALUES

[H]uman nature needs more lessons than a weekly sermon can convey.⁸⁰

A. *In General*

As we saw, commentators have offered hypotheses going beyond the traditional, revised, and modified-traditional explanations⁸¹ for regulation. These suggestions should be pushed further, for they are instructive, if incomplete. Edelman, for example, argues:

Not only does systematic research suggest that the most cherished forms of popular participation in government are largely symbolic, but also that many of the public programs universally taught and believed to benefit a mass public in fact

77. See 1 JUERGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 288-95 (1981) (describing, among other things, "perlocutionary acts," where the speaker "produces an effect upon the hearer," and teleological actions, for which the intention of the agent is constitutive; Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 256-65 (1981) (discussing whether judges should consider legislative intent).

78. See, e.g., Beauchamp, *supra* note 1; John C. Moskop, *The Moral Limits to Federal Funding for Kidney Disease*, 17 HASTINGS CENTER REP., Apr. 1987, at 11, 12 (discussing the view that "society benefits from the symbolic significance of providing resources for lifesaving care at a level sufficient to make such care available to all who need it"); David T. Ozar, *The Case Against Thawing Unused Frozen Embryos*, 15 HASTINGS CENTER REP., Aug. 1985, at 7, 10-11 ("[I]t is not beyond the realm of possibility that widespread public acceptance of a practice in which human embryos are made when it is efficient and economical to make them and disposed of when it is efficient and economical to dispose of them would have an impact on the community's valuing of human life in other contexts . . ."); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 975 (1986) ("symbolizing" values "is an essential part of any human community, and helps constitute and identify the community's values").

79. On problems in using the term "communication," see *infra* notes 92-100 and accompanying text. There is no claim here that regulation is "government speech" in the sense intended by first amendment scholars, nor "language" in the sense understood by linguists, philosophers, or anyone else. The terms are used loosely to evoke ideas about regulatory effects. For more extensive remarks on communications, see Tiersma, *supra* note 42, at 1549-69.

80. JANE AUSTEN, *MANSFIELD PARK* 255 (Penguin ed., 1966).

81. See *supra* text accompanying notes 66-72. Perhaps some observers see these additional hypotheses as contained within the prior offerings. Even so, they need more investigation.

benefit relatively small groups. We can show that many business regulations and other law enforcement policies confer tangible benefits on the regulated businesses while conveying only symbolic reassurance to their ostensible beneficiaries.⁸²

Something “symbolic” or instructive may be going on, but exactly what is it?

For our purposes, the described range of “symbolization” or communication must be expanded. His observations deal with specific “reassurance” about express regulatory goals (the factories are safe), and perhaps about certain matters of regulatory process (the licensing test was fair).⁸³ These reassuring communications may often be inappropriate: medical regulation, for example, does not assure competence, honesty, respect for patient dignity, or “reasonable” prices. It may not even promote them any more than a free market would. Even scrupulously fair processes may thus be processing things that shouldn’t be processed. The idea of (false) symbolic reassurance on specific matters is thus consistent with a capture theory or a theory that legislators and regulators are trying to maximize certain benefits for themselves. Indeed, such messages are exactly what one would expect if these theories are true. The messages and their effects are thus not justifications for regulation. They are part of the explanation, however, being constituents of the nefarious plot to garner unjust benefits and get away with it. So we had better press on in looking for other communicative possibilities. If we do not, we stop too soon, concluding that, aside from unjustly benefiting some group, much regulation is at best “*merely sym-*

82. EDELMAN II, *supra* note 1, at 4. Cf. ARNOLD, *supra* note 60, at 34 (“[T]he function of law is not so much to guide society, as to comfort it.”).

As indicated in the text, the discussion here is not aimed at fraudulent specific reassurance. Outright falsehood is not necessarily involved in the social reinforcement of values through perception of regulatory networks. Cf. GUSFIELD, *supra* note 59, at 86 (“[M]yth is neither true nor false but presents a belief in a past or future situation or event on which the present action can be based.”). Such narrative falsehoods should thus be distinguished from (partly) mythic ideals, such as the determinacy and consistency of belief systems, and from value beliefs, whatever their truth value. See generally EDMUND R. LEACH, *GENESIS AS MYTH, AND OTHER ESSAYS* (1976).

If we speak of “symbolism” in the process of enacting and implementing regulations, we need also to speak of it in the process and outcome of *deregulation*. This will be clear as we move on. See DERTHICK & QUIRK, *supra* note 71, at 39.

83. Cf. Levine, *supra* note 56, at 187 (discussing the “process paradigm,” under which government regulation intended to promote efficiency or redistribute wealth must satisfy fairness constraints). Recall that, as argued in this article, satisfying fairness requirements may be a social goal and implementing rules of fairness—in tradeoffs with other goals—may thus directly promote efficiency.

bolic,"⁸⁴ at worst completely fraudulent, and persists simply because of ignorance or irrationality and ought to be stamped out.⁸⁵

To pursue this, look at regulation, including business regulation, from the "interpretational" perspective suggested by some anthropologists (e.g., Geertz):

The concept of culture I espouse . . . is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning. It is explication I am after, construing social expressions on their surface enigmatical.⁸⁶

Not everything we encounter is a text to be interpreted, and no claim is made here that the interpretative approach should be the sole or dominant perspective in cultural analysis. Even where the approach seems plausible, it is not free of difficulties. (Understanding the very meaning of this "meaning" framework is not the least of the difficulties.) To view cultures and human actions as "texts"⁸⁷ poses many of

84. Lawrence M. Friedman warned against this in *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563, 572 (1984):

It is one thing to say that law is not *merely* instrumental; it is quite another to behave or write as if it is not instrumental at all, or as if its instrumental features do not matter as much as the rest of its work. I would argue exactly the opposite. No symbol, no myth, no legitimator can last in this society, without at least *some* instrumental function or base. Symbols that are only symbolic die out. To ignore what the legal system actually *does* (as opposed to what it says)—to ignore data, legal behavior, living law—runs the risk of falsifying the historical record itself.

Id.; see also Maskop, *supra* note 78, at 13; Robertson, *supra* note 79, at 975.

85. Edelman's views are not necessarily inconsistent with this view. See generally EDELMAN I, *supra* note 1; EDELMAN II, *supra* note 1.

86. GEERTZ, *supra* note 32, at 5. He also states:

To look at the symbolic dimensions of social action—art, religion, ideology, science, law, morality, common sense—is not to turn away from the existential dilemmas of life for some empyrean realm of deemotionalized forms; it is to plunge into the midst of them. The essential vocation of interpretive anthropology is not to answer our deepest questions, but to make available to us answers that others, guarding other sheep in other valleys, have given, and thus to include them in the consultable record of what man has said.

Id. at 30.

87. The well-known first amendment problem of dealing with expressive conduct comes to mind, but it deals with overt use of actions as communicative symbols. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 304-05 (1984) (Marshall, J., dissenting) (emphasizing the role of context in determining whether an act is speech under the first amendment). The interpretive perspective here goes far beyond "conduct as speech," however: regulation may involve "communication" only in a metaphoric sense. Neither the government nor the observer may intend or apprehend the "transmission of a message"—though learning may occur whether or not there is a message. This article does not consider the differences in the nature and mechanisms of

the difficulties plaguing legal and literary interpretation—obscure or mixed messages, a multiplicity of plausible readings, collective authorial intentions, the very nature of “text.” It adds other problems as well, such as differences among group members in access to information about the nature and purpose of social practices, resulting in different perceptions, messages and learning within the group.⁸⁸ Nevertheless, the idea seems worth pursuing. Indeed, the “problem” of gauging the perception and learning of group members through social practices may be, as noted earlier, the very object of a useful investigation.

If we view medical licensure through such interpretive lenses, we can discern several related normative message categories: 1) the values of life and health; 2) the unconditional, equal worth of persons or classes of persons (because all have roughly equal access to the information conveyed by the process of licensure); 3) the importance of the community and of community in general (because the community is the source of this important information); and 4) the ultimate rationality of important belief systems (the complex regulatory scheme is, after all, justified by sound, consistent considerations, or so one might think).

Other regulatory systems can also be parsed in this way. The messages, if they are transmitted at all, can be at a fairly high level of

learning in communicative—as opposed to noncommunicative—contexts.

88. For an extensive critique of the hermeneutic approach in anthropology, see Roger M. Keesing, *Anthropology as Interpretive Quest*, 28 *CURRENT ANTHROPOLOGY* 161 (1987):

Although I find much of deep value in contemporary symbolic anthropology, I will argue that our task goes well beyond interpreting cultural meanings, and I will argue that interpretation itself is fraught with difficulties, some perhaps ultimately intractable. . . . I will suggest that views of cultures as collective phenomena, of symbols and meanings as public and shared, need to be qualified by a view of knowledge as *distributed* and *controlled*. Even in classless societies, *who knows what* becomes a serious issue. Cultures as texts, I will argue, are differently read, differently construed, by men and women, young and old, experts and nonexperts, even in the least complex societies. . . . Cultures are webs of mystification as well as signification. We need to ask who *creates* and *defines* cultural meanings. . . . If symbolic anthropology is not to be yet another passing phase and fad, anthropology as an interpretive quest will have to be situated more wisely within a theory of society

Id. at 161-162, 169; see also Michael Martin, *Geertz and the Interpretive Approach in Anthropology*, 97 *SYNTHESE* 269 (1993) (arguing that Geertz’s account of his interpretive approach has serious limitations).

For comments on law as a symbolic mechanism, see generally Gary B. Melton & Michael J. Saks, *The Law as an Instrument of Socialization and Social Structure*, in *THE LAW AS A BEHAVIORAL INSTRUMENT* 235, 252 (Gary B. Melton ed., 1986) (“The law functions . . . as a symbolic representation of the ideals of the state, and it purports to teach the citizenry these principles, to serve as a model of a natural order.”). *Cf.* 1 HABERMAS, *supra* note 77, at 75-107 (describing “concepts of social action”—teleological, normatively regulated, dramaturgical, and communicative).

abstraction: what is taught may be about general political/ideological orientation, and may be connected with a society's very sense of self. Much depends upon the precise source and mechanism of the regulation and on general "receptivity" conditions among the observers.

Depending on the values and preferences at stake, then, the overall communicative impact of some forms of regulation may be at least as important as the more easily discernible economic effects. This communicative impact of regulation rests on the way human beings are wired up to learn and feel.⁸⁹ It includes both learning and nonlearning effects; either sort may be factors in behavior, and either sort may form part of the rationale of the legislation.⁹⁰ There is thus no sharp distinction drawn here between "symbolic" and "instrumental" actions, and no assumption is made that the government activity involves any subterfuge.⁹¹

There are many weak links in this notion of the communicative effects of regulation, and some of them will be discussed later.

89. Cf. EDELMAN I, *supra* note 1, at 67 n.5:

I regard it as misleading and irrelevant to label this process of creating perceptions and meanings as 'irrational.' It is more to the point to say that it is inevitable, that it has systematic effects upon political attitudes and behavior, and that a beginning can be made toward specifying those effects.

Id.

90. Nonlearning effects of regulatory activities might include, for example, effects on mood, and immediately responsive behavior that the regulation is intended to induce. Such effects may, of course, influence the learning process.

91. See JOSEPH R. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS 21-22 (1981):

I am more conscious [than in an earlier study] of the mix of the instrumental and the symbolic and much more aware of the complexity of symbolic actions as modes by which public consciousness is itself constructed and defined. . . . [I]n this study I am concerned with knowledge, law, medicine, and technology as cultural patterns, as metaphors by which a reality is presented. This method of analysis is itself dependent on a metaphor, that of the theatre. To see public actions and public policies as theatrical is to emphasize the ritual, ceremonial, and dramatic qualities of action. . . . [This does not] absolve the sociologist from looking for self-serving and instrumental elements in otherwise symbolic and ceremonial behavior.

Id.

There is a literature on "symbolic interactionism" that might be useful in analyzing the communicative and noncommunicative effects of regulation. See, e.g., JOEL M. CHARON, SYMBOLIC INTERACTIONISM: AN INTRODUCTION, AN INTERPRETATION, AN INTEGRATION 130-44 (1979) ("Interaction means *mutual social action*, individuals communicating to each other in what they do, orienting their acts to each other. . . . Thus we arrive at the significance of *symbolic interaction*: humans are constantly acting in relation to each other, communicating symbolically in almost everything they do."). This can be carried too far: it is not helpful to see all conduct as the deliberate selection of symbols within part of a conscious process of communication. Again, not everything is a text.

B. *The Mechanisms and Contents of Communications; Learning Effects*

Just how does the “communicative impact” of regulation occur? How do the messages get through?

1. *In General*

The idea is that some regulation reflects, implements, reinforces or “expresses”—and thus teaches—certain values, attitudes and beliefs.⁹² It does so by repeatedly being perceived through certain frameworks, in much the same way that any human conduct is perceived and, possibly, learned from over time.⁹³ In this light, as was said, regulation and its

92. It seems unnecessary to explore extensively the interactions among normative lenses, perceptual processes, and attitude and belief formation. It is enough to say that they are interconnected and that causality does not run in one direction only. This leads to a deeper point about regulation that can only be suggested here (it was raised by Professor Robert Bone): the very “language” of regulation is partly set up by regulation itself.

93. We need briefly to distinguish regulation as communication: (a) that aids moral learning through “cognitive” mechanisms; (b) that aids it through a “conditioning” process involving positive and negative reinforcements; (c) that conditions without moral learning; (d) that aids rational cost-benefit analysis. These overlapping distinctions are not discussed further. *See generally Symposium on Moral Development*, 92 ETHICS 409 (1982); J. Philippe Rushton, *Altruism and Society: A Social Learning Perspective*, 92 ETHICS 425, 435 (1982); Thomas E. Wren, *Social Learning Theory, Self-Regulation, and Morality*, 92 ETHICS 409-11 (1982) (“[S]ocial learning theory regards moral actions as having the same earthy dependence on reinforcement schedules as all the other kinds of human behavior have. . . . From a social learning perspective, the overwhelming majority of human social behavior is learned from observing others.”). This “social learning” perspective is often contrasted with “cognitive” approaches. The Symposium, for example, divides itself into these two camps. For accounts of the differences, see BERNARD J. BAARS, *THE COGNITIVE REVOLUTION IN PSYCHOLOGY* 1-14 (1986) (describing cognitive psychology and frameworks in science); Dennis Krebs, *Psychological Approaches to Altruism: An Evaluation*, 92 ETHICS 444, 452 (1982). For the present, it seems prudent not to reject insights from any source; they all may help clarify the nature of the learning process. *See, e.g.*, RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980) (referring to “causal attribution” theory “as a fundamental process underlying much of social perception and action”); *see also infra* note 97 (discussing “framing”). Note that the term “socialization” is often used to refer “to the acquisition of a society’s norms by its members. The process of acquiring values and norms is the fundamental link between the individual and social and political life. The primary socializing agents are assumed to be the family, schools, and religious institutions. This article targets a larger set of agents. “Socialization is used to explain both how individuals become attached to a culture and how the culture and institutions of a society are then maintained over time.” ELLEN S. COHN & SUSAN O. WHITE, *LEGAL SOCIALIZATION A STUDY OF NORMS AND RULES* 10 (1990) (citations omitted).

The kind of moral “learning” stressed here—dealing with attitude and value change—is often distinguished from the process of making cost-benefit calculations in reaction to threatened or actual sanctions. *See* Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984); Melton & Saks, *supra* note 88, at 258 (describing the distinction between

communicative effects can in theory be partly constitutive of a given society's fundamental value dispositions—its very identity as a society.⁹⁴ (Obviously, one can inquire into the learning effects not just of particular regulatory schemes, but of technological innovations, and of the “contagious” effects of the very ideas of science and technology on human cognitive and affective processes.)⁹⁵

Confirming such learning effects would require findings about our perceptions and beliefs concerning regulatory systems—that these systems exist, that they were enacted for certain reasons—consciously or not—and that they in fact substantially fulfill their goals. These perceptions and beliefs, however, may not be entirely present to our minds. Much learning through observation may take place insensibly.⁹⁶ (It may even be that conscious awareness of regulatory messages and of learning processes interferes with the learning process, but this issue is better addressed by psychologists.) Moreover, different persons may learn different things. They will notice different things, make different inferences about reasons and motivations behind regulatory schemes and actions, construct different moral lessons, and generally differ in their ways of learning—partly because of preexisting normative

“educative” and “deterrent” effects). In general, it seems that “deterrence” might be part of a conditioning process or a precursor to moral cognition, as well as the outcome of a cost-benefit analysis—perhaps simultaneously. *See supra* notes 55-59 and accompanying text on punishment as expression of ideas. The educative or communicative impact of punishment is not restricted to the person punished: recall the contrast between general deterrence and specific deterrence.

It would not be profitable to try to define “learning” here. For an extended effort at definition, see ERNEST R. HIGARD & GORDON H. BOWER, *THEORIES OF LEARNING* 2-6 (1966). On matters of perception generally, see HOWARD MARGOLIS, *PARADIGMS AND BARRIERS* (1993); HOWARD MARGOLIS, *PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT* 112-40 (1987) [hereinafter MARGOLIS, *PATTERNS*].

94. “Identity of a society” is obviously a complex notion, particularly in heterogenous, multicultural communities.

95. *See* EUGENE B. BRODY, *BIOMEDICAL TECHNOLOGY AND HUMAN RIGHTS* 41 (1993) (“With the development of modernization both the individual’s organization of knowledge and cognitive style can change.”) (citation omitted). On cognitive “contagion,” see MARGOLIS, *PATTERNS*, *supra* note 93, at 181-85.

96. *See generally* PAWEL LEWICKI, *NONCONSCIOUS SOCIAL INFORMATION PROCESSING* 12, 220 (1986); John F. Kihlstrom, *The Cognitive Unconscious*, 237 *SCI.* 1445, 1445 (1987).

As indicated earlier, nothing is suggested here about the conscious intentions of those who create regulatory systems. One might, however, cite learning effects as a basis for an inference about the purposes or expectations, conscious or not, of some of the creators. One might also urge that regulation can be justified by the hypothetical consent of rational observers—framers and community members—whose attention is called to, say possible learning effects of public actions. *See* OWEN & BRAEUTIGAM, *supra* note 65, at 27 (“The model of regulation proposed here is derived from a generalized observation about the *effect* of regulation, an argument that it would be rational for voters to wish for this effect . . .”).

views.⁹⁷ Indeed, a given person may be pulled in different directions by multifaceted perceptions. And the behavioral effects of even similar learnings will depend upon variables too complex to specify completely.⁹⁸ Nevertheless, there may well be dominant messages,⁹⁹ as suggested later. (It is easy to quarrel with the term “communication” here, but further comments are reserved until later.)¹⁰⁰

2. *The Communications Process and Its Contents*¹⁰¹

a. *Noncontingency, Individual Worth, and Community*

Certain regulatory networks communicate and reinforce certain

97. See NISBETT & ROSS, *supra* note 93, at 66-73 (“characterizing the datum: the role of preconceptions”). “Framing” in cognitive psychology rests in some ways on ideas of multiple characterizations and perspectives, and is reflected in the philosophical problem of act description. On act description, see generally ALVIN I. GOLDMAN, *A THEORY OF HUMAN ACTION* (1976). Competing “levels of generality” are one example of framing/characterization problems. See generally Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U CHI. L. REV. 1057 (1990). The relevance of framing/characterization to “mixed messages” in the learning processes seems plain. For an account of framing processes and the effects on decision-making where expected utilities are readily calculable, see Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 458 (1981) (“When framing influences the experience of consequences, the adoption of a decision frame is an ethically significant act”). Of course, common examples of the nature and effects of rival but consistent frames can be found in legal argumentation and analysis. See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 238 (1960) (noting that adversaries use the same facts to frame differing legal interests); cf. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (explaining idea of paradigms in scientific analysis).

98. Mechanisms of learning reflect human variations and limitations, and so one cannot confidently predict specific attitudinal or behavioral outcomes. If one observer is more acute or perceptive than another (or simply sees different things), they are likely to learn different things, if they learn anything at all. Some learning mechanisms might reflect major propensities for error in thinking. See, e.g., NISBETT & ROSS, *supra* note 93, at 74-76 (distinctions in characterization of data).

99. The urge to find a dominant message may arise from a strong aversion toward uncertainty and complexity. Cf. EDELMAN II, *supra* note 1, at 31 (“It is characteristic of large numbers of people in our society that they see and think in terms of stereotypes, personalization, and oversimplifications, that they cannot recognize or tolerate ambiguous and complex situations, and that they accordingly respond chiefly to symbols that oversimplify and distort.”). This characteristic is not necessarily a matter of lack of acuteness. On a variety of grounds, including efficiency, it is rational to prefer the simple to the complex in many enterprises, and to “satisfice” (Herbert Simon’s term) in interpreting the world—i.e., calling a halt to further reflection and analysis. See IRVING L. JANIS & LEON MANN, *DECISION MAKING* 25-26 (1977). For the original explication of satisficing and “bounded rationality,” see HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR* xxviii-xxxi (3d ed. 1976). Perhaps, then, both conscious and unconscious learning follow a satisficing paradigm.

100. See *infra* notes 139-80 and accompanying text.

101. Some observers, inspired by a rich anthropological literature, may wish to talk of “myths” and “rituals” in describing the communicative effects of regulation. There is nothing

values *precisely* because autonomy and *the contingencies of outcome associated with it* are displaced, suggesting the idea that the contingency is unacceptable, and thus that the underlying interests are so important that they generate noncontingent duties ("entitlements" of a sort).¹⁰² The regulatory networks may also communicate the idea of equality of individual worth within the set of persons noncontingently protected. Because the contingencies seem to be eliminated (or altered) by collective action, the regulations reinforce ideas about the worth of community life.¹⁰³ They also ease the tension between community and individual by connecting the community with the recognition of individual worth and of the worth of smaller communities or groups within the larger one.¹⁰⁴ (This may bear on the status of minority groups and

wrong with this so long as one understands (as suggested) that "myth" is not necessarily about some discrete falsehood that civilized people should reject and that "ritual" does not refer only to things like tattooing and wearing dark robes when dispensing justice. Regulation isn't overtly symbolic in most cases—it is used to accomplish certain things, proper or not. For a critique of the expansive use of "ritual," see generally Jack Goody, *Against "Ritual": Loosely Structured Thoughts on a Loosely Defined Topic*, in *SECULAR RITUAL* 25 (Sally F. Moore & Barbara G. Myerhoff eds., 1977).

102. There is a connection between the idea of noncontingency (say, in providing lifesaving care) on the one hand, and that of rights of access to the commodity and duties to provide it on the other. This article does not investigate such rights and duties. Social institutions and practices may of course reinforce or weaken views that those rights and duties indeed exist.

103. See Grey, *supra* note 24, at 894-97 (right to material guarantees beyond subsistence based on concept of fraternity, which in turn requires some noncontingent social arrangements and transactions).

This article does not emphasize any particular sort of community, nor any particular interpretation of "community," nor any particular rationale for promoting "community" as a value. Nor does it offer any endorsement of "communitarianism". Nor are communitarian values pitted against "liberalism": community-oriented attitudes and beliefs are not necessarily inconsistent with liberal individualism, and liberalism is theoretically consistent with strong individual preferences for community welfare. See WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 1-2, 9-10 (1989) (describing project of defending liberalism against charges of insensitivity to the importance of community). But see Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 *MICH. L. REV.* 685, 698, 735 (1992) (individualistic values as a major part of our public culture, possessed in common by the whole community; shared or communal values neither necessarily communal in substance nor necessarily anti-individualistic). For an account of different forms of "communitarian" argument, see also Christopher McCrudden, *Community and Discrimination*, in *OXFORD ESSAYS IN JURISPRUDENCE* 221 (John Eekelaar & John S. Bell eds., 1987). See generally RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 56-57 (5th ed. 1989) ("communal wants"); Ronald Garet, *Communitarianism and Existence: The Rights of Groups*, 56 *S. CAL. L. REV.* 1001 (1983).

104. See EDELMAN II, *supra* note 1, at 58 ("The assurance that all involved groups [in a regulatory scheme] are legitimate and can participate at will in a joint ritual . . . constitutes a demonstration of symbiosis . . ."). Cf. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 25 (1937) (observing that all social organizations share, among other things, a creed or rituals having "the effect of making each individual feel an integral part of the group and which makes

on social stratification generally.) The collective action, implemented by a central decisionmaking unit, suggests that the noncontingent duties are part of a rational, consistent, workable belief system, thus promoting rationality values. (The reinforcement of a rational, consistent system may cast a halo over its constituent values, further reinforcing them.) Some examples are offered below.

b. Elaboration

(1) Regulation as Communication of Caring, Comfort, and the Recognition of Human Capacities

What is learned depends on what is seen, and what is seen depends on many variables—e.g., perceptual frameworks, knowledge, time available, attention, abilities of various sorts, and so on. Some of the descriptions below of possible “communications” may seem quite complex,¹⁰⁵ but what is “simple” or “complex” is itself a function of these variables.

Certain forms of regulation express “caring”¹⁰⁶—a much-used term that seems to include, among other things, recognition of individual worth through openly making certain beneficial processes noncontingent. The visibility of the process also suggests assurance that it will be repeated when needed. Consider again a system guaranteeing good faith efforts at lifesaving medical treatment for everyone needing it. How does a system that indifferently saves everyone stress individual worth? Possibly by saying that life as a human being (or life itself) entails individual worth; and possibly by largely eliminating certain criteria of inclusion and exclusion—both those that openly reflect individual nonworth (e.g., you’re too useless to be saved, or you’re not kin)

the group appear as a single unit”).

105. Here one may worry over, or applaud, de Tocqueville’s comment that “[t]he public will believe a simple lie in preference to a complicated truth.” Daniel E. Koshland, Jr., *Minorities in Science*, 262 *Sci.* 971 (1993) (quoting DeTocqueville).

106. *Cf.* Fuchs, *supra* note 61, at 351-52 (discussing externalities involving satisfaction from knowing that the sick are receiving medical attention and from satisfying the demand for equality in medical care); Steven Kelman, *Regulation and Paternalism*, in *RIGHTS AND REGULATION: ETHICAL, POLITICAL, AND ECONOMIC ISSUES* 217, 236 (Tibor R. Machan & M. Bruce Johnson eds., 1983) (“[C]onsumers who wanted to see a higher level of concern for their welfare demonstrated by the government might prefer regulation to certification [of product safety] because the former demonstrates a higher level of concern.”).

and those that uncritically exclude (lack of funds).¹⁰⁷ Much the same point is made by Professor Barnett.¹⁰⁸

Perhaps this example suggests the unlikelihood of encountering a true "minimal state."¹⁰⁹ If there is a cross-cultural demand for caring and comfort, there will be a demand for regulation—a demand partly independent of the regulatory system's exact subject matter.

The next example illustrates the complexity of the idea of regulation as a tool for transmitting values. Suppose a rule requires that competent patients receive certain information, whether they want it or not, thus prohibiting "overdelegation" of decisionmaking power to physicians.¹¹⁰ The idea of forcing information on patients who do not wish it is much maligned. Compelled disclosure arguably offends the patient's dignity as a person,¹¹¹ and can cause genuine mental and physical harms. But consider whether there are matters we think autonomous persons do and should insist on deciding for themselves. If so, perhaps forcing information on someone is not necessarily an assault on personhood—quite the contrary. (We often forego giving information to incompetent persons.) Such coercion presupposes *respect* for rational faculties as well as *disrespect* for exercising those faculties to avoid their further use in certain situations. Coerced education is thus, on

107. Some excluding criteria are of course inevitable, however—e.g., good faith medical criteria with relatively noncontroversial value components (e.g., "You're so weak, the surgery will kill you almost instantly."). But they are easy to use as covert "social worth" criteria (e.g., no transplants for those over 65). See generally HENRY J. AARON & WILLIAM B. SCHWARTZ, *THE PAINFUL PRESCRIPTION* (1984).

108. BARNETT, *supra* note 19, at 165:

Is the persistent use of a form of law that does not accomplish its express objective simply the product of human inertia? I think not. While inertia cannot be excluded as a factor, a more fundamental reason is probably that regulatory law serves some societal need. But what need does such law meet and how does it do so? The answer, I suspect, is that regulation promotes societal cohesiveness in part by providing a symbol that increases identification with the social system. Law makes people feel the system cares about their problems and endorses their values. Even though regulatory law is generally ineffective for modifying the social behavior to which it is directed, it is a symbol that increases commitment to society. Its role in this regard probably grows in importance as a population becomes more heterogenous culturally, specialized occupationally, and dispersed geographically.

Id.

109. For a discussion of the terms "minimal state," "night-watchman state," and "ultramiminal state," see NOZICK, *supra* note 49, at 25-28. It is not necessary to specify here the exact characteristics of such states.

110. See generally Shapiro, *supra* note 22, at 385-390 (discussing delegations to physicians).

111. See Alan Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413, 459.

this view, a recognition of personhood. Similarly, accepting someone's decisions—say, to delegate important choices—may exhibit lack of respect for personhood. (Such acquiescence may also look like ignoring the person; when one is being coerced, one is not being ignored.)

So, ordering someone around in certain ways might be a recognition of personhood—and *appear* so—rather than a denial of it, depending of course on the idea of personhood in use. Major examples include coerced medical treatment and prevention of suicide. But our ideas of “personhood” and “dignity” are incomplete, and may require “outside” reference to other ideas, including autonomy—ideas that are themselves difficult to deal with. If an observer of a coercive system even faintly recognizes the underlying normative issues in a given scenario, this may change the message analysis—for that observer, at least. Thus: does the value of *freedom to pursue preferences* (including those for ignorance and delegation) override the value of *self-direction* as a component of autonomy? If so, to compel self-direction is presumptively wrong on autonomy grounds, and perhaps also (therefore?) on personhood grounds. Yet if self-direction overrides freedom to pursue preferences, then compelling self-direction is pro-autonomy and perhaps pro-personhood. (One is tempted to return for help to personhood and dignity, continuing the conceptual ping pong.)

These normative issues are not themselves, however, the object of investigation here. Discussing them simply helps us discern the various communicative impacts of regulatory systems. Which messages dominate when information is imposed over objection, or withheld on request? Perhaps a practice of tolerating uninformed assent by competent patients attenuates the value of autonomy as rational choice. Yet, if physicians are viewed as vastly superior in expertise, perhaps tolerating patient passivity *in certain situations* promotes the ideal of rational autonomy. That ideal embraces delegation of certain tasks in order to enhance the delegator's long-run autonomy. Thus, delegation by a patient may preserve her life and health and conserve scarce decision-making resources for other important matters. Delegation may also reinforce a view that life and health are independent of and superior to autonomy as self-direction.

There are still other messages. For some persons, the aura of coercion surrounding forced information may dominate the aura of encouraging “rational autonomy” because of their view that human dignity requires deferring to a patient's preferences, including preferences to delegate—a requirement that outweighs the ideal of rational self-direc-

tion. They may also perceive in such coercion an assault on the ideal of rationality because they understand that delegation of decisionmaking power may well be rational under various circumstances.¹¹² The withholding of information may also reinforce the idea of physicians as caring about patient welfare, because of a view that some information may be harmful or lead the patient to decline treatment.¹¹³

All these multiple characterizations may compete. The regulatory network itself may seem to consist of strands that work against each other, reflecting awkward compromises, and furthering few interests except keeping the peace or offering reassurance (which may, under certain circumstances, be of great importance). The richness of the multiple characterizations—reflecting the richness of normative theory itself—may indeed in some cases render the idea of “value reinforcement” too indeterminate to apply to a group or even to a given observer. This is particularly so when the characterizations, while accurate, pull in different directions. To shift examples for a moment, if someone sees both a vindication of life and an indifference toward suffering in the imposition of medical care over the objections of seriously ill patients or their proxies, it is hard to say what the learning effect is.¹¹⁴ Perhaps one learns of the complexity of value issues—or simply is confused.

As for coercively informed patients, they need only compare themselves to incompetent persons to perceive that forced rationality shows some respect for their faculties. (But so does disallowing such force!) To be coerced in certain ways is to be recognized as a person.¹¹⁵ Because such coercion can also be seen as an assault on personhood, it is plain that the idea of personhood itself is an uncertain guide to recti-

112. Cf. Shapiro, *supra* note 22, at 369-82 (discussing rationality of delegation under various circumstances).

113. Cf. *Arato v. Avedon*, 858 F.2d 598, 607 (Cal. 1993) (holding that physicians are not required as a matter of law to disclose life expectancy information not directly requested by patient and discussing a “therapeutic privilege” to withhold information under certain circumstances).

114. It can thus be unproductive to press such “what values are being reinforced?” questions too far. When there is an apparent conflict of values and no clear ordering principles, it is hard to say what *ought* to be reinforced. Empirical questions about reinforcement are raised here because it is useful for complete normative analysis to consider the effects of regulation, even if we are ultimately stymied on the merits in given situations.

115. See Francis I. Kane, *Keeping Elizabeth Bouvia Alive For the Public Good*, 15 HASTINGS CENTER REP. Dec. 1985, at 5, 8 (“In demanding that we help her destroy her life, [Bouvia] has led us to profess, not just abstractly, the value of this individual life.”); cf. JAMES F. CHILDRRESS, *PRIORITIES IN BIOMEDICAL ETHICS* 32 (1981).

tude. Working out these rival conceptions of personhood is not the point here, however, assuming it can be done at all. Yet it is necessary to do so if one wishes to confine the scope of "coerced rational autonomy."

(2) Regulation as Socializing and Socialization

The idea here is simply that the desire to regulate may partly be content independent, reflecting a deep-seated urge to form a community that fosters human interaction. In some cases, this urge may be unconnected with the promotion of specific substantive values because the unstated goals are the benefits of mutual recognition, comfort, and social relations generally.¹¹⁶ If so, this suggests that we will regulate to some extent *just to be acting together*—in a way that acts continuously over time to reinforce the association. On this view, there is again little chance of a minimal state. Yet this "togetherness" notion does not explain why regulatory schemes differ nor why some matters are regulated and others not, so it is left aside here as too general for present purposes.

(3) Contingency and the Public-Private Distinction; Privatization and Markets

The public-private distinction designates a variety of overlapping contrasts, and it is (predictably) hard to specify shared meaning elements. All that is necessary here, however, is to identify some of the contrasts, and show their connection to the idea of regulation as communication of the idea of noncontingent obligations.

One contrast concerns the idea of state or government action, as when testing certain conduct under the Fourteenth Amendment. Another deals with a broad separation between the "political" domain and matters of family and commerce.¹¹⁷ Still another implicates notions of

116. In other cases, a connection between human interaction and other goals may be seen and ultimately become an objective of the interaction. Cf. SHELDON COHEN & LEONARD SYME, *Preface to SOCIAL SUPPORT AND HEALTH XV* (Sheldon Cohen & Leonard Syme eds., 1985) (discussing "possible influence of social supports on health and health behavior").

117. Cf. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 5 (1992):

[A] distinction is drawn between the political realm (involving decisions which concern the welfare of all) and the realms of family and market (involving decisions to promote private interests). The distinction may then be used in various ways. It may be used descriptively, such as to explain that in the United States private interests are valued more than political ones. The distinction may also facilitate evaluations, such as the assessment of the relative

autonomy—what ought to be free from governmental or even “private but-social” intrusion, and what ought to be addressed by government. In some contexts, the public-private distinction implicates the view that there is information that should be kept confidential within some “unit of privacy” or “unit of autonomy”—an individual, a family, a private association. Finally, there is a contrast between domains of voluntary versus compelled association—e.g., choice of friends versus choice of platoon mates. In general, “privatization” of certain functions (punishment, law enforcement, trash collection, etc.) might be seen partly as a movement that challenges received interpretations of the public-private split.¹¹⁸

In some cases, whether something is “public” or “private” may depend on where one stands. For some purposes of “public vs. private,” a commercial market is private. For other purposes, it is public. (The market is “out there,” not in your home, and you are not likely to go shopping in your bathrobe, unless you are patronizing an interactive home shopping network.)

For any of these contrasts, privatization seems to be a process of moving from one domain of activity to another. “Privatization” is of course not synonymous with “deregulation.” One can regulate or not regulate private enterprises; one can even conceive of government agencies operating largely unsupervised, as if they were private unregulated entities. Still, privatization may be one form of deregulation.

Consider, then, relevant versions of the public—private distinction

costs and benefits of the tendency of individuals to “mind their own business.”

Id. Gavison also labels some varying senses of “private” in referring to “private as self-regarding; private institutions based on norms of contract and property (the more voluntary parts of which are called ‘private law’); and private as free.” *Id.* at 14.

Gavison argues that one must be careful in attacking the distinction generally, or any version of it. For example, the fact that “private” conduct has externalities does not necessarily undermine the ascription of privacy. *Id.* at 15. Gavison also cautions, “the terms ‘private’ and ‘public’ assume a variety of meanings, with differing normative implications, within the relevant literature.” *Id.* at 2; see also Ann L. Jennings, *Public or Private? Institutional Economics and Feminism*, in *BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS* 111-123 (Marianne A. Ferber & Julie A. Nelson eds., 1993) (discussing “the interconnected web of dualistic meanings in the public/private distinction that emerged in the nineteenth century.”). For earlier works on the public-private distinction, see generally Symposium, *The Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

118. The idea of privatization may embrace a normative view that some functions now exercised by government either may be “delegated” to the private sphere, or, more strongly, belong there, either in the first place or because of change of circumstances. On other motives for the privatization process, see *infra* note 133 and accompanying text). *Cf.* Gavison, *supra* note 117, at 4, 7-9 (discussing descriptive and normative meanings to “public” and “private”).

in thinking about the impact of commands, standards, and practices deriving from various sources. Think again of emergency care. If you fall on the street, persons standing outside certain well-known relationships may have no legal duty to assist you. Suppose a stranger does assist you, and thinks it an absolute duty on her part to do so. From her standpoint, the duty is noncontingent (in certain senses), but from your or the community's standpoint, the transaction is a matter of pure luck.

Suppose next that you present yourself at an emergency room in a private (or even public) hospital in a jurisdiction where there is no duty to treat emergency patients who cannot pay (or who are not members of favored groups).¹¹⁹ Even if you are treated, this is still no exemplar of commitment.

Yet the matter is otherwise if a statute or constitution creates (or "recognizes") a duty, or a common law decision announces one. In any of these cases—to varying degrees—one may see a degree of collective commitment and recognition of a duty of care. (Again, the matter of perception is complex; one might imagine a reluctant legislature enacting a mandatory treatment law as a logrolling payoff to powerful legislators and the interests they are trying to further. What is taught here?) To fail to assign the provision of care to a duty-bound public domain may thus be to "marginalize" the persons excluded, and perhaps to marginalize persons generally, for anyone can at anytime be found in the inability-to-pay category. The value of life—at least of those groups with limited ability to pay—is thus attenuated in the sense that lifesaving seems contingent.¹²⁰

119. The public-private distinction here cannot exactly track the distinction between noncontingent and contingent duties. If the public hospital is free to reject nonpaying patients, then treatment is contingent on ability to pay. The exact nature of the "public" commitment is thus at stake—some other public source of authority is required, e.g., a statute, constitution, or common law decision. For a review of sources of legal duties to provide emergency care to indigents, see Demetrios G. Metropoulos, Comment, *Son of COBRA: The Evolution of a Federal Malpractice Law*, 45 STAN. L. REV. 264, 265-67 (1992).

120. For a discussion of privatization and marginalization, see Gavison, *supra* note 117, at 22 (discussing the feminist claim that "the privatization of women has resulted in their marginalization."). This is all the more likely where it is generally known or believed that women are victimized without adequate relief in the private realm. "The [public and private] realms, typically, are . . . valued and assessed differently. Three approaches to this valuation process compete in the general literature. The first devalues the private as unimportant and unchallenging, lacking the nobility and courage demanded by involvement in the public." *Id.* at 25. The second approach deals with the private as a "haven"; the third deals with both realms more evenly. *Id.* Gavison concludes that the feminist challenge "provides a strong reminder that 'out of sight is out of mind,' that low visibility and suppression distort public perceptions of what is important. Finally, the feminist challenge raises important questions concerning what the ultimate values and institu-

There are thus different forms and degrees of "publicness" that in turn suggest different sources or levels of authority, and, in turn, different learning effects.¹²¹ Perhaps seeing something as a constitutional duty would have a different impact from seeing something as a statutory duty. Consider the varying perceptions that would be created under different outcomes in *DeShaney v. Winnebago County Department of Social Services*,¹²² where a governmental unit's failure to protect a child against his father was ruled not to be a matter of constitu-

tional structures of human life in society can and should be." *Id.* at 43.

Cf. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMM. 319, 323 (1993) ("Feminist lawyers have objected to the withdrawal of the law from the so-called domestic sphere on the basis that the withdrawal left women unprotected from abuse and gave the ideological message that domestic life was less important than commercial life or other aspects of society governed by law."). Once again, the idea is that a failure officially (or centrally) to correct a situation may affirmatively reinforce inappropriate attitudes and beliefs, or at least forego an opportunity to reinforce proper ones. *Cf.* Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMM. 329, 334-35 (1993):

Public decisions . . . define the preconditions against which all ostensible private conduct takes place. . . . [T]he very definition of legal injury requires some pre-existing definitions of interests, the interference with which gives rise to a grievance. . . . That the physical invasion of my house by a private person may be termed a legal wrong, while the erection by the same person of an ugly structure down the street is not, is the result of an implicit state decision. My suffering from the aesthetic affront may thus be attributed to the state.

Id.

One need not go so far, however, as to "attribute[] to the state" various adverse events and processes in order to make the points urged here about the effects of regulation or nonregulation. Kay, in any event, does not conclude that "state action" is to be read out of the constitution, and endorses a more limited role for the idea of a constitutional violation than is suggested by an expansive theory of attribution of responsibility. *Id.* at 333-34, 342-49.

Cf. Rand L. Rosenblatt, *Medicaid Primary Care Case Management, The Doctor-Patient Relationship, and the Politics of Privatization*, 36 CASE W. RES. L. REV. 915, 967, 968 n.248 (1986) (discussing radical privatization as bearing on "consciousness of health and health care as individual and social issues"; and as undermining of "our cultural capacity to perceive the social patterns of health problems").

121. *Cf.* BARNETT, *supra* note 19, at 168-69 (different sources of law may be connected with different societal needs); Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1497-98 (1982) (discussing the "Moral Exemplar Model" as an aspect of state action analysis, and illustrating it with an example in which a corporate entity "has the appearance that the government has its hand, at least symbolically, on the helm, which has special exemplary significance under the Model"). Locus of authority may also be related to interpreting the first amendment's establishment clause, as in part, a ban on government endorsement of religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

122. 489 U.S. 189 (1989). The constitutional merits of the case are not discussed here. For an analysis of *DeShaney's* reliance on the public-private distinction, see Kay, *supra* note 120, at 329. Kay also discusses the idea that certain "characteristics of constitutional law are in many ways unsuitable for ordinary law." *Id.* at 338.

tional default. Recognition of a constitutional claim of right under the circumstances suggests a duty of care quite different from what the case, as it is, describes: that it is a matter of luck in finding state employees and institutions that can effect certain rescues.

This very hierarchy of authority may seem to cut another way. What it shows is that there is little or nothing that is purely private, and perhaps little or nothing that is totally public, thus leaving the distinction largely pointless. Yet neither the fact that there are varying kinds and degrees of privateness/publicness nor the fact that there are "external" effects of supposedly private conduct explodes the distinction.¹²³ It of course makes tracking its effects extremely difficult.

To compound the problem, what one regards as a "true" source of authority (descriptively or normatively) may heavily affect one's perception. Members of an orthodox religious group, for example, may view only certain religious texts, or certain persons, groups or higher beings, as truly authoritative; they may thus take an "externalist" standpoint concerning secular laws.¹²⁴

The claim here, then, is simply this: assigning certain performance duties to (or recognizing them as "belonging" to) a public domain may communicate an official commitment to something, such as the absolute value of life for all and to various forms of equality generally.¹²⁵ This may be true for several versions of the public-private contrast. Moreover, a commitment from the public domain may be taken to reflect recognition of a noncontingent duty of some sort—unlike the situation in the "private" market.

Two explanatory points should be made here. First, markets should not be too rigidly characterized. There are markets and markets, and all operate in widely different contexts. Markets are not, *qua* markets, inconsistent with the widespread individual recognition of a variety of moral duties beyond some version of ethical egoism. But the

123. Cf. Gavison, *supra* note 117, at 14-18 (discussing the claims that nothing is really private and that no social institution is private).

124. See, e.g., Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 745 (1987-88) ("The central point of this paper is that religious groups may view themselves as a source of authority at least equal to the state, and that they may see issues of the church and state as questions involving competing systems of law or sovereignties.").

125. See Frankford, *supra* note 50, at 382; cf. Werner Baer & Melissa Birch, *Privatization and the Changing Role of the State in Latin America*, 25 N.Y.U. J. INT'L L. & POL. 1, 18 (1992) (pace of privatization may depend on public reaction to among other things, "concentration of ownership within certain domestic elites").

formal characteristics of markets do not *explicitly* speak to such duties, and thus there may be a perceptual difference between their operation and other forms of human interaction.¹²⁶ This is partially illustrated by *Rossell v. Volkswagen of America*,¹²⁷ where the Arizona Supreme Court declined to apply "malpractice" standards to automotive engineers, thus denying them the benefit of the often-decisive effect of custom.

Special groups will be allowed to create their own standards of reasonably prudent conduct only when the nature of the group and its special relationship with its clients assure society that those standards will be set with primary regard to the protection of the public rather than to such considerations as increased profitability. We do not believe that automobile manufacturers fit into this category. This is no reflection upon automobile manufacturers, but merely a recognition that the necessities of the marketplace permit manufacturers neither the working relationship nor the concern about the welfare of their customers that the professions generally permit and require from their practitioners.¹²⁸

Of course, the professions are also in "the marketplace" to some degree. Nevertheless, the contrast drawn remains; that between contingently attending to other parties' welfare and noncontingently doing so (with the appropriate reservation about the meaning of "(non)contingent").

Second, talk of noncontingent "duties" raises the questions of who owes the duty and to whom. One can talk of the state's duty to save

126. For a discussion of markets containing a distinction parallel to the one here, see Gregory C. Keating, *The Unreasonableness of the Economic Interpretation of the Hand Formula* (Jan. 27, 1994) (unpublished manuscript, on file with *The University of Pittsburgh Law Review*):

[T]he duty of care that negligence law imposes is one that persons owe directly to one another; the equality practiced by markets is not a duty to persons but an aspect of the institution. Participants in market relations simply do not owe one another duties of equal concern and respect. They are free to pursue the rational satisfaction of their own preferences.

Id. Much depends, however, on the meaning of "equal concern and respect." In a legally regulated market, there may be some recognition of moral duties of this sort. Still, the basic distinction between benefitting others contingently (as a byproduct of exchanges in the market) and benefitting them as a matter of duty is an important one. Cf. Jan Narveson, *The Justice of the Market: Comments on Gray and Radin*, in *MARKETS AND JUSTICE* 250, 268 (John W. Chapman & J. Roland Pennock eds., 1989) (discussing social interactions in markets).

See also Davis, *supra* note 24, at 70 ("Though I know of no way to decisively prove the point, I think it would be better for us to devote our energy and resources to the development of policies that express our understanding that children are inherently valuable individual persons rather than to policies that may exacerbate our tendency to regard children as expensive private investments.").

127. 709 P.2d 517 (1985).

128. *Id.* at 523 (emphasis added); see Keating, *supra* note 126 (discussing *Rossell*).

lives without speaking of any other party's duty to do so, but the point to stress is this: if enough of us hold certain values, it is rational to try to structure the attitudes and beliefs that would promote those values. If we think life and health are valuable for all equally, we may also think that we have certain general duties to each other to promote life and health—even if we do not feel obliged to drop what we are doing and rush out to save lives. These duties *inter se* might be taken to require that we so arrange things socially that certain transactions should be noncontingent, or contingent only on appropriate factors.

A brief comment on current “privatization” moves: the idea of regulation as communication obviously bears on assessing the reassignment of certain tasks—housing prisoners, delivering water and power, enforcing the law, etc.—to government agencies or to private firms. Yet “privatization” is an especially misleading term here.¹²⁹ To house prisoners in privately owned and operated facilities is not a complete divestiture by government of the public function of punishment for crime. The penal statutes, the law enforcement agencies, the criminal trial, the imposition of punishment—all are unmistakably public in an obvious sense.¹³⁰

129. For a discussion of the different forms of privatization of criminal punishment, see John J. DiIulio, *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 155, 156-57 (Douglas C. McDonald, ed., 1990) [hereinafter PRIVATE PRISONS] (urging that “it is a mistake to conceptualize privatization [concerning prisons and jails] as an ‘either or’ issue”).

130. *But see id.* at 174, 177-78 (noting scenarios where “cops, courts, and corrections” have all been privatized, and complaining of delegation of authority to administer justice to nonpublic entities).

For additional descriptions of prison privatization, see Philip A. Ethridge & James W. Marquart, *Private Prisons in Texas: The New Penology for Profit*, 10 JUST. Q. 29 (1993). The authors note that there is a history of private sector involvement with prison operations in the United States. *Id.* at 32. Prison privatization, however, is not the most useful example for analyzing regulation as communication. Privatization here does not seem to represent a wholesale abandonment of state functions to an unregulated domain. State governments would remain accountable under the fourteenth amendment, for example. *See Medina v. O’Neill*, 589 F. Supp. 1028 (S.D. Tex. 1984), *rev’d on other grounds*, 838 F.2d 800 (5th Cir. 1988); Ethridge & Marquart, *supra*, at 31. There is of course the possibility of a different public perception, suggesting the view that prisoners are being abandoned to the depredations of the private market. There is also the view that it is intrinsically wrong to shift public functions to the private domain. *Id.* at 38 (quoting testimony opposing privatization because “[i]t is morally wrong for the state to delegate to a corporation the degradation of an individual’s liberty . . .”).

Consider the possibility that if publicly operated prisons are known for harsh treatment of prisoners and it is thought that privately run prisons would be more humane, privatization might be viewed as a reinforcer of humanitarian attitudes. For an extended review of this and other issues, see generally PRIVATE PRISONS, *supra* note 129. In Douglas C. McDonald, *Introduction to id.* at 1, 11-12, the author questions whether privatization “offer[s] an effective means of *upgrad-*

The evaluation of any given privatization process, then, requires some descriptive and conceptual precision at the very start. Also, if we are indeed speaking of (partial) conversion of a function *already* largely “public” to a private process, the fact that something public—as public—is being undone has to be taken into account.¹³¹ The divestment of public responsibility for law enforcement, for example, is likelier to suggest an indifference to human suffering than is the failure of a minimal state to construct state-run police forces. (The very idea of governmental or public indifference may not even arise in such a state.) It reinforces ideas that protection of one’s life, family or property is contingent on atomistic market transactions rather than on one’s intrinsic value as a person.¹³²

Not all questions of privatization, however, fully implicate grand issues such as autonomy, efficiency, and the proper roles of the public and the private. In overthrowing an oppressive regime, for example, a nation’s citizens may seek to dismantle much of what they associate with the prior system, whatever it may have been. Privatization or state regulation may thus be pursued to displace its opposite.¹³³

As before, no empirical confirmation for any of these speculations is offered. Nor is it argued that on grounds of “regulation as communication” alone, any given location along the public-private spectrum is overall a good place for an institution to be. It is simply suggested that

ing the conditions of confinement.” See also Charles H. Logan, *Well-Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577 (1993). These issues did not arise recently. There is a long history in the United States of privately owned and operated prisons. See DiIulio, *supra* note 129, at 158-59.

131. See *infra* notes 188-213, 261 and accompanying text (contrasting government medical services with market); *infra* notes 211-12 and accompanying text (discussing consequences of deregulating the ICC).

132. See Miles Corwin, *Guns for Hire*, L.A. TIMES MAG., Nov. 28, 1993, at 24, 26: [T]he [private security] trend . . . raises troubling questions, primarily about the birth of a two-class police system. Many security experts foresee the day when police will provide just minimal public safety; any security beyond that will be a free-market commodity like health care and education. Residents and merchants with the money to spend will hire private security, while the poor will rely on an overburdened police department “We’re turning into a society where not everyone in the city has equal protection,” says Mark Baldassare, a professor of urban planning at UC Irvine.

Id.

133. See, e.g., Ronald Daniels & Robert Howse, *Reforming the Reform Process: A Critique of Proposals for Privatization in Central and Eastern Europe*, 25 N.Y.U. J. INT’L L. & POL. 27, 60-66 (1992) (compensatory justice as part of privatization); Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT’L BUS. L. 315, 324 (1993) (state property became the “symbolic focus of hostility” toward prior evils in Czech region).

several ideas outlined here should be mapped onto various privatization issues—in particular, the idea that delegation of certain functions to the private sphere may attenuate or reinforce various attitudes and beliefs that are normatively significant.¹³⁴ (For present purposes, “normatively significant” simply means that the attitudes and beliefs affect the incidence of normatively preferred or dispreferred behaviors and public perceptions of the nature of the community.)

It would be a mistake, however, to assume that any privatization process reflects or generates moral views that are at odds with recognition of strong duties of care or commitment to others. Suppose, for example, that privatization of prisons dramatically improves the conditions of confinement.¹³⁵ (Of course, this outcome in theory risks counterproductive communications—e.g., devaluation of the seriousness of certain criminal offenses.)

It is thus not clear that privatization marks an attenuation of ideas of noncontingent duties and bonds to others. Even if it did, there might be counterbalancing forms of learning. For example, it has been suggested that in the mental health field, privatization has developed because psychiatric treatment is viewed as more acceptable—a process linked with decreased stigma of mental illness.¹³⁶ In full context, then, some privatization processes offer some messages that might be morally preferred.¹³⁷ Of course, much depends on resulting patterns of access to the privatized care.¹³⁸

134. Cf. DiIullo, *supra* note 129, at 169 (“There is more than human caprice behind the fact that some tasks are in public rather than private hands; there are nontrivial reasons why we have both government and business, both politics and markets, both public agencies and private corporations, both MPAs and MBAs.”).

Yet how, in fact, will any given degree of delegation be perceived by members of the community? Does it make sense to argue to the community observers that they should study and revise their perceptions?

135. See Logan, *supra* note 130, at 601 (“The private prison outperformed the state and federal prisons, often by quite substantial margins, across nearly all dimensions.”).

136. See ROBERT A. DORWART & SHERRIE S. EPSTEIN, *PRIVATIZATION AND MENTAL HEALTH CARE: A FRAGILE BALANCE* 62 (1993).

137. *But see id.* at 6:

One of the concomitants of these [contemporary] trends [in the general health care system] is the increasing tendency toward business-like approaches in providing health services. Medical care, and by extension psychiatric services, are increasingly viewed as ‘product’ or commodity. This tension between whether human services should be supplied because of a public obligation or mission to serve community interests or because of a desire to sell a service in order to generate a profit is one that we believe to be at the heart of many current policy debates in mental health.

Id. (citation omitted).

138. See *id.* at 93 (concluding that privatization has had “mixed results in improving access

3. *Changing the Message*

To change the message, one can change a variety of factors, including the symbols or language, the medium of communication, or the "decoding" mechanism of the audience. If we become convinced that certain regulatory systems teach something we don't want them to teach, can we reeducate people so that they *don't* find "messages" of certain sorts? For example, one might, through normative analysis, be talked out of thinking a market system necessarily impairs life values. Or, as suggested earlier, the idea that government is abdicating or abandoning public responsibilities and leaving citizens and prisoners to the contingencies of the private sphere might be countered by evidence that privatization may improve everyone's lot.

This problem of revising our perceptual frameworks cannot be dealt with here. The main point is that we learn from what we see. Whether we should rearrange what we see involves extensive moral analysis.

C. Concepts—"Communication," "Language," and Cognate Terms; "Values" and Mixed Messages About Them; More on "Contingency"

There are many well-known conceptual problems connected with the terms "communication," "language," "symbol," "message," "meaning," and the like, and they require some explication. This task was deferred until we had an initial context for discussion.

We deal here not with the specific verbal communication of rules or decisions, but with the learning effects of having regulatory systems. One difficulty with using the term "communication" in this context is simply that not all learning rests on communication, and not all perception is perception of "symbols." We learn, for example, from observing natural processes without nature "communicating" with us.

Regulation, however, is purposive activity and it is plausible to see some of it as nonverbal communication or akin to it.¹³⁹ Suppose, for example, parents self-consciously conduct themselves in certain ways in order to train their children. From the parents' standpoint, this behav-

to care for those in need of treatment, bringing increased access to for those with insurance and decreased access for those without it").

139. See Randall P. Harrison, *Nonverbal Behavior: An Approach to Human Communication*, in *APPROACHES TO HUMAN COMMUNICATION* 253, 256 (Richard W. Budd & Brent D. Ruben eds., 1972) (stating that as a result of work in nonverbal communication, "previous defining characteristics [of "communication"], such as intentionality, purposefulness, and awareness, are being reexamined . . .").

ior is a nonverbal teaching mechanism, and some government regulation might be viewed *partly* in this way. ("Partly," of course, because regulations ordinarily do something besides communicate—though perception of that something may, loosely speaking, be communicative in the sense that it generates ideas. Harsh punishments, for example, "embody punitive hostility, they do not merely 'symbolize' it."¹⁴⁰ Most forms of regulation are, in any event, not conventional symbols.)

Some may hold, however, that unless the parties "addressed" see the behavior as symbolic or otherwise communicative, rather than merely perceive it and react, there is no communication.¹⁴¹ Moreover, there are well-known difficulties in the ideas of collective and of individual intentions. It might thus be better just to speak of learning caused by repeated observations of regulatory behavior and by inferences made from those observations. More specifically, regulation reflects or "expresses" beliefs and attitudes of the enactors; observers of the regulatory scheme in action make conscious or nonconscious inferences about the enactor's beliefs and attitudes; the effect of the repeated observations and inferences is that their own beliefs and attitudes are thereby affected. Regulation, on this view, is no more "symbolic" of anything than the rustling of leaves is "symbolic" of the wind (though it is evidence or a "sign" of it). It simply provides a mechanism for observation, perception, inference, and learning about the world and its inhabitants, and about the particular economic and noneconomic goals of certain regulatory systems.¹⁴² Whether regulation

140. Skillen, *supra* note 59, at 517 (1980). Skillen later cites Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1392 (1971) ("[M]uch of what matters about expressive rules, procedural or otherwise, is that they embody and do not merely implement the values of the community that follows them."). Skillen and Tribe seem to use the term "embody" for different purposes, but the point remains the same: regulation does things, and doing those things is distinct from symbolizing them or making them evident or using them as examples. Of course, in any situation an observer of conduct may take regulation as evidence of (perhaps, in some cases, a "symbol" of) a purpose, an attitude, a value, or the like.

141. Harrison, *supra* note 139, at 254 (theorists restricting the idea of nonverbal communication to "intentionality"); cf. Paul Grice, *Meaning*, 66 PHIL. REV. 377 (1957) (connection between intention and one sense of "meaning").

142. The idea that regulation has a communicative impact should not be conflated with the idea that some regulation is expressly intended to promote "non-commodity values." See Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983). Here, Stewart describes certain goals that regulation should address and promote (aspiration, diversity, mutuality, civic virtue), but he is speaking of the specific aims and hoped-for direct effects of regulation rather than its communicative impact alone. *Id.* at 1566-69. Thus, he refers to "[r]egulatory measures aimed at securing diversity and promoting aspiration The preservation of wilderness areas or classical music broadcasting formats are examples of such policies." *Id.* at 1571. Direct implementation of regulation and communication-by-regulation may

is literally communication or not may have no bearing on the learning or other effects of having a regulatory scheme.

Furthermore, one might also argue that if there is communication, there must be a communicator, but finding "government" or "society" to be the message-giver seems a pretty amorphous idea, as does the idea of an identifiable set of addressees. If a "community" is the addressee, the problem is compounded: invoking "community" as a part of a description of (or justification for) action is, without more, of limited usefulness. Community of whom, doing what, how, when, and why?¹⁴³

So, why not suspend "communication" talk and avoid problems of attributing instructional intentions to lawmakers or of introducing troublesome concepts such as unconscious intentions or "unintended communications"? Let us simply talk of learning from "noncommunicative impacts" and avoid expanding "communication" to describe just any interactive event in the universe.¹⁴⁴

These arguments are not unpersuasive. Nevertheless, broad references to the communicative impact of regulation will continue here for several reasons. First, some regulation may be self-consciously communicative or instructional, at least in the eyes of some of the enactors, implementers, and citizens.¹⁴⁵ (This seems true, in part, for criminal

be hard to separate, however, and it may not be important to do so in every case.

The idea of regulation as communication idea is also distinct from that of vindicating process values through appropriate regulation. Cf. Matthew L. Spitzer, *Radio Formats by Administrative Choice*, 47 U. CHI. L. REV. 647, 685 (1980) (discussing appearance of fairness).

143. See Skillen, *supra* note 58, at 523:

Expressionists often write . . . as if punishment represented 'the community,' a cohesive entity disturbed only by 'the current rash of thuggery'. But are there such 'communities', or is the 'expression' part of a bid to establish them? What is the relation of the person punished to these values? Does he share them? Or is the ritual, in that case, empty or merely hostile to him. What is communicated then? There seems to be a problem here: if the punished respects the rules and the punishing agent, punishment is expressively redundant; criticism or admonition would do. But if these conditions are *absent* the punishment merely expresses alien hostility—merely functions as a demonstration of strength. Then again, crime has an 'expressive' dimension too—the whole thing is getting out of hand.

Id.

144. *Contra* Harrison, *supra* note 139, at 253, 254 (offering expansive meaning of "communication" that includes "any stimulus that impinges on man, animal, plant, or machine").

As stated before, however, this article does not rest on the idea that any given form of regulation is expression, communication, or language. It deals with intended and unintended learning effects of institutional practices. Still, this approach poses problems that parallel those reflected in Skillen's criticisms of the expressive view of punishment. See Tiersma, *supra* note 42; *supra* note 143 and accompanying text.

145. According to Michael E. Levine, persons involved in adjudication, rule-making, and

punishment—so much so, indeed, that it may be sharply different from many other forms of regulation.¹⁴⁶) In such cases, “communication” seems an appropriate term, in a literal if somewhat expansive sense. Second, even without an instructional purpose, if enactors were told of the instructional aspects of regulation, they might acknowledge such “perlocutionary meanings”¹⁴⁷ as justifications for the regulation; the learning process might thereafter be viewed as communication in a nonmetaphoric sense—an inculcative purpose would be seen “in” the regulatory network.¹⁴⁸ The process of generating such learning effects thus bears sufficient structural similarity to communication that we can roughly look upon some regulation as an “action text” to be “read.” Indeed, as we saw, this is a prominent anthropological perspective.¹⁴⁹ Third, tracing the steps required for communication reveals much of what is discerned in identifying a learning sequence. Finally, one virtue of using “communication” talk to cover more than literal communication is that it suggests the normative hypothesis discussed here: in deciding whether and how to regulate, we should take into account the full range of learning—and other—effects of regulation.

Of course, some regulatory effects are simply not the direct result of communication in any reasonable sense. The most accurate way to

implementation of airline regulations regularly discussed the communicative impacts of regulatory measures, including value and attitude impacts as well as signals to various constituencies (industry, Congress, the general public, the media, and various communities) about the personal beliefs of the officials involved. Personal communication with author (Mar. 30, 1994). Levine was General Director of the Civil Aeronautics Board during its deregulatory phase.

146. For a critical analysis of this view, see Skillen, *supra* note 58, at 515:

A *symbol* can express something in the sense of being a semantic vehicle for communicating it. Expression in this sense is ‘linguistic’, where the linguistic is understood in a broad sense to include gestures, decorations and other convention-constituted conduct that is *intended* to have this sort of meaning and can be so understood. Punishment, on this view, then, is the communication of a message.

Id. (second emphasis added).

147. Perlocutionary effects are “certain further effects [the legislature] intends its statute to bring about.” Moore, *supra* note 77, at 256; see also 1 HABERMAS, *supra* note 77, at 289.

148. Moore, *supra* note 77, at 260-261:

Any change in society that it would be reasonable to believe a statute’s passage would effect and which would be an intelligible thing for a legislator *qua* legislator to want is equally eligible to serve as the intention discovered *in* a statute. This leaves room for a wide variety of different intentions for any given statute.

Id.

149. See *supra* notes 86-88 and accompanying text; see also DWORKIN, *supra* note 42, at 50, 58-59, 62, 65 (interpretation of social practice); Paul Ricoeur, *The Model of the Text: Meaningful Action Considered as a Text*, in INTERPRETIVE SOCIAL SCIENCE 73, 81, 83, 86, 99 (P. Rabbinow and W. Sullivan eds., 1979); *supra* notes 42, 78 and accompanying text.

talk, then, is simply to say that both learning (the main focus here) and nonlearning effects are mediated both by communicative and noncommunicative mechanisms.

If we do talk of communication, however, we should avoid trivializing the enterprise by pejorative references to the "merely symbolic," as if the regulatory system involved some silly, "primitive" ritual.¹⁵⁰ Symbols are tools of learning. Value reinforcement (through "symbols" or perceptions of conduct or whatever) is not silly. It may promote behavior that any human community, primitive or advanced, wishes to promote. It is thus a possible beneficial effect of the regulatory process. Moreover, persons of every level of intelligence learn values in this way, though not solely in this way. We cannot dismiss a reliance on the communicative impact of regulation as caving in to human weakness—the learning effects may be too important. We have to show that the disadvantages of such reliance, in a given case, outweigh the benefits of learning or that other methods of learning are more appropriate. It is at least possible that value reinforcement from the observation of regulatory systems is a more effective instructional mechanism for certain matters than decentralized market alternatives—especially if one holds that some values need to be overprotected in order to avoid underprotecting them.¹⁵¹ If so, we had better think carefully before dismantling regulatory systems because they seem to be inefficient on standard microeconomic theory.¹⁵² We may otherwise lose important opportunities for value reinforcement.

It bears repeating, however, that to notice a learning mechanism is not to endorse it. The fact that we are built to learn in certain ways does not mean we should not seek to alter these ways to gain greater

150. See DiIulio, *supra* note 129, at 175:

To make symbolic differences the sum and substance of one's normative position on private prison and jail management (or any other issue) is to forsake moral reasoning for a species of mysticism. It is not unreasonable to doubt both the practical efficacy and the moral significance of what have been termed "institutional props of authority." But it is not going too far in that direction to argue that such differences may matter in ways that make privatizing this particular communal function especially problematic and wholly resistant to facile moral judgments of any kinds.

Id. "[I]t is simply unclear how one can distinguish morally between private and public courts, and between private and public policing, and yet see no moral difference between private and public corrections." *Id.* at 176; see also *supra* note 24 and accompanying text; *supra* note 28.

151. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 213.

152. As noted earlier, this is not a defense of any and all regulatory systems. Even those systems conveying the most important messages most effectively might, on balance, merit dismantling on other grounds.

benefits.¹⁵³ In particular, there may be better ways of teaching things than by resorting to central direction. Again, the claim is simply that one should consider the full impact of regulation—a point not confined to health care. As Professor Brodley has argued in discussing antitrust policy:

Some dismiss the value of competitive equality as a misguided preference for the welfare of small producers over the interests of consumers. This view, however, is shortsighted and one-dimensional. The vitality of the competitive system depends upon acceptance of the market processes by both the participants and the public at large. That acceptance turns on the belief that the competitive process permits the exercise of individual initiative and enterprise. The defeat of individual competitive effort by a combination of competitors frustrates that belief and undermines support for the competitive system. The argument is not that there should be an unmeasured sacrifice of consumer welfare for producer equality. But if the consumer's interest is not affected or affected only marginally, as when joint exclusionary practices are not necessary for the venture's formation, competitive equality should be favored. *Even if this favoring causes a short-run allocational loss, if it sufficiently promotes competition in the long run, it will enhance overall consumer welfare.*¹⁵⁴

1. "Value" and Mixed Messages

"Value" is a term that wanders over a large conceptual map containing highly abstract features (justice, equality) as well as narrowly specific ones (no sex before marriage). Indeed, applying the term to such a vast range arguably entails category mistakes. Although nothing special turns on being precise here, nor on clearly distinguishing values from norms, preferences, tastes, or dispositions,¹⁵⁵ the clutter of terms itself suggests empirical and normative complexities.

For present purposes, the chief complexity concerns mixed messages (whether conflicting or just different) arising from perceiving things at various levels of generality, or perceiving "different views of

153. Cf. DANIELS, *supra* note 3, at 223:

There may be an important "symbolic value" to the expensive rescue [e.g., of trapped coal miners] made in lieu of less expensive preventive measures, but we are looking to design a system in a rational, principled way, and we do not want symbols to hide from us the real human cost of not investing in alternative programs.

Id. Daniels later refers to "moral education" as a value in selecting certain principles affecting distribution, *id.* at 226, so he is not necessarily denying that we should assess "symbolism" as a route to useful learning. As he states elsewhere, "disease reminds us of the fragility of life and the limits of human existence—and the solidarity we show with the ill by caring for them has come to have deep religious and moral significance in many cultures." *Id.* at 49.

154. Brodley, *supra* note 37, at 1533 n.30 (emphasis added) (citations omitted).

155. See *supra* note 5.

the cathedral," or making different inferences from what is perceived. This mixed-message problem, writ large, involves the more general problem of multiple characterizations and classifications, and the richer one's sense of values, norms, preferences, etc., the more complex one's "reading" of the social system being observed.¹⁵⁶ People armed with different value and conceptual orientations see different things, and fix on or set aside different aspects of their perceptions. They may as individuals sense multivocal messages.¹⁵⁷ Or they may sense only the message that—for them—dominates. What is "learned" from this welter of perceptions thus depends on the particular vision one is caught by, the generality or specificity of one's understanding of the events observed, how one makes associations and distinctions,¹⁵⁸ how one makes inferences, and how one understands certain value concepts. In particular, a person's preexisting normative views may determine or "frame" his or her perceptions and thus his or her learning.¹⁵⁹ One may thus "observe" in everyday processes the implementation of a staggering number of "values" and the confirmation of an equally impressive list of beliefs. If one sees an ill-clad young African-American woman carried off by white male paramedics in an ambulance marked "County Trauma Center," one may "learn" about the importance of life; the community's perception of the importance of life; the importance of community; the equality of the races; the fruits of racial integration; the injustice of the white economic system (African-American persons need to be rescued); the need to exercise due care; the random, arbitrary, unjust risks of life; the fragility of women; the superiority of men; the unreliability of private enterprise; the impropriety of private profiting from the misfortunes of others (because the trauma unit is

156. See *supra* note 98; see also GUSFIELD, *supra* note 59, at 183 ("[E]vents have multiple dimensions. Sometimes at one and the same time, sometimes with one dimension overshadowing another contradictory to it."); Lane, *supra* note 31, at 237 (discussing problem of "mixed results" of market effects; asking what criteria we should choose among market's stimulative and self-reliance effects on the one hand, and destruction of easy bonding on the other).

157. See EDELMAN I, *supra* note 1, at 145, 174. Different groups may be targeted for different messages. Cf. *Spence v. Washington*, 418 U.S. 405, 413 (1974) ("It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings."). For a discussion of extreme separation of communications to different groups, see generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634 (1984).

158. Cf. Roger N. Shepard, *Toward a Universal Law of Generalization for Psychological Science*, 237 SCI. 1317 (1987) (investigation of generalization and discrimination).

159. Cf. Tversky & Kahneman, *supra* note 97, at 458 ("[t]he framing of acts and outcomes can also reflect the acceptance or rejection of responsibility for particular consequences, and the deliberate manipulation of framing is commonly used as an instrument of self-control").

from the County); the importance of organization, cooperation and division of labor; the repression of the poor; the risk of miscegenation; the superiority of white persons (they are the rescuers); the importance of altruism; or the predisposition of government to waste one's hard-earned money on rescuing the careless and the undeserving poor and on interfering with God's will.

Furthermore, many of these multiple characterizations are fully compatible with each other. Indeed, this may in a given case reflect an underlying moral tension. Thus, to take another example, the fact that saving the life of a suffering patient may present itself both as promoting life-as-such and denigrating quality-of-life is no more "inconsistent" than saying that a cup is both half full and half empty or that an optical illusion like the Necker cube presents variant aspects. We will bump into similar cacophonies with other examples.

This abundance of messages does not mean that what is heard is incoherent. Seeing multiple aspects of something may be essential for anything approaching full description and understanding. Further, we may find dominant communications¹⁶⁰ with respect to certain audiences. If we discover not only mixed but apparently conflicting messages, we should consider in what sense the messages conflict, whether it is good that they do (they may, after all, reflect genuine moral conflicts¹⁶¹ that we should recognize) and whether we should deliver additional messages to help resolve the conflict.¹⁶² It is likely that

160. See *supra* note 156 ("one dimension overshadowing another"); see also EDELMAN I, *supra* note 1, at 6 ("It is through their power to merge diverse perceptions and beliefs into a new and unified perspective that symbols affect what men want, what they do, and the identity they create for themselves."); *id.* at 42 (referring to "hierarchical structure: the power of some cognitive elements to dominate others").

161. For a discussion of conflicts of values, see WILLIAMS, *supra* note 51, at 71-82 (discussing conflicts of values). This article does not attempt to explain the idea of value inconsistency.

162. One effect (function?) of mixed messages is that they encourage a tolerable mix of conduct-types, none of which can be agreed upon as the preferred form of conduct. For example, if there is "too much" visible euthanasia, life values are impaired, but if there is "too little," the value of avoiding suffering is impaired. Perhaps some sort of "optimal" level results. Cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 175 (1982) (discussing the idea that "we come closer to achieving the amount of judicial supervision we want by denying that it is permitted at all than we would by acknowledging what is going on and trying to control it by doctrine and language"). It may seem "hypocritical," but the conflicting values of lifesaving and nonsuffering are both reinforced by such "inconsistent" behavior. (Of course, moral confusion may be a consequence of this multiple reinforcement.) In general, "hypocrisy" in legal ordering may reflect serious moral tension. It can function as a succession of nods in different directions, recognizing the apparently competing values in an effort to preserve all of them. Loose talk condemning hypocrisy suggests the availability of easy moral resolutions ("ban it or allow it") and may denigrate some of the values in contention. Recall the discussion *supra* at note 49 and accompanying

some community practices (e.g., rituals) are “designed” to counteract troubling inconsistencies say, “by reinterpreting or redefining the rules or relationships”¹⁶³—in effect, to annul the difficulties. The confused learning may arise from conflicting practices, the variation between living conditions and promised ideals, and the like.

The mixed message problem suggests a perspective for tracing the different communicative effects of markets and centralized economic systems: each system of order may highlight or obscure different messages. A market, for example, reinforces the idea of variations in human traits by exposing and highlighting differences in the capacity to attract resources. It also reinforces the idea of individual self-direction. Yet it also may obscure certain matters. Thus, because the correlation between wealth or income and merit is believed to be highly imperfect, losing out on something for lack of funds does not clearly import a lack of worth, as might a system of centralized patient selection.¹⁶⁴ The market thus promotes a form of equality. Compare this with a system of decision by formal adjudication where (in many cases) losers lose, not by chance or other arbitrary mechanisms (e.g., favoritism), but “on the merits”: someone thought long and hard about you and you lost. This is hard to explain away or excuse (though one may try by various attacks on legal institutions). The availability of “principled adjudication” may be comforting for some (the “day in court” process orientation) but not for all, or for all disputes.

2. “Contingency”—Of Transactions and of Outcomes

Contingency is an important idea in identifying the differing communicative impacts of centralized and decentralized ordering systems.¹⁶⁵ In what follows, we will have to consider both the general idea of contingency and the specific identification of what is contingent on what.

Compare again lifesaving in a purely private market with lifesaving in a government system providing or financing all medical care. In one sense, lifesaving is “contingent” in both systems. Just because you

text on the design of institutions.

163. Sally Falk Moore, *Epilogue to SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY* 210, 234 (Sally Falk Moore & Barbara G. Myerhoff eds., 1975) [hereinafter *IDEOLOGY*].

164. See David Sanders & Jesse Dukeminier, Jr., *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 *UCLA L. REV.* 357, 371, 377-79 (1968) (discussing the Seattle “God Squad” that selected patients for hemodialysis).

165. See Grey, *supra* note 24, at 897.

receive medical care does not mean you will not die. More importantly, the very effort at lifesaving is contingent in both systems. Because resources are scarce, having a government program does not mean the government will treat you. It may choose someone whose risk of dying is greater. It may devise "medical" exclusions or make you wait in line until it is too late. And it certainly is not clear that more lives will be saved, net, under government lifesaving action than under private action. Many believe quite the reverse.

By contrast, in the private market, there is no official community statement about lifesaving. No one need be saved, because no one need try to save (moral duties arising from certain relationships aside). Providers need not serve those without resources, and receiving charity is contingent on resource availability and on private selection processes. Lifesaving is thus not only contingent, it is contingent on matters such as having money, and on someone being willing to sell medical services or to be charitable or to perform a personal favor.¹⁶⁶

In the government system, however, one may perceive an official statement about lifesaving, and thus about the value of life. If so, one may infer a related presumption that very sick people who could benefit from therapy must be treated, and that failure to do so must be explained (the patient was too sick for the drastic treatment that could have helped, the line was too long—who knew there would be such demand?, etc.). The contingencies are thus different from those in the market system.

In the government system, there is also an implied proposition about equality of entitlement: everyone who needs treatment gets it. People are *supposed* to be saved in the one system. They are neither supposed to nor not supposed to be saved in the other; there is no statement except, perhaps, the implied view that (some?) life is not important enough to merit community attention, *at least as compared with other values*, such as autonomy.

Both systems, to be sure, are "*outcome contingent*" (anyone can die even with treatment). The market system, however, is also "*transaction contingent*": no life-promoting transaction is required, unlike the government system, in which sick people presumptively must be tended

166. It is also contingent on the sick person perceiving himself or herself as needing and being worthy of the resources needed for treatment. The sense of self-worth of some persons may decline in a market system as gulfs in wealth or income grow.

to.¹⁶⁷ This apparent transaction noncontingency may reinforce pro-life attitudes and offer a sense of security.

Of course, the government system will in fact be transaction contingent in various ways. There may be express exclusions based on age or medical status (these involve suppressed value judgments), and hidden exclusions through "subterfuges."¹⁶⁸ Nevertheless, the government must in good faith review the criteria: having to make the evaluation is noncontingent. The private provider, on the other hand, can simply review a prospective patient's economic status and terminate further consideration. (The situation is, of course, sharply different if statutes or regulations require the private provider to act in certain ways. Yet this is a form of central direction by government, which allocates various forms of implementation to the "private" sector.)

These distinctions among contingencies can only carry us so far, however. If the government consciously and expressly declines to enter the health care arena on the ground that private distribution would more efficiently promote lifesaving, the resulting "statement" is quite complex.¹⁶⁹ If people believe more lives will be saved in the market

167. It is true that in the market system the existence of the market itself—and its opportunities for lifesaving exchanges—may seem noncontingent to many, but this is different from the "compulsory"-appearing nature of the lifesaving transactions themselves in the supposed government system. The noncontingency characterizing the market does not necessarily embrace the lifesaving transactions that happen to arise within it.

No inquiry is made here into the nature and effects of the common law rule that strangers generally have no duty to rescue persons in peril, absent certain relationship or connections to the creation of the peril. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 59, at 375-85 (5th ed. 1984). For a discussion of the recognition of a rule in various Continental European nations, see LEON SHASKELSKY SHELEFF, THE BYSTANDER 108-110 (1978). Questions of course can be raised about the learning effects of various rescue policies. *Cf.* Mitchell McInnes, *Psychological Perspectives on Rescue: The Behavioural Implications of Using the Law to Increase the Incidence of Emergency Intervention*, 20 MANTIOBA L.J. 656, 675-76 (1991) (suggesting that pro-rescue norms might be strengthened through the psychological effects of implementing rescue laws).

168. *See* AARON & SCHWARTZ, *supra* note 107, at 100:

[T]he British physician often appears to rationalize, or at least to redefine, medical standards so that he can deal more comfortably with resource constraints. . . . Most patients in Britain appear willing to accept their doctor's word if he says that no further treatment of a particular disease is warranted. This passivity may stem from lack of knowledge about possible treatments or simply from a patient's respect for the physician's authority.

Id.; *see generally id.* at 89-112. *But see* Norman G. Levinsky, *The Organization of Medical Care: Lessons from the Medicare End State Renal Disease Program*, 329 NEW ENG. J. MED. 1395, 1398 (1993) (stating that patient-advocacy groups have exerted sufficient pressure on the British health system "to reduce the barrier to dialysis for older patients.").

169. *Cf.* Tversky & Kahneman, *supra* note 97, at 458 ("framing outcomes in terms of overall wealth or welfare rather than in terms of specific gains and losses may attenuate one's emo-

system, the messages in a government system may be obscured, suspected, or rejected. It is thus possible that the perceptual impact of the many-more-lives-saved system will swamp that of the noncontingently-acting-but-more-impotent government system.

Further, the idea that “toleration of X (e.g., death from nontreatment) implies endorsement of X”¹⁷⁰ rests in part on perceptions of the duties and powers of the tolerator. If it had never occurred to a citizen that the community had some role to play in promoting certain kinds of transactions, such as lifesaving, the simple observation of market contingencies would not necessarily stimulate the idea of community “failure” to do what it should have done. The “value impairment” might thus be of a lesser order than where, say, the community saves some but not others, or moves out of the health care business having previously entered it. Still, the foregone opportunity to reinforce life values might be considerable.¹⁷¹

We also need to note the possibility that market contingencies communicate a preferred message even in the case of lifesaving services. Suppose, for example, that unusual scarcity of some medical resource combined with its high visibility produce—for a time—open decisions based on merit. Perhaps lifesaving contingent on money, chance (a lottery),¹⁷² or status would be perceived as preferable to lifesaving openly contingent on intelligence or social worth. In moving from a market to central decisionmaking, we are replacing one set of contingencies with another. *Which impairs life values more: contingency resting on wealth, on merit, on chance, on . . . ?* Clearly, we need to consider more than some simple numerical idea of saving lives. The selection criteria—the contingencies generally—may determine if life-affirming (or other) values are promoted or demeaned.¹⁷³ The compli-

tional response to an occasional loss”).

170. Cf. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting): Persecution for the expression of opinions seems to me perfectly logical. . . . To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result [being opposed], or that you doubt either your power or your premises.

Id.

171. Arguably, however, failure even to conceive of a possible community role in lifesaving suggests (but does not prove) a preexisting low valuation of life interests. There may thus be little incremental impairment of life values from observing community inaction; and there may be reinforcement of other values, such as autonomy and privacy.

172. See *infra* notes 276-80 and accompanying text.

173. Perceived inconsistencies in the criteria may muddle up the message—but the inconsistencies, such as they are, may not always be apparent. Cf. Spitzer, *supra* note 142, at 684:

cations in describing and characterizing the learning effects of different sets of contingencies are thus considerable.¹⁷⁴

("[E]ven if the values represented by the axioms [governing the FCC's ranking of radio formats] still seem important, the marketplace obscures their fundamental inconsistency.')

174. The meanings of "contingency" require some more attention. (Several of the following points were suggested by Professor Robert Bone.)

The domain we address is transactions that benefit given individuals. "X is contingent," where X is such a transaction, might mean several things—e.g., that X is neither logically necessary nor impossible, that X is neither physically necessary nor impossible, that X has a probability of significantly less than one but rather more than zero, or that X has no known probability. (If an event seems nearly certain, impossible or very improbable, we might not view it as contingent.)

More to the point, it might also mean "not required"—as by authority or moral rules. For our purposes, then, the focus is less on probabilities than on the criteria for distribution that affect the probabilities, and on the identity of the decisionmaking authority (which may affect the perception of probability and contingency). X's occurrence may be affected by factors relating to a prospective recipient's needs, wants, or merits; or to wealth, kinship or other relationships. The subject of the contingency might be viewed as the transaction involving needed-or-wanted-benefits, rather than the ultimate outcome. Note that the contingencies of need and want may be built into the description of the proposed transaction ("We give needed X-rays," vs. "We give X-rays, depending on whether they are needed"). This may be why medical care that is "automatically" provided to those who need it seems noncontingent (rather than contingent on need), while it seems contingent if it rests on ability to pay or kinship. (One can make the same move to noncontingency with these latter criteria by building them into the description of the transaction.)

The perception of contingency is also affected by the identity of the "supplier" of the transaction and the rationales under which he, she or it operates. Thus, the perception of contingency may depend on whether the transaction's occurrence is a matter of official community recognition, or an "accident" in which, somehow, the private market, commercial or charitable, has developed mechanisms for providing care (even care that is "noncontingent" under the suppliers' criteria) to those who need it. To explain just why one kind of transaction seems noncontingent and another does not (assuming this is so at all) would require further efforts by others.

It is possible that a lifesaving transaction is equally probable in different systems, but the apparent sources of (non)contingency are different, and this may be a crucial aspect of differential value reinforcement. We need to contrast the bare probability aspect of contingency with other aspects, such as distributional criteria and the identity and authority of the decisionmaker. (Some of these other aspects of course may be connected with ultimate probability.) Of course, the perception of probabilities may be erroneous, as when people mistakenly think lifesaving transactions are more or less probable in different systems, but misperceptions as well as accurate perceptions have learning consequences.

An obvious question: if the lifesaving transaction would be more probable for a given person or group in a private market rather than a parallel government system of "guaranteed" care, would the latter nevertheless present itself as the less contingent?

We have already seen that the perceptions of some may be sharply different from those of others who observe the same system. Thus, a wealthy person may sense less contingency concerning her own treatment in a market system than in a government benefit or tribal kinship program—especially for exotic therapies. Here, self-control through wealth might reduce the sense of contingency. For persons with fewer resources or power, the contingencies may seem much greater, both in probability and moral gravity.

"Reducing the contingencies of the market," in any event, doesn't mean raising probabilities to one, or creating complete individual control, but replacing what are viewed as less acceptable contingencies by more acceptable ones.

Finally, a qualification implicit in what has already been said: The idea of contingency and absoluteness has been framed so far to track—but only partly—the “public-private” distinction. But the perception of contingencies and who is “responsible” for them depends in part on the observer and her circumstances. For some, what government does may be entirely irrelevant from the “authoritativeness” standpoint: the true author of these contingencies or non-contingencies and the party responsible for their implementation may be, for example, one’s kinship group, or religious community, or fraternal/sororal order, or the deity or deities themselves, and so on.¹⁷⁵

3. “Impairs a Value”

There are several senses of “impairing a value,” assuming that we have some prior interpretations of “value” in general and of some specific values in particular. In one sense, a value is impaired when the conduct required by it (efforts at lifesaving, fair procedures) simply fails to take place. In another sense, the value is further impaired when this failure is noticed by someone who is demoralized by it. In a third sense, the value is impaired if this failure results in shaping attitudes and behaviors inconsistent with the value.¹⁷⁶ Finally, the apparent rationales and processes underlying a transaction affect in complex ways whether a value is impaired. For example, life can be saved for different reasons and under different procedures—markets, merit or social worth selection, lotteries. That lives are saved does not, standing alone, tell us everything. In some cases, then, we may not have a clear idea of what it is either to impair or to affirm life values.

If we lack an adequate moral theory, however, it is not clear we are measuring anything significant when we chart “value impairment.”

For other uses of ideas of contingency, see RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 61 (1989) (“[t]he citizens of my liberal utopia would be people who had a sense of the contingency of their language of moral deliberation”); SMITH, *supra* note 59, at 30 (“All value is radically contingent,” being “the product of the dynamics of a system, specifically an *economic* system.”).

175. See *supra* note 124 and accompanying text.

176. Consider this example for working out the meanings of “value impairment”:

Anti-paternalistic policies may be construed in ways other than their proponents and practitioners intend. For example, if we do not intervene to prevent suicides out of respect for patient autonomy, our nonintervention may be seen as expressing the conviction that these deaths do not matter. A policy that affirms “you should care for yourself” may be interpreted as “we don’t care for you.”

JAMES F. CHILDRESS, *PRIORITIES IN BIOMEDICAL ETHICS* 32 (1981). In this light, “paternalism” can be viewed as an instrument for value learning and general community benefit.

Recall the question above about lifesaving as a value. How, exactly, is it impaired in a given situation? It is not enough simply to say that it is impaired by failing to save a life because of an irrelevant contingency; we need a moral theory of irrelevance. How else could we tell if leaving life contingent on the market is worse than leaving it contingent on the patient's own wishes, on a lottery, or on a determination of merit?

Anyone who urges that some system attenuates a value by its communicative impact, then, has a considerable task not only in charting the actual attitudinal and behavioral effects of regulation, but also in accurately *characterizing* these effects as impairments of the value. To say that market lifesaving vs. kinship lifesaving vs. merit lifesaving produce different attitude and behavior changes is one thing. To show these changes to be impairments of "lifesaving values" is something else.

Whether impairment of a given value is itself a bad thing is left aside here. Within the framework of some set of values, it is likely that attenuation of any of them would presumptively be wrong. This is especially so at the highest levels of generality of "value," as when we talk of justice or autonomy. Nevertheless, these frameworks may judge particular attitudes—"values," loosely speaking—to be inconsistent with them.¹⁷⁷

The valuing of values is mentioned here simply to acknowledge that value impairment is not necessarily a disadvantage. Schooling people out of the wrong values is something most societies aspire to. It may even be that under some circumstances, highly prized values can be encouraged too strongly. An embattled group may wish to encourage taking risks to life and health in order to build an effective warrior class, and wind up overdoing it. A poor nation may wish to inculcate individualism and self-reliance, at the expense of communitarian and nurturing values, to improve everyone's lot overall.

To summarize to this point: The idea of regulation as cultural transmission of values does not presuppose anything inconsistent with existing models of how productive systems work, how demand and supply curves for various behaviors are shaped and reshaped, how preferences or tastes are formed, or how equilibria are reached. It simply supposes that there are economic systems in which there may be endog-

177. Cf. CALABRESI, *supra* note 1, at 83 ("deciding whether we want to get accustomed, whether we wish to become callous") (emphasis omitted). The idea here is that such decisions about acceptable normative developments are made within a larger normative framework (which itself may ultimately be questioned).

enous change of preferences resulting from the communicative impact of regulatory systems. This communicative impact in turn arises from perception of the existence of such systems and of their effects—particularly those that structure transactional contingencies or non-contingencies in certain ways.

In short, the subject is *how the very methods of pursuing certain preferences* (e.g., producing and distributing certain goods and services through a market) *affect those preferences and related preferences over time*.¹⁷⁸ The hypothesis is that *the social system of production and distribution is itself an endogenous preference reinforcer*¹⁷⁹ *because of its communicative impact*. The preferences may concern anything, though of course the emphasis here is on preferences about value attitudes.¹⁸⁰

178. See Thomas M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 543-44 (1979):

I think that transactions "between consenting adults" can sometimes legitimately be restricted on the ground that, were such transactions to take place freely, social expectations would change, people's motives would be altered and valued social practices would as a result become unstable and decline. I think, for example, that some commercial transactions might legitimately be restricted on such grounds.

Id.; see also ANDREW BARD SCHMOOKLER, *THE ILLUSION OF CHOICE: HOW THE MARKET ECONOMY SHAPES OUR DESTINY* 11-12 (1993) ("[O]ver time, the market system shapes the values that govern the choices we make.").

179. Cf. T.A. Marschak, *On the Study of Taste Changing Policies*, 68 AM ECON REV 386, 386 (1978) ("[I]f there are indeed important non-renewable resources, then it becomes crucial to determine how present consumption of the resource, and policies which discourage it, affect future tastes."); Carl C. von Weizsacker, *Notes on Endogenous Change of Tastes*, 3 J ECON THEORY 345 (1971).

180. To the extent we consciously try to preserve, change or reinforce preferences it makes sense to talk about preferences about preferences. For example, we may see ourselves as having a preference that we prefer to retain or to strengthen and so we take self-binding actions, say, to reinforce ourselves against weakness of will. See JON ELSTER, *ULYSSES AND THE SIRENS STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); Burton A. Weisbrod, *Comparing Utility Functions in Efficiency Terms or, What Kind of Utility Functions Do We Want?*, 67 AM. ECON REV 991, 993-94 (1977):

[T]here also exists a class of preferences that can be compared with each other. With respect to the latter class we find that there is a significant sense in which one set of preferences (and the expected consumption bundle associated with it) can be said to be *preferred* to another set of preferences (and the expected consumption bundle associated with it). That being the case, it becomes meaningful to talk about the efficiency or inefficiency of allocating resources to shaping preferences. . . . [T]he means for affecting the kinds of utility functions that people have becomes, at least in part, a matter of resource allocation: how much of its resources would it be efficient (in the Pareto sense) for society to allocate for the purpose of *shaping* utility functions if the alternative is devoting resources to pricing, taxing, subsidizing, and enforcing legal arrangements to deal with allocational inefficiencies resulting from noninternalized externalities?

Id.; see also DWORKIN, *supra* note 22, at 20 (describing autonomy as "a second-order capacity of

Once again, the idea that how we pursue our preferences affects those very preferences suggests that efficiency calculations cannot be fully accurate unless they take this feedback loop into account. Mechanisms that appear clumsy in the short run may be efficient with respect to static goals because they reinforce the preferences for reaching those goals; and if preferences change significantly (rather than being "reinforced"), the efficiency calculation falls through to the extent that it is based on goals no longer relevant.

D. Regulation as Communication: Some Refinements

Determining whether regulation has instructional effects and what they might be is not a simple matter of applying elementary learning theory. Moreover, such efforts are not likely to show that all regulation is a continuous source of learning, desirable or undesirable. As we have seen, many factors determine the contents of the regulatory message, the nature and rate of learning, and whether there is even any message or learning at all. Some additional variables are suggested here, dealing mainly with perceptions of community, government, contingency, and indeterminacy.

1. Community vs. Government

In any group, there is an uncertain connection between "community" and "government."¹⁸¹ This may affect the content of the communication arising from various sources of activity. For example, if government is generally perceived as being at war with important community sentiments, being "outside" of the community, representing a rival community, or simply lacking authority, its actions may be viewed with hostility or suspicion and its status as an embodiment of community values may be weak or nonexistent.

What might we conclude from this about the idea of regulation as cultural transmission? Perhaps under these supposed circumstances the perception of regulation produces little learning or reinforcement relevant to preference formation. Or it may produce a great deal, but of

persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values."); *infra* notes 237-38 and accompanying text (discussing self-paternalism).

181. The larger the group and the more plentiful the subgroups, the likelier this seems. See KYMLICKA, *supra* note 32, at 135 (noting that political community and cultural community may not coincide). The "community vs. government" contrast, discussed *supra* notes 113-32 and accompanying text, may form one kind of public/private distinction.

the “wrong” kind—reinforcing hostility toward the government and its programs, or casting doubt on the very abilities or good faith of government. “[T]he inability or unwillingness of policy-makers to present reasoned policy alternatives raises questions of their competence and sends a worrisome message to the public about the ability of their governors to handle issues in a technological era.”¹⁸² If, on the other hand, there is a close association between government and community, government action may generate powerful value reinforcements.¹⁸³ In some cases, private institutions may occupy a reinforcement role similar to that of government. In general, the gulf between community and government calls attention both to governmental and nongovernmental “community regulation,” including customs and their associated pressures.¹⁸⁴

2. *Contingency as Promoting Values*

We saw earlier that perceived noncontingency in producing and distributing certain highly valued commodities might be an element of value learning. Perceived contingency may also be an element in quite different learning paths, some of which may be morally desirable. Suppose autonomy as individualistic self-direction¹⁸⁵ is a major value, perhaps outranking life-promotion values in various circumstances. The contingencies in lifesaving found in a free market may express and reinforce this value ordering, and erasing the contingency might attenuate it. This is closely connected to the next point about indeterminacy.

3. *Indeterminacy¹⁸⁶ and Value Reinforcement*

A perception of moderate indeterminacy may encourage reflection and promote values of rationality and accommodation. It may also promote autonomy indirectly by leaving room for individual manipulation

182. ANDREA L. BONNICKSEN, *IN VITRO FERTILIZATION* 90 (1989).

183. *Cf.* EDELMAN, *supra* note 1, at 101-02 (discussing reasons why “governmental acts are powerful shapers of perceptions”): “[Another reason] lies in the intensity with which the state becomes for many a symbol of identity and self-definition: a part of the ego, making it a matter of pride and self-protection to give it credence and loyalty.”

184. *Cf.* DWORKIN, *supra* note 42, at 100 (“Should the rules or principles embraced in the community’s conventional morality in the reductive sociological sense I described be counted as political decisions?”).

185. *See* Shapiro, *supra* note 22, at 384-85.

186. The “Critical Legal Studies” literature has made much of the idea of “indeterminacy.” For an analysis of the various indeterminacy theses, see Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). Solum distinguishes determinacy, indeterminacy, and underdeterminacy. *Id.* at 473. *See also* STEVEN J. BURTON, *JUDGING IN GOOD FAITH* 3-34 (1992) (discussing “stubborn indeterminacy”).

of concepts and creative control over one's moral life. An inability to achieve certainty in normative analysis is simply part of conceptual reality (whether consciously viewed this way or not). Perceiving this does not necessarily erode anything of importance, and does not interfere with moral learning and behavior—which should embrace the idea of moral and empirical uncertainty anyway. Indeed, for moral pluralists an essential core of moral behavior is to recognize value conflicts, to take them into account, to make tradeoffs, and to avoid what seem to them to be irrational dogmatic conclusions about lexical orderings or about the requirements of particular values. To watch courts or other public officials pretend to certainty may be offensive to them, though they might think that such shams are appropriate for less educated observers.

So, once again, what some people perceive and learn may be quite different from what others perceive and learn. We need to specify the audience and the subject. It may turn out that inducing conflict and uncertainty is often a good thing, depending on who is listening to what under what circumstances.

It seems likely, however, that the reduction of contingency and indeterminacy often plays a stronger role in our regulatory schemes than promoting them. One key variable involves the degree of perceived indeterminacy. If some important, recurring value disputes seem completely baffling, it may, for some observers at some times, cast the competing values and value analysis generally into disrepute. This article does not argue against educating people out of such responses; it simply says that aversion to indeterminacy and conflict is reflected in much community and government action¹⁸⁷ and this ought to be recognized, though it is clearly not the whole explanation for most regulation.

4. *Other Variables*

The nature and rate of regulatory instruction may vary with the perception of the scope of the regulation network; the government's or community's commitment to it; the degree of controversy surrounding it generally; how long it has been in place; how sharp a change it made in past government practice—or nonpractice; and whether it created, altered or undid something.

187. This applies to both the public and private domains. *See supra* notes 118-39 and accompanying text on the public-private distinction.

IV. PROFILE OF A TRANSACTION: A GENERAL EXAMPLE OF THE COMMUNICATIVE IMPACT OF REGULATION AND NONREGULATION

Suppose persons A and B have just exchanged goods or services. A gets a substance that is supposed to control heart disease, and B gets a chicken. How and why did this exchange take place? What is the set of rules and principles that informed A's and B's conduct in setting up and completing the transaction? What are the value beliefs informing these rules and principles?¹⁸⁸ What follows is something of a caricature but is useful for thought experiments. There is no endorsement or rejection of any of the regimes described.

First, A and B might be related, or be members of a close-knit group (*gemeinschaft*).¹⁸⁹ The exchange might be an example of Karl Polanyi's idea of "reciprocity"—"socially *obligatory* gift-giving."¹⁹⁰ Although a broad sense of the term "market" might apply here—there is no overt government intervention—the exchange seems sharply different from a commercial exchange. But how, exactly? If kinship or other close connection dominates, then the exchange reflects and symbolizes membership in a group. It might also reflect and implement a pro-life value *within* the kinship group *because the exchange is obligatory, not contingent*.¹⁹¹ That is, it is not contingent on personal likes and dislikes,

188. Cf. MARSHALL DAVID SAHLINS, *STONE AGE ECONOMICS* 183 (1972) ("[E]very exchange, as it embodies some coefficient of sociability, cannot be understood in its material terms apart from its social terms."); Sunstein, *supra* note 5, at 242-44, 253 (distinguishing "market choice" from "political choice" and stating that "[i]t is incorrect to say that the consumption choice accurately reflects a preference, whereas a political choice does not. The preference is itself endogenous to the setting in which it is expressed.").

189. FERDINAND TONNIES, *COMMUNITY AND SOCIETY: GEMEINSCHAFT UND GESELLSCHAFT* 34-35 (C. Loomis trans. & ed., 1957) ("All intimate, private, and exclusive living together, so we discover, is understood as life in *Gemeinschaft* (community). *Gesellschaft* (society) is public life—it is the world itself. In *Gemeinschaft* with one's family, one lives from birth on, bound to it in weal and woe. One goes into *Gesellschaft* as one goes into a strange country."). Cf. NOZICK, *supra* note 49, at 322 (referring to "the difference between a face-to-face community and a nation"). Obviously, there are no clear borders marking these distinctions.

190. George Dalton, *Introduction to KARL POLYANI, PRIMITIVE, ARCHAIC, AND MODERN ECONOMIES* ix, xxxv (Beacon ed., 1971) (emphasis added).

191. Cf. Sally Falk Moore & Barbara Myerhoff, *Introduction to SECULAR RITUAL*, *supra* note 101, at 3, 22:

[W]e argue that formality as such often conveys an element of presented *certainty*. It is our conviction that one level of meaning of many formal actions is to present or refer to the culturally postulated and the *socially unquestionable*. It is an attempt to reify the man-made. That which is postulated and unquestionable may but need not be religious. It may but need not have to do with mystical forces and the spirit world. Unquestionability may instead be vested in a system of authority or a political ideology or other matters. If ritual is considered a set of formal acts which deal with or refer to postulated matters about

or the patient's wealth (even if B did in fact get a chicken). If the rules simply say "healers must treat all sick group members," the exchange is a social or moral imperative. (Other goods and services might be distributed differently within the group.) It is B's duty to evaluate and treat, if treatment is indicated, and A's right to be so evaluated and treated. On some views of the "sick role," A may have a duty to submit to evaluation and treatment.¹⁹² This right/duty relationship is connected with constriction of choice imposed "from above"¹⁹³ by the community.

The result of the transaction is to reflect the noncontingent importance of the group, of membership in it, of a particular member of the group, and of that member's interests in life and health.

In primitive and archaic economies subsistence livelihood in effect was guaranteed as a moral right of membership in a human community. It is the social right to receive land, labor, and produce in ordinary times, and emergency support from kin, friends, leaders, and rulers, that [Karl] Polanyi also meant by the "embeddedness" of economy in society. Fear of hunger—the "economic whip" of nineteenth-century capitalism—and the quest for material self-gain were not structured as incentives to participate in economic activity.¹⁹⁴

"Typically in primitive and early economies, land and labor were allocated in accordance with kinship, political, or tribal rights and obligations, and not as commodities to be bought and sold."¹⁹⁵

Second, suppose that the exchange is a market transaction in a "minimal state" and that there are no laws creating the obligation to provide medical care to persons not already in the physician's care. Nor are there any government transfer payments or government-provided medical services. Nor are there any rules governing who is allowed to

society or ideology (or matters those mounting the ritual *want to be unquestioned*) then the notion of a secular ritual is not a contradiction in terms.

Id. (emphases added) (citation omitted); *see also* Grey, *supra* note 24, at 897.

192. Compare TALCOTT PARSONS, SOCIAL STRUCTURE AND PERSONALITY 275 (1964), with ELIOT FREIDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE 12-15 (1970).

193. MAX WEBER, 2 ECONOMY AND SOCIETY 760-65 (Univ. Cal. Press ed., 1978); *cf.* MILNER S. BALL, THE WORD AND THE LAW 145 (1993) ("The received wisdom suggests judicial review as promising evidence of a transcendent other However, I have grown uncertain about the potential of judicial review as a site of research for encounters with the Word. . . . I belong to a generation particularly susceptible to the investment of courts with inherent capacity for transcendence.").

194. Dalton, *supra* note 190, at xiii. Dalton goes on to warn against "ethnic nostalgia" and the belief in the "noble savage," and comments on the harshness of life in primitive societies. *Id.*

195. *Id.*

give or receive health care. Let us change the chicken into money, suggesting a larger social system.

In that world, the exchange may reflect little of what was going on in the prior example. It need not involve any recognition of personal duties or duties deriving from status, nor any particular attention to life values, nor any particular valuing of A, the sick party. Indeed, B's—and society's—view of him *may* be utterly impersonal.¹⁹⁶ His only relevant trait *may* be ability to pay. If he disappears, someone else's money will do as well. “In Gemeinschaft with one's family, one lives from birth on, bound to it in weal and woe. One goes into Gesellschaft as one goes into a strange country.”¹⁹⁷ A is, in a sense, fungible.¹⁹⁸ If A

196. But not necessarily. Individuals in a market may, for example, seek out friends or persons they wish to favor as other parties to a commercial transaction (even if only for first-refusal rights). E.g., Narveson, *supra* note 126, at 268 (preferring one checkout person over another in a supermarket because of preferable traits). Moreover, it seems too much to urge that community-oriented and life-affirming values will not exist even in a minimal state. The emptiness of a minimal state may not be so empty, and it may evolve, even while remaining a minimal state.

Note that terms such as “impersonal” and “fungibility of persons,” though not logically connected with the idea of exclusion from a community, nevertheless have a strong affiliation with it. Cf. Robert Burt, *The Ideal of Community in the Work of the President's Commission*, 6 CARDOZO L. REV. 267, 277 (1985) (“This legislation [federal law involving education for the handicapped] was the ‘consequence’ of the earlier action regarding renal dialysis in the sense that the same vision underlay both—that of an inclusive community, rejecting no one and making a special effort to include those with special vulnerabilities.”). This suggests an association between the idea of noncontingency in certain matters and membership in certain communities, but, again, there are communities and communities. One can even speak of the “community of the market” and its intrinsic contingencies. See Guenther Roth, *Introduction to 2 WEBER*, *supra* note 194, at LXXVIII; see also Epstein, *supra* note 13, at 13:

Thomas H. Murray . . . has best articulated the standard [commodification] line: “Gifts to strangers affirm the solidarity of the community over and above the depersonalizing, alienating forces of mass society and market relations.” But why and how does this impersonality happen? Lots of markets depend on close relations of trust. Legalizing the sale of organs does not require a donor to be indifferent to the fate of the donee, or to take only the highest price for the organ.

Id. (quoting Thomas H. Murray, *Gifts of the Body and the Needs of Strangers*, HASTINGS CENTER REP., Apr. 1987, at 30, 35).

197. TONNIES, *supra* note 189, at 33-34.

198. But only in a sense. See Narveson, *supra* note 126, at 268. “Fungibility” seems related to group size (among other things) in part because the larger the group, the more difficult it is to perceive and recall individual identifying characteristics of others. Group size may thus be a factor (along with other features of social organization) in the gemeinschaft/gesellschaft distinction. Cf. Loomis & McKinney, *Introduction to TONNIES*, *supra* note 189, at 15 (discussing folk-urban topology).

Note the possible connection between fungibility and equality. Pursuing the link may help to show how different exchange systems may reinforce different forms of equality. The central idea of fungibility seems to be “interchangeability for certain purposes”—one X is as good as another. If so, then in some plausible sense of “equals,” “X_i equals X_j” is true and this formula captures

had no money or other resources, he would receive no health care, except by the *contingency* of B's charitable impulses or her belief in a duty of care under the circumstances. A is not cared for *automatically*, by virtue of membership in some group, or simply because he is a person, or is sentient. Maybe he lives, maybe he dies. No big deal. (At least it's no big deal as compared with the value of the libertarian regime.) If he had a little money, he might receive some care, but it might be inadequate; he wouldn't have a wide range of choice, in any event. What he gets is contingent not just on his choice but on his resources and on others' choices. There is a sense in which he is valued as a tool—a means of profit—not as having intrinsic worth. (Then again, the healer in the kinship community may provide treatment as a matter of role-fulfillment that elevates or preserves her status in the group; the patient is still a tool. Drawing sharp contrasts based on “us-

some forms of political equality, as when we say “W's identity is irrelevant: he/she will get opportunity Z, just as all other members of his/her group do. All the members are ‘functionally interchangeable’ in this respect.”

If “fungibility” entails equality of some sort, why does it have pejorative connotations? Probably because it suggests that the fungible entities have no traits at all that would distinguish one from another for most purposes. (Of course, differences of no consequence in some contexts may become significant in others. Coin collecting is an obvious example.) When we speak of equality of persons, however, we ordinarily mean no such thing. Even when we posit similar traits (red hair, genius), this does not swallow up the differences—we do not posit overall identity. It seems important to our notion of personhood that individuals are distinct, even if indistinguishable for specific purposes—e.g., bidding for goods in a market where there is equal ability to pay. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1881 (1987) (“Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person.”); *id.* at 1885 (“In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible . . .”).

Yet there are contexts in which people are fungible in a limited sense, as suggested above, though we understandably shrink from talking this way. A shoe salesman cares little who buys a given pair of shoes—one paying customer is roughly as good as another (at least when fixed prices eliminate haggling). And this form of fungibility/equality may be a benefit, for it helps to avoid exclusion from transactions on the basis of other traits—e.g., kinship, race. Cf. Jules Coleman, *Competition and Cooperation*, 98 ETHICS 76, 84 (1987) (noting the replaceability of persons in system of perfect competition). See *infra* note 214 and accompanying text. Moreover, viewing a person as “fungible” in the restricted senses discussed here is consistent with treating her as a person—with respect, civility, and so on. Ascribing and acting on fungibility (again, in a restricted sense) is not necessarily inconsistent with an ascribing and acting on personhood.

Finally, note that fungibility/nonfungibility characterizations depend on precisely what sets are being described, and for what purpose. For a given purpose, “shoes” are not fungible (the set is too heterogeneous), but “shoes exactly alike to all appearances” may well be. It is not clear what “exactly alike” could mean with respect to persons, even when genetically identical and similarly raised.

ing” or not “using” persons may not adequately characterize a given situation.)

On the other hand, if A had adequate resources, he might well be accepted without regard to his “kinship” to B—his family ties, allegiances, race, ethnic origin, and so on, would all be irrelevant. (Here, of course, much depends on the prevalence of racism, ethnic hatreds, and the like; markets do not simply erase social groupings and exclusions.) Moreover, if no one is obliged to help him, he is obliged to help no one either: there is no moral force-field subjecting him to stifling obligations.¹⁹⁹ He is a member of a larger, looser community of strangers (*gesellschaft*).²⁰⁰ And in our supposed exchange his interaction with a (powerful) stranger is nonviolent. Indeed, there are those who speak of the “community of the market”²⁰¹ and of the “integrative” functions of conflict and competition.²⁰² Markets promote or are consistent with certain kinds or aspects of community and may impair other sorts.

199. See GUSFIELD, *supra* note 60, at 27-28, 55-56, 92-93 (discussing the constraining effects of kinship and *gemeinschaft* ties).

200. Cf. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 22 (1982): In the isolated communities of early American society, the sick were usually cared for as part of the obligations of kinship and mutual assistance. But as larger towns and cities grew, treatment increasingly shifted from the family and lay community to paid practitioners, druggists, hospitals, and other commercial and professional sources selling their services competitively on the market. . . . The transition from the household to the market as the dominant institution in the care of the sick—that is, the conversion of health care into a commodity—has been one of the underlying movements in the transformation of medicine.

Id.

201. See Roth, *supra* note 196, at LXXVIII.

202. Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LIT. 1463, 1972 (1982) (“some features of market society make for social integration rather than the opposite”); MacNeil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567, 592 (1986) (“the exchange of obligations to exchange goods for money in the future is the epitome of social solidarity”). But see SCHMOOKLER, *supra* note 178, at 70:

Market forces corrode community. James Fallows, in his book in praise of American mobility, declares that “Our individualism *is* our source of community. We’re all doing our best for ourselves, but as players in the same game.” But this is not community. Participating together in a competitive game as social atoms does not bind us together: it does not give us the ability to choose together those aspects of our destiny that we wish to have in common, and it does not give us a feeling of connectedness with our fellows.

Pseudocommunity is what the market gives us. The need for a sense of interpersonal connection remains, but it becomes another force to be *used* by the market, more than a force that people can draw upon to control the market.

Id. (quoting JAMES FALLOWS, *MORE LIKE US* 209 (1989)). See also *infra* notes 216-17. Again, one might respond, in part, that there are different sorts of community, involving different “levels of generalization” and different sorts of relationships and activities.

Here, then, we have a different set of values that appear to be reinforced: autonomy (in some forms) and equality of opportunity (in some forms).²⁰³ The promotion of autonomy itself is mixed. A system of abstract opportunity exists, but, depending on one's autonomy theory, those without resources lack immediate opportunities and so are relatively nonautonomous. The promotion of equality is also confused because of the competing opportunity vs. outcome perspectives. To the extent that this sort of market transaction is thought to promote *overall* the more widespread distribution of medical services, it may promote life values. To someone with an economist's antennae, the market system may be more life-affirming than the kinship-reciprocity system.

Our difficulty in characterizing "the" value message arises from factual uncertainties, from viewing different aspects of the transaction, and partly from theoretical problems concerning the values in question. Again, our own perceptual and normative stances will color what we see. There is probably no univocal message. Nevertheless, the ideas of contingency of life, fungibility of identities, and thus of limited personal worth are clearly apparent within this mix—as are equality of opportunity, autonomy, and the possibility that individuals in exercising autonomy will on their own assign high value to the welfare of the state's other inhabitants.

Third, suppose a mixture of the sort we have in the United States. There is medical licensure (which conveys some information, of uncertain significance, about medical quality);²⁰⁴ transfer payments for some, perhaps restricted to medical matters; obligations (of certain entities or persons) to provide emergency care; funding of certain forms of medical care for catastrophic diseases (hemodialysis, for example); and so on. There are also some uncertain professional and social obligations of physicians not to exclude people from their services arbitrarily—including inability to pay. Here, the analysis of the transaction between A and B is similar in part to the second example. There is no necessary recognition of A as a worthy member of a close-knit community that cares for him. He remains fungible (in a restricted sense). On

For a more extensive comparison of market and non-market regimes, see Radin, *supra* note 198, at 1870-87 (critique of universal commodification); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

203. See generally DOUGLAS RAE, *INEQUALITIES* (1981) (discussing the varying meanings of "equality" and "equality of opportunity"—e.g., "prospect-regarding" and "means-regarding" forms of equality of opportunity).

204. For a critical view of occupational licensure and a defense of the market, see FRIEDMAN, *supra* note 60, at 137-60.

the other hand, he is again not automatically excluded as an "other," for ethnic, racial or kinship reasons (though of course such exclusions may occur by individual choice). Still, if he has no money, doesn't qualify for transfer payments, has no insurance, and is not having an emergency, he may go untreated, leaving his health, his life, and his family at risk.

The regulatory background of this third transaction is different, however. Licensure confers a practice monopoly in favor of persons trained in certain ways. Even if the state does a poor job of operating this licensing system, it is rendering formally *noncontingent* the community's assurance—if not the fact—of basic competence in health care services. It implements this, in part, by announcing an absolute right to the information about quality suggested by the license.²⁰⁵ It thus reinforces the importance of human life and health in general. (This account does not displace the role of professional desires for income and status in pressing legislatures to establish licensing systems.)

Further, leaving nonemergency medical care to the market while guaranteeing emergency care and some forms of chronic care impairs life values far less than providing no care. (These effects assume resources are not so scarce that queuing or full exclusion does not overwhelm all other considerations.)

In reinforcing the value of human life regardless of kinship ties or personal traits, regulation thus shifts *gesellschaft* traits in the direction of *gemeinschaft* traits (though there could hardly be a *gemeinschaft* of the whole). Those persons (and groups) that see themselves as especially vulnerable also see themselves as in the group of the whole, and thus feel more valued.²⁰⁶

Suppose someone now demonstrated that there would be more or better medical care in a market without licensure, and thus that the symbolic reassurance of medical quality under the status quo is mis-

205. Perhaps licensure and medical distribution systems reinforce the status of the "disease model" and "sick role," and hence the authority of the physician. The regulatory schemes imply the existence of both a reasoned normative system and a valid scientific conceptual scheme, and so validate the ideas and ideals central to physician authority. On the development of medical professionalism, see STARR, *supra* note 200, at 3-29; FREIDSON, *supra* note 192. Note also that by restricting the number of persons who can practice a profession, licensure may convey the idea of an expert enterprise that few can master. Perhaps this enhances its perceived worth or efficacy. Cf. *Dire Consequences of Physician Oversupply*, 9 JAMA 281 (1887) (quoted in *JAMA 100 Years Ago*, 258 JAMA 1123 (1987)) ("[n]othing will degrade the profession so quickly in the eyes of the public as over-crowding").

206. See EDELMAN II, *supra* note 1, at 137, 167.

leading. This would be useful but not decisive in showing licensure to be wrong. Formally reserving the medical quality issue as one for the community seems to reflect a value ordering that assigns high value to life and health interests for everyone in the "market community." It thus regains a bit of the value-promotion lost when the "reciprocity exchange" in the close group was replaced by market exchange. Whether the society in some sense consciously apprehends this or not, the regulatory scheme reflects an aura of central concern about health care. If this message is lost, and this weakens reinforcement of the idea that all human life is valuable, how do we know that the resulting adverse effects (loss of life or quality of life in the society as a whole in both medical and nonmedical contexts) will not outweigh the benefits of improvement in health care that economic theory might predict would arise from "going private?"

[Kenneth Arrow] has argued that, ". . . ethical codes can contribute to economic efficiency." . . . He did not point out explicitly, however, that the acceptance of ethical codes involves shaping or altering utility functions, and thus, to say that ethical codes can contribute to efficiency is equivalent to saying that some utility functions (those that reflect acceptance of certain ethical codes) are superior in efficiency terms to others. It is also equivalent to saying that it can be efficient to use resources for gaining acceptance of ethical codes and, thus, to shape utility functions.²⁰⁷

In short, the apparently less efficient system in fact might be the more efficient system²⁰⁸ with respect to an object of both systems—promoting lifesaving conduct. If lifesaving preferences are strengthened, then there may be more medical lifesaving transactions, and more life-preserving and life-enhancing processes in *nonmedical* contexts as well (e.g., subsistence, housing).

If so, some of the "costs" of regulation are costs only in a loose sense—they are integral elements of the process of reinforcing values associated with lifesaving behavior. Thus, requiring treatment for the nonpaying may promote efficiency because it contributes—*by its very ("inefficient") noncontingency*—to such value reinforcement.

Other values are at stake, of course, and we cannot abruptly conclude that national health care is obligatory. Yet, one cannot denounce

207. Weisbrod, *supra* note 180, at 994 n.6 (quoting Kenneth Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL. 303, 317 (1973)).

208. Cf. Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1193 (1977) (observing that "efficiency and equity are not mutually exclusive domains").

it on simple efficiency grounds for at least three reasons. First, if we favor life-promotion over other values, the “inefficiencies” of regulation may in fact produce the very reinforcements we wish and are thus not always “costs.” Second, if the nature of the exchange regime itself affects preferences and thus behavior, then there is no constant backdrop of preferences by which to measure efficiency. Third, if one includes among the goals of the community the reinforcement of a sense of community and kinship,²⁰⁹ then one again cannot focus exclusively on the amount and nature of commodities produced and distributed. All or most goals are to be traded off.

Yet messages in this third, mixed situation are also confused, complicating the value reinforcement analysis. The provision of health care itself is still in large part contingent, thus impairing life values. On the other hand, autonomy values are promoted, though at the price of stigmatizing those with inadequate resources, who become marked as recipients of free medical care for the needy. This compromises equality-of-status ideals.

Of course, there is some pro-life value reinforcement because market contingencies are erased to an extent. Individuals get quality assurance information—accurate or not—as soon as they see the licensed physician’s name. No contingency. To be reasonably assured of basic competence, he does not have to search for rating services and pay them a fee. No one is told, “You get quality and information about it only if you pay.” Nevertheless, if information—or anything else—were instead only available for a price, the values at stake in this contingent arrangement might not seem important enough to merit assurance. The lifesaving transaction would not be a “merit good.”²¹⁰

Finally, assume adoption of a national health care system, whether through direct provision of care by government or through government

209. See KARL POLANYI, *THE GREAT TRANSFORMATION* 46 (1944):

The outstanding discovery of recent historical and anthropological research is that man’s economy, as a rule, is submerged in his social relationships. He does not act so as to safeguard his individual interest in the possession of material goods; he acts so as to safeguard his social standing, his social claims, his social assets. He values material goods only in so far as they serve this end.

Id. Schmookler refers to the “disintegrative” force of the market. Schmookler, *supra* note 178, at 95. One must ask, however, just what is being (dis)integrated.

210. Merit goods are defined as “common wants—i.e., wants which individuals feel obliged to support as members of the community. These obligations may be accepted as falling outside the freedom of individual choice which ordinarily applies.” MUSGRAVE & MUSGRAVE, *supra* note 103, at 58. This article does not claim that all forms of health care are or should be viewed as merit goods.

or government-mandated insurance systems. Both health care itself and information about it are noncontingent in the sense that there is formal community commitment to it. The value-promotion mix here is quite complex. Life-or-death is not a matter left to the moral "irrelevancies" of wealth on the one hand, or social status in a particular community on the other. Indeed, where the community is so large, membership seems irrelevant unless aliens are excluded. Free choice is compromised, but this is not in all respects a cost—it is an integral part of promoting the life interest. If one strongly wants to reinforce it, there is little sense in wishing for more autonomy with respect to the threshold provision of care if that very autonomy compromises the value. Large domains of choice may of course remain—in choosing physicians, treatments, etc.—depending on the system.

Yet there is likely to be significant counter-reinforcement. In actual practice, shortages, queuing, and outright exclusion on marginal "medical" grounds may be fairly obvious. Many may believe that the total quantity and quality of health care would be greater under a system more like a classic market, and they may thus see the prevailing system as strongly inconsistent with life values. The communicative impact of the regulatory system is thus uncertain. Yet, the impact of formal noncontingency may be considerable, and for all we know may dominate the other messages. After all, if one's living or dying rests on the arbitrariness of one's place in nature or on the social structure and if the community could change this situation if it wished, how important could life or death really be to the community? Moreover, if it is unimportant to the community, how could it be important at all? (Or so our minds may work, unbidden.)

Some modest anecdotal evidence of the importance of the perception of contingency in the provision of services comes from airline deregulation. Here, if community members perceive uncertainty in the availability of transportation services, this might suggest to them a low appraisal of the social worth of the communities involved and their members by the regulating authorities. The issue is not as dramatic as lifesaving and arises from contingencies different from those in health care, but the episode recorded by Michael E. Levine is instructive nonetheless:

[W]e greatly underestimated the value placed by the travelling public, civic authorities, bankers and businesses on stable expectations. This meant that we greatly underestimated the costs perceived by the public of repeated substitutions of one airline for another in providing service. . . . [We] were told by civic authorities that predictability was very important. But we assumed that as long as

there was adequate and more or less uninterrupted air service to smaller cities, people wouldn't get too excited if the government or the bankruptcy courts changed from time to time the names of the airlines providing the service. . . . But we learned that people who perceive themselves as dependent on this air service see the repeated changes as evidence of instability rather than of assured continuity. . . . We ended up willing to trade off more in that way of operating cost-effectiveness for stability in choosing airlines to provide subsidized service. . . . [U]sing hindsight, it is possible to modify the theories that we used to generate our policy of competitively supplied subsidized service to take into account the costs to the public of dealing with uncertainty in acquiring information²¹¹

Of course, if regulation leads to higher prices, the consumer is disadvantaged in that respect. Yet this disadvantage may seem to be less serious than the appearance of unpredictable interruption of an important service that marks the integration of persons and their communities into the community of the whole. Is our best move to try to talk observers out of their reaction to apparent instability or simply to let them adjust to the new reality of deregulation?

The idea of contingency (related to various forms of "instability") thus cuts across all regulatory areas. It would thus be a useful task for regulatory theorists to chart, in health care and other fields, what sorts of things are viewed as acceptably contingent, and in what sense of "contingent." One might well expect fewer deregulatory moves in, say, health care and product safety than in air travel pricing practices.²¹²

211. Michael E. Levine, *Remarks*, USC L., Fall-Winter, 1985, at 23-24. See also EDELMAN II, *supra* note 1, at 57-58:

Certain messages are implicitly but clearly conveyed by the very creation and continued functioning of the agency, and the messages are solace for very anxious people. . . . To see vividly this function of an administrative agency it is helpful to consider the alternative: the situation prevailing before an agency is established in a policy area, or the situation that would prevail if an existing agency were magically abolished. . . . If the Interstate Commerce Commission, for example, were suddenly abolished, its function of maintaining and raising rates and legitimizing mergers and abandonments of service would have to be performed by the private carriers themselves. Potential customers would fear sudden and substantial changes; and the carriers themselves would fear strong public protest. Anxieties on both sides and anticipatory protest would create a degree of instability and tension that would have to be eliminated, very likely by the creation of an agency much like the ICC.

Id.

212. See DERTHICK & QUIRK, *supra* note 71, at 218:

The politics of deregulation with respect to health, safety, and the environment—the subjects of the post-1967 wave of new regulation—were entirely different from the politics of procompetitive deregulation. Even Reagan in his earliest statements drew a distinction. "We have no intention of dismantling the regulatory agencies," he told the nation within three weeks of taking office, "especially those necessary to protect the environment and to ensure the public health and safety."

Id. (footnotes omitted).

This is indeed suggested by a striking comparison: pricing, routing and other "commercial" matters were deregulated (to an extent), but not airline safety. Perhaps the idea that an adequately functioning market for airline services would produce optimal safety has been overwhelmed by the need to establish an aura of noncontingency and absoluteness, emanating from the community, about the value of life.²¹³

NOTE: THE BENEFITS OF COMMODIFICATION

The aim here is to elaborate briefly on matters suggested earlier concerning the effects of markets on the ways in which their inhabitants view each other.

Markets are often criticized because they are thought to commodify its members and their interactions: the contingent bonds associated with fungible things seem to become associated with persons. On the other hand, our bonds to persons outside our group may be as thin as those to objects—although we may bond in certain ways to special objects, in markets or out. (Market critics speak of human alienation and fetishism of commodities.²¹⁴)

Yet the market's commodification of medical care, despite the contingencies it reflects and the restricted fungibility it promotes, is hardly an unrelieved disaster. There are advantages associated with being dealt with *in limited ways* as a commodity. Markets are regimes in which people have choices they might otherwise not have. Of course, they may "lose" choices by comparison with other systems: nonmarket regimes bear their own sets of options which may not be available in markets. Final comparative evaluations are not offered here—only the promotion of comparisons. To transform a formerly nonsalable entity into a commodity (one's organs, for example) creates obvious op-

213. See *supra* note 14 and accompanying text. One could list a variety of topics for further investigation. Consider, for example, the effects of various kinds of tort reform on perceptions of the values of life, health and equality, and the resulting effects on preferences, attitudes and behavior.

214. For definitions of "commodification," see Radin, *supra* note 198, at 1859; *cf. id.* at 1925-36 (discussing surrogate motherhood and baby-selling). The idea that persons themselves might be viewed as commodities is not an entirely clear one. It might mean that the persons themselves are saleable or transferable, as in slavery; or that their body parts, or the use of them, are similarly saleable or transferable; or simply that they are viewed as "fungible" sources of supply or demand in a market—a situation that does not necessarily compromise their personhood. (This does not exhaust the array of meanings.) Note Professor Radin's focus on the idea of "incomplete commodification." *Id.* at 1933-36. For a discussion of alienation, alienability and fetishism see *id.* at 1871-77. For a discussion of fungibility see *supra* note 198.

tions.²¹⁵ More generally, markets may enhance possibilities of *certain forms* of social intercourse, community, beneficial exchange, and human respect by replacing some highly restrictive criteria of association (e.g., kinship) with ability to pay.²¹⁶ No doubt these enhancements are not always pure benefits. And it is hard to compare the restrictiveness of an ability-to-pay criterion with kinship or status criteria characteristic of other distributional systems. (As always, issues about markets should be evaluated in light of the hovering question: "Compared to what?")

Nevertheless, a practice of viewing people indifferently as fungible, anonymous sources of supply (though not necessarily as themselves commodities) is one way of reinforcing equality, autonomy, and even community (all in certain senses).²¹⁷ Fungibility is not the same as objectification.²¹⁸ Moreover, many recommendations for health care reform reflect the felt necessity of structuring behavior through market-like incentives in this way.²¹⁹ Commodification in a sense? Perhaps so, and perhaps properly so.

215. See Lori B. Andrews, *My Body, My Property*, HASTINGS CENTER REP., Oct. 1986, at 28 (endorsing regime in which some body parts can be sold or transferred).

216. *But see* SCHMOOKLER, *supra* note 178, at 70; *cf.* Robert E. Lane, *Market Choice and Human Choice*, in MARKETS AND JUSTICE 226, 237 (John W. Chapman & J. Roland Pennock eds., 1989) (citing RICHARD SENNETT, *THE TYRANNY OF INTIMACY* (1976)) ("Intimacy, says Sennett, impedes sociability, a wider but looser set of relations."); Margaret Jane Radin, *Justice and the Market Domain*, in MARKETS AND JUSTICE, *supra*, at 165, 184 ("People engaged in market interactions are not just acquiring things, they are relating to each other."). Part of the idea here is that the question of membership in a community may serve as a major constraint on access to various benefits. Community-based systems of distribution may largely exclude nonmembers from access to various goods and services. *See generally* MICHAEL WALZER, SPHERES OF JUSTICE 31-63 (1983) (how groups are constituted; membership).

217. *Cf.* Coleman, *supra* note 198, at 88 ("The virtue of the market is that it is compatible with moral skepticism and, therefore, maximizes social interaction without threatening the underlying consensus necessary for stability."). More generally, Coleman suggests that "competition itself arises only where cooperation fails, and . . . even where competition succeeds it requires that collective action succeed first." *Id.* at 83. Markets and associated commodification may thus bring significant benefits, as do other forms of cooperative action.

218. See Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFF 77, 95 (1991) ("Liberals . . . deny that it is wrong to buy or sell things that one respects. Treating something as a commodity need not mean treating it *merely* as a commodity."). Kymlicka adds in a footnote, "the liberal commitment to the market depends precisely on the assumption that noninstrumental activities are compatible with the market." *Id.* at 95 n.25. *See also* Lane, *supra* note 31, at 244 ("[T]he main problem for the development of human personality is the character of the choices made and not the exchange of goods and services for money in the market."). *But cf.* Radin, *supra* note 216, at 175 (discussing the argument that "[w]e cannot know the price of something and know at the same time that it is priceless").

219. *See generally* MARK A. HALL & IRA MARK ELLMAN, HEALTH CARE LAW AND ETHICS 56-70 (1990) (reviewing briefly "competitive reforms" in health care).

V. REGULATION AND THE VISION OF RATIONAL PRINCIPLE

The learning effects of regulation do not rest exclusively on the exact contents of the regulatory scheme. The very fact that there is regulation at all might itself be a potent source of perceptions, whether for better or worse.

Consider, for example, the view that certain community practices mask conflict and indeterminacy and offer reassurance that everything makes sense.²²⁰ As Sally Falk Moore puts it,

Whether rituals, laws, rules, customs, symbols, ideological models, and so on, are old and legitimated by tradition, or newly forged and legitimated by a revolutionary social source, they constitute the explicit cultural framework through which the attempt is made to fix social life, to keep it from slipping into the sea of indeterminacy.²²¹

There is, of course, the risk that community action will compound the indeterminacy and confusion, or act in ways that seem irrational or perverse.²²²

Yet the precise paths to determinacy and rationality need not be immediately apparent to all, so long as it is believed that some persons know the way. The reassurance that all is consistent and nonarbitrary can be conveyed by suggesting that special decisionmakers (e.g., chief

220. There may be differences between hiding the existence of a specific value conflict; acknowledging a superficial conflict but making it appear that in the final analysis there is no inconsistency (because of exceptions, larger generalities that resolve conflicts, etc.); and making it appear that *any* apparent conflict occurring within an overall value system will be rationally resolved (possibly accompanied, in certain cases, by a showing that there is no "true" conflict). Nothing here turns on these distinctions. I of course do not enter the debate about the existence and nature of moral dilemmas. See generally WILLIAMS, *supra* note 51, at 71-82; Alan Donagan, *Moral Dilemmas, Genuine and Spurious*, 104 *ETHICS* 7 (1993).

221. Sally Falk Moore, *Epilogue* to *IDEOLOGY*, *supra* note 163, at 210, 221-22. See also LEACH, *supra* note 82, at 38-39:

In Levi-Strauss's view myths commonly focus around some irresolvable paradox of logic or of fact: e.g., "How could there be a first man and a first woman who were not also brother and sister?", "How can one fit a desire for immortality with a knowledge of the certainty of impending death?", "How is it that human beings are on the one hand animals (natural) and on the other hand not-animals (cultural)? The 'variations' on a theme' which constantly recur in mythological systems serve to blur the edges of such "contradictions" and thus to remove them from immediate consciousness.

Id.; see also ANDREW BAUM ET AL., *SOCIAL PSYCHOLOGY* 11-13, 63-64, 64-70 (1985) (discussing cognitive dissonance and balance theories).

Of course, not all regulation is aimed at reducing indeterminacy and contingency. These reductions are simply important goals or effects under various circumstances.

222. See *supra* text accompanying note 182.

executives, legislative bodies, courts, shamans) have access to the (hidden) foundations of rationality and truth.²²³

The contribution of courts to the vision of rational principle²²⁴ is distinctive, but is touched on only briefly here. Briefly, modern courts (and perhaps certain political or intellectual leaders) may possess a sort of charismatic authority because of their *mysterious*, inaccessible mastery of principle.²²⁵ Why mysterious? If crucial general terms are “open-textured”²²⁶ or otherwise vague or ambiguous, and if principles conflict at the highest levels of generality, how is it that these people in robes triumphantly announce “therefore it is so?”

This sort of skeptical inquiry²²⁷ has long been familiar to lawyers, and its force suggests a certain affinity between the auras of shamans or political leaders on the one hand and those of the masters of legal reasoning on the other.²²⁸ (Note the connection between the idea of mysterious knowledge and that of a “profession.”)²²⁹ Somehow, some folks see things the rest of us do not, whether it is messages from the

223. Cf. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 232-33 (1990):

[Judges'] business is to resolve disputes in a way that will vindicate those norms and, more fundamentally, satisfy social needs. . . . It is precisely to resolve the most difficult, the most uncertain, disputes that we have judges. Compelled to decide such cases, many judges pretend—sometimes to themselves as well as to the world—that what they have done is added two and two and gotten four, so that anyone who disagrees with their decision is crazy, or that what they have done is chosen Right over Wrong, so that anyone who disagrees with the decision is morally obtuse. In fact they are more likely to have engaged in the same kind of inconclusive practical reasoning, heavily influenced by personal experiences and temperament, that jurors and politicians and civil servants use to make judgments. [Among t]he distinctive things about the judges [is] that . . . their reading is dominated by legal materials largely unknown and incomprehensible to the lay public . . .

Id.

224. Cf. Solum, *supra* note 187, at 469 (discussing Critical Legal Studies) (“[S]ome claim that the appearance of determinacy in the application of legal rules is itself an example of legitimizing legal discourse. The notion that legal rules produce determinate results reinforces the claim that the law is a neutral mechanism of dispute resolution.”).

225. For a discussion of charismatic authority, see I WEBER, *supra* note 193, at 241-45.

226. The phrase “open-textured” is associated with Friedrich Waismann in *Verifiability, in LOGIC AND LANGUAGE* 117, 119 (Antony Flew ed., 1952). It refers to a form of indeterminacy not curable “by giving more accurate rules” and is thus distinguishable from simple vagueness; open textured terms are always “corrigible or emendable.” *Id.* at 120.

227. For accounts of various forms of skepticism, see Moore, *supra* note 77, at 151.

228. For a brief account of recent jurisprudential history, see Richard A. Posner, *The Decline of Law as an Autonomous Discipline 1962-1987*, 100 HARV. L. REV. 761 (1993).

229. Cf. Gordon Horobin, *Professional Mystery: The Maintenance of Charisma in General Medical Practice*, in *THE SOCIOLOGY OF THE PROFESSIONS* 100 (Robert Dingwall & Philip S. C. Lewis eds., 1983) (“[T]he policeman, the nurse and the ambulance driver probably perform more-life-saving actions [than physicians], but they perform them through skills anyone can learn. They lack mystery.”).

spirit world or some conclusive normative insight (e.g., “affirmative action *really* is/isn’t required/prohibited by equality standards”). No, principled decisionmaking is not as mysterious as magic, but it is mysterious enough. Decision by principle and decision by oracular insight may not appear fully distinct to all observers.

Suppose, for example, that a group places a strong value on life and equality, as well as on freedom of choice and nonsuffering for all its members. There are two relevant features of medical care in the group. There is an unregulated, unameliorated market in which some members, left to the contingencies of kinship and charity, are doomed to death.²³⁰ There is, however, a strong ethic favoring unremitting use of high technology to prolong lives even where this extends the suffering of the patient (and others). The group as a whole openly espouses the values of life, equality, and nonsuffering. Yet there is a perceived “contradiction”—using that term very loosely.²³¹ People suffer—it is the price of longer life; some die and some live, and many who die could have been saved by medical intervention.

Various techniques can be used to mask the supposed “inconsistencies” generated by the market, e.g., adding “adjustment premises” that purport to clarify the values or state exceptions to them.²³² Thus, leaders offer several explanations: those who cannot afford medical care are generally the undeserving poor; private charities erase the contingencies of the market; patient exclusions from charity are medically justified; the incidence of illness and death is exaggerated; those who died could not have been helped anyway; and so on.

As for the problem of the “technological imperative” to use life-saving care, courts may announce, for example, that under certain circumstances it is consistent with reigning principles to withhold care, thus allowing relief of suffering.²³³ As Professor Fiss said in a some-

230. It is possible that the workings of the market, in a given person’s perceptions, may be irrelevant to what is perceived as contingent or noncontingent. He or she may, for example, believe that matters of life, death and one’s station in life are God’s work.

231. The terms “contradiction,” “paradox,” “value conflicts,” and cognate terms are hard to nail down. I note only that showing a contradiction or paradox presupposes an interpretation of the ideas or propositions thought to generate an inconsistency. If there is no agreement on interpretation, there may be no agreement that there is an inconsistency. A kind of functional “indeterminacy” remains, however, precisely because of the lack of agreement on interpretation. For a strong effort at improving on the loose use of “contradiction” see JON ELSTER, MAKING SENSE OF MARX 43-48 (1985).

232. See CALABRESI, *supra* note 1, at 88-91 (discussing subterfuges).

233. See generally *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). “Relief of suffering” has an uncertain application in *Cruzan* because the patient was in a persis-

what different context, “[t]he social function of contemporary litigation is not to resolve disputes, but rather to give concrete meaning to that [public] morality within the context of the bureaucratic state.”²³⁴

It may be that the very idea of central control by the group, through designated leaders, suggests the consistency and rationality of the community enterprises in question. Why would government take over medical care, after all, if it offered simply a different version of the random, arbitrary choices of a decentralized system? (Or so a given citizen might think.)

VI. DOES COMMUNICATION THROUGH REGULATION COST TOO MUCH?: COMPARING THE EFFICIENCY OF DIFFERENT REGIMES FOR A GIVEN COMMUNITY²³⁵

So far, it appears quite possible that regulation communicates on a wide variety of subjects. There may be messages about the particular goals of regulation, important values and interests (e.g., life, health, equality, autonomy) the importance of the community and community in general and the consistency and determinacy of the community’s value and belief systems.

As we saw, it would be a mistake simply to pit such value reinforcement projects against efficiency. One must ask about efficiency with respect to which goals and which mechanisms meant to further them. One must also ask an intimidating empirical question about which rival health care system would *in fact* save more lives across society as a whole (not just in medical transactions): a supposedly value-reinforcing regulatory system that deals with health and lifesav-

tent vegetative state. *See id.* at 266.

234. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 *LAW & HUM. BEHAV.* 121, 124 (1982). Fiss was speaking of “structural reform” litigation that addresses threats to constitutional values posed by “large-scale organizations, the bureaucracies of the modern state.” *Id.* at 121. Because many death-and-dying cases involve analysis of asserted constitutional values and the interests of health care providers, the quotation in the text is not inapt here.

235. This section builds on the discussion of efficiency, *supra* text accompanying notes 9-13. In a different context, the kind of issue at stake is briefly illustrated in Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 *AM. B. FOUND. RES. J.* 737, 768:

Although I can appreciate the symbolic reasons for regulating the tiny sliver of the sexually violent that is obscene in the constitutional sense as well as being sexually violent, I can appreciate as well that the marginal symbolic advantages in making a statement against sexual violence would not outweigh the costs.

Id.; *see also Cruzan*, 497 U.S. at 356 (Stevens, J., dissenting) (“However commendable may be the State’s interest in human life, it cannot pursue that interest by appropriating Nancy Cruzan’s life as a symbol for its own purposes.”).

ing as “unquestionables” or a market system that produces, at least in the short or medium runs, a greater number of health-promoting and lifesaving transactions.

Value reinforcement, however, does not come free any more than lunches do; regulation may result in fewer goods and services than a market might bring. Furthermore, as far as learning effects are concerned, it may also reinforce some disfavored or harmful attitudes and beliefs. Do these regulatory costs outweigh the supposed gains in social learning, and the broad reassurances about security, community, and so on? Moreover, the whole idea that regulation contributes to certain forms of learning is itself speculative, and the gains from learning must be appropriately discounted. To rely on some mushy theory of the communicative impact of regulation is to embrace “ritual” in the most pejorative sense of the term, as one might argue. Thus, moral reinforcement may well be inefficient, leaving us with fewer goods and services than we need or want.

These views have considerable force, particularly since attention to “regulation as communication” has no obvious stopping point and could eventually result in many intrusions that we can do without—all on some nonverifiable claims about normative messages. There is no knockout argument in response. Nevertheless, there are some points to consider in pursuing the debate.

For one thing, the reinforcement of life-affirming norms may affect large areas of our lives. Such norms deal not just with medical care but with willingness, both public and private, to promote public health and adequate levels of nutrition and housing, to care for children and for the elderly, to maintain adequate policy protection, and so on.²³⁶ Of course, “life-affirming” doesn’t cover every good thing under the sun (and is in various ways a confusing concept). In addition, the values encompassed by the term are often overridden, though we may regret this. Perhaps then, some “self-paternalism”²³⁷—self-binding measures

236. See Ozar, *supra* note 78, at 10.

237. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113 (1972) (defining “self-paternalism”). For a critique of the idea, see Jonathan Schonsheck, *Deconstructing Community Self-Paternalism*, 10 LAW & PHILOS. 29, 36-37 (1991) (observing that community self-paternalism is in fact “majority self-paternalism”). For additional discussion, see generally Richard J. Arneson, *Liberalism, Freedom, and Community*, 100 ETHICS 368 (1990); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). Note the connection between this issue and the idea of “merit goods,” discussed *supra* note 210; see also MUSGRAVE & MUSGRAVE, *supra* note 103, at 57 (“A group of people share an historical experience or cultural

to defend against weakness of will or other human dispositions²³⁸—is justified, though this is a controversial matter. We seem to need *practice* in and *illustration* of promoting the life ethic in order to avoid weakening it²³⁹—again, overprotection to avoid underprotection. The open failure even to try to promote a value-reinforcement goal poses its own set of risks to a normative system.

Further, some kinds of social goals may themselves be promoted primarily or most efficiently by the learning effects of group action.²⁴⁰ For example, suppose the full set of societal goals includes maintaining a strong sense of group affiliation (“We’re all in it together”)²⁴¹ and a sense of overall rationality of belief systems. (These goals might be viewed as both intrinsically and instrumentally valuable.) If some kinds of regulated enterprises promote these goals, then *with respect to the full array of social goals*, these enterprises may promote efficiency better than nonregulated ones.²⁴² (Because different groups—and the same group at different times—may have wildly different values and goals, efficiency comparisons are exceedingly difficult, if not impossible, as Allen Buchanan has strongly argued.²⁴³)

One can criticize a community’s goals on a variety of grounds—indeed, one can argue that we ought to try to rewire ourselves to have different goals and learning capacities, but this is immaterial for present purposes. The topic here is not about constructing the best of all possible worlds or perfecting humanity. It is about what sorts of goals we have now and how we pursue them. Whether we are pursu-

tradition with which they identify, thereby establishing a common bond.”).

238. See ELSTER, *supra* note 231, at 36-37.

239. Cf. Robert Burt, *The Treatment of Handicapped Newborns: Is There a Role for Law?*, 1 ISSUES IN L. & MED. 279, 283 (1986) (“The ethos of communal caretaking is already stretched thin in our time.”).

240. Cf. GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES 38-41, 137-41 (1978) (gains from saving known lives at the cost of losing a greater number of unknown lives).

241. See Peter Singer, *Freedoms and Utilities in the Distribution of Health Care*, in MARKETS AND MORALS 149, 172 (Gerald Dworkin et al. eds., 1977):

The knowledge that we are all in it together when it comes to vital things like medical care, and that your money cannot buy you anything that I am not equally entitled to, may do a good deal to mitigate the effects of inequality in other, less vital areas and create the atmosphere of community concern for all that I have already discussed.

Id.

242. Cf. OWEN & BRAEUTIGAM, *supra* note 65, at 35 (“People are willing to trade off some efficiency for increased procedural fairness.”). If fairness is a goal, however, promoting it should not necessarily be *contrasted* with efficiency—efficiency must be measured against the *full set* of social preferences. If regulation reduces risks, “voters in a society of risk—averse individuals will prefer a regulated economy to a free market economy, even if it costs something.” *Id.* at 25.

243. BUCHANAN, *supra* note 64, at 36-46 (discussing problem of comparing whole systems).

ing them effectively may depend on a variety of processes, including the reinforcement of values through the learning effects of certain governmental or group actions. The fact that these mechanisms may be inefficient with respect to a narrower set of goals considered separately (for instance, the short run quantity and quality of medical transactions) does not keep them from being efficient with respect to a broader set. To further the possibility of advancing *all* the goals in that set, we may be willing, on reflection, to take risks based on informed speculation and to pay higher prices for goods and services. (Making such tradeoffs among goals in accordance with some rational ordering system is of course part of running an efficient system.)

Suppose, however, we simply *knew* that, despite learning effects, more lives would be saved in the long run if an unregulated market system were in force. If the point of taking learning effects into account is to increase the long-run number of lifesaving transactions, that rationale itself would suggest use of the market mechanism, unless other goals (e.g., communitarian) were still more important. Perhaps in this unlikely case of certain knowledge, we ought to forget about learning effects.²⁴⁴

Of course, we are unlikely to have such knowledge, and so ought to take care in doing efficiency analysis. Although it is a bit far afield, Geertz's example of Balinese cockfighting illustrates this need to attend to the uses of group action in promoting various goals.

If a man whose fortune is a thousand pounds (or ringgits) wagers five hundred of it on an even bet, the marginal utility of the pound he stands to win is clearly less than the marginal disutility of the one he stands to lose. In genuine deep play, this is the case for both parties. They are both in over their heads. Having come together in search of pleasure they have entered into a relationship which will bring the participants, considered collectively, net pain rather than net pleasure. Bentham's conclusion was, therefore, that deep play was immoral from first principles and, a typical step for him, should be prevented legally.

But more interesting than the ethical problem . . . is that despite the logical force of Bentham's analysis men do engage in such play [F]or the Balinese . . . , the explanation lies in the fact that in such play, money is less a measure of utility, had or expected, than it is a symbol of moral import, perceived or imposed. . . . It is in large part *because* the marginal disutility of loss is so great at the higher levels of betting that to engage in such betting is to lay one's public self, allusively and metaphorically, through the medium of one's cock, on the line.²⁴⁵

244. There are obviously serious—perhaps intractable—problems in comparing the number of lives saved because a market is used and the number of lives saved because of reinforcement of lifesaving values.

245. GEERTZ, *supra* note 32, at 434. For a critique of Geertz's account of cockfighting, see

Such observations, however, do not meet the objection that classical efficiency with respect to medical transactions is a less speculative subject than regulation as language, and that we should not sacrifice the former by emphasizing the latter. This is a colorable risk-of-error position and is hard to refute, although the general idea of regulation as communication that reinforces values is not all that speculative. It rests on basic ideas of learning theory that seem sound—e.g., the observation of patterns and regularities in behavior, the repeated association of perceptions, and so on.²⁴⁶ In any event, my only intention here was to discuss the ideas and to warn that the costs of deregulation or nonregulation may be greater than we thought.

VII. SOME PARTICULAR EXAMPLES: NATURAL ORGANS AND ARTIFICIAL HEARTS—PROBLEMS OF TOO MUCH AND TOO LITTLE CHOICE; ORPHAN DISEASES; LOTTERIES; SURROGATE MOTHERHOOD²⁴⁷

A. *Natural Organs*

Assume first a regime of largely unfettered opportunity to enter into exchange transactions involving organ transplantation. Then vary the individual and background circumstances to allow comparisons between it and more centralized community systems of distribution involving restrictions on sales and using various selection criteria for organ transfers. Then listen to what the regulatory schemes or non-schemes are saying. The messages, once again, are likely to be as complex as normative theory itself, but this does not foreclose the possibility of louder and softer voices. The goods and services involved in organ transplantation are unusually visible, and so analysis of their distribution raises communicative matters more intense than those associated with other commodities, including medical ones.²⁴⁸ There are many

Martin, *supra* note 88, at 279-83.

246. See MARGOLIS, PATTERNS, *supra* note 93, at 112-140 (discussing learning and patterns). For a brief critique, see Lorraine Daston & Gerd Gigerenzer, *The Problem of Irrationality*, 244 SCI. 1094 (1989) (reviewing MARGOLIS, PATTERNS, *supra* note 93). Cognitive psychology is not an entirely new discipline. See, e.g., DAVID HUME, A TREATISE OF HUMAN NATURE 10-13 (L.A. Selby-Bigge ed., 1888) (discussing “the connexion or association of ideas” as arising from “RESEMBLANCE, CONTIGUITY IN TIME OR PLACE, AND CAUSE AND EFFECT.”).

247. “Performance enhancement” is discussed elsewhere. See generally Shapiro, *supra* note 17.

248. For this reason, the general question “[s]hould the goods and services required to preserve and restore our health be bought and sold in the marketplace, like television sets and haircuts, or should they be provided in some other way?” Singer, *supra* note 241, at 149, requires a further breakdown of subsets of medical commodities. Questions about financing emergency medical care, scarce lifesaving resources, and “routine” medical care may have different answers.

factors that help to explain why some forms of lifesaving are more vivid—and thus more “communicative”—than others, but it must be left to social scientists to fix them more precisely.²⁴⁹

We should, then, compare several systems for organ distribution, including (1) private sales are permitted,²⁵⁰ (2) they are not permitted but there is no government role in paying for or providing organ transplantation, (3) they are not permitted but government does pay for or provide for much or all transplantation, (4) there are both private sales and a partial government payment or provision system, (5) only the government buys organs and then sells or distributes them, and (6) government compels organ sales or donations in certain cases.

Not all these variations are extensively investigated. The emphasis here is on sales and appeals for assistance, and, again, on the role of contingency in lifesaving transactions.

1. *Sales, Media Shows, and Contingency*

In the market, whether one lives or dies depends not only on patient choice, but seller choice, patient resources, scarcity, and of course one's medical condition, support network, and so on. It may also depend on audience choice where a media appeal is made for contributions or organ donations.²⁵¹ No one is “officially” saved simply by virtue of being a person or a person within a certain community. (No one is even officially made the subject of a save-this-person campaign; the campaign itself is contingent.) The very contingency associated with choice—and the dependence of choice upon factors such as personal attractiveness, public relations skills, and *whim*—may compromise the idea that life is unique and invaluable.

This negative picture may be tempered somewhat by the nature of the appeal (save Baby Jane because she is a baby/person/child of God,

249. The factors may include extreme scarcity that creates head-to-head competition for lifesaving resources, sudden and well-publicized technological change, and technology-driven challenges to basic descriptive and evaluative categories. Technologies presenting such challenges include those for predicting or altering human attributes, genetically or otherwise; for assisting reproduction; and for prolonging life. See generally SHAPIRO & SPECE, *supra* note 1, at 12-42 (discussing attributes of the “new biology”); Shapiro, *supra* note 15.

250. Federal law now prohibits organ sales that affect interstate commerce. See 42 U.S.C. § 274e (1988).

251. See e.g., Harry Nelson, *Only Days to Live: 16-Month-Old Boy in Urgent Need of Liver*, L.A. TIMES, May 19, 1987, § 2. The child had already had a liver transplant, but it failed. A second liver was obtained. *Doctors Implant Second Liver in Threatened Boy*, L.A. TIMES, May 20, 1987, § 2, at 6. Media solicitations might occur either with or without the existence of a market for organs (though the existence of a market could spur advertising).

not because she is white/an only child/cute), and also by the fact that the policy debate is, to an extent, kept to one side.²⁵² Moreover, since the effort is about lifesaving and everyone is being called on to help and expensive media resources are being used, the affirmation of life is certainly not trivial. The affirmation of life may in fact be more vivid than that communicated by the simple awareness of a government-“guaranteed” distribution system. Autonomy ideals are maintained by leaving things up to the viewers, although this may work against the affirmation of the value of life.

Finally, if scarcity is recognized and thought to be attributable to unavoidable features of the world (we have only one heart and two kidneys apiece), a specific person’s life will be seen as contingent on *some* distributional system, so the attenuation of life values may be lessened by perceiving this.

Nevertheless, it remains clear that thumbs down by the audience means death even if thumbs up does not guarantee life. The aura of the Roman Circus is unmistakable: audience whimsy is a major basis for lifesaving. Media distribution, as with other private ordering systems, thus leaves medical lifesaving efforts contingent by clearly indicating that *no one need be saved*, and if someone is saved, it is based on his having certain personal traits, on entrepreneurial skills, on wealth, etc.

Of course, some will indeed be saved, but there is no central, official, community-wide commitment to maximizing lifesaving opportunities (though there may be some kinship or other group-based commitments within the larger community). This sort of contingency may seem to reflect an indifference to life. Unavoidable organ scarcity does not, although long-term failure to try to increase supply in certain ways may suggest such indifference.²⁵³

Lifesaving is contingent, so also, therefore, is the vindication of fairness and equality claims. There is a clear picture of *what the contingency rests on*—wealth, and the personal decision of the seller or contributor, the basis for which may be unknown—or known and suspect.

The possibility of sales of course results in a particular emphasis

252. See Richard A. Rettig, *The Policy Debate on Patient Care Financing for Victims of End-Stage Renal Disease*, 40 LAW & CONTEMP. PROBS. 196, 220-22 (1976).

253. For a brief review of methods to increase supply, see Albert R. Jonsen, *Ethical Issues in Organ Transplantation*, in MEDICAL ETHICS 229, 237-41 (Robert M. Veatch ed., 1989). On the possibility of a “futures market” for organs, see Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989).

on wealth not only as a criterion of eligibility for lifesaving but of vulnerability to loss of body parts on the seller's side. The wealthy do not need to carve themselves up (in life or in death) to feed their families. They do not risk charges of moral culpability or cowardice in failing to do so. Within some audiences, then, the market reinforces class divisions by visibly tolerating, even endorsing the categorization of people on the basis of wealth. One might argue that this is a case illustrating some disadvantages of expanding our options (by legalizing or facilitating organ sales).

2. *Sales and the Problems of Too Much Choice*²⁵⁴

It was said earlier that the contingency of lifesaving in a market system for organ distribution rests partly on the buyer's resources and the personal decision of the seller. What about the seller's choice process? Most persons are not anxious to dismember themselves for money. Yet if they do not do so, then under certain circumstances they risk the disapproval of others—e.g., on the ground that their ill-nourished, ill-sheltered, ill-clad, medically-indigent families need the money the sales could provide. (Indeed, perhaps the disapproval would be morally sound; the non-seller *would be* culpable under some circumstances for failing to care for his family.) The fact that he or she need not sell is not the point here: the existence of choice is precisely what creates the risk of culpability and disapproval, as well as of heroism. Potential sellers not disposed to sell are thus in a sense "normatively worse off" because of the risk of culpability, and may be worse off under a simple utilitarian criterion because of their own reactions to their failure and to the disapproval of others.²⁵⁵ Those disposed to sell are, on the other hand, normatively better off because they have opportunities for virtue and heroism. Yet the widespread (nonconscious?) fear of choice and of the risk of moral liability and censure that attends it may account in part for the lack of serious moves toward a regime of organ sales.

Fears—well-grounded or not—about moving down a slippery slope from voluntary sales to the conscription of living persons as organ banks may also help explain avoidance of establishing organ markets. Perhaps to avoid these risks of a system of private choice, we in effect delegate to government the task of dealing in some way with the organ

254. On "too much choice," see generally Gerald Dworkin, *Is More Choice Better than Less?*, 7 *MIDWEST STUDIES IN PHIL.* 47 (1982); Shapiro, *supra* note 15, at 348-40.

255. These senses of being "worse off" (risk of moral liability, decline in utility) bear much more analysis than can be provided here.

shortage. In any event, the absence of a market demands *some* explanation, in the face of the acute shortage of organs for transplantation and the significant loss of life it entails.²⁵⁶

Given these problems of “too much choice,” what exactly is the communicative impact of formally disallowing markets for organs? Isn’t it a plain assault on lifesaving values? We can *see* all these people dying for want of organs. Is it seen that way, and accepted because other values are taken as superior? If it is not seen that way, what is masking it? Our perceptions of competing values, once again?

If banning these lifesaving transactions is seen as impairing the value of life, perhaps a market would promote it. It may be quite likely that an organ market would not just save lives, but visibly do so. Yet the market, as we saw, saves lives contingently only. Banning the market avoids the open contingency of life based on wealth or income (though other open contingencies remain, as with media shows). Moreover, the loss of lives may on the whole be less visible than it would be in a market system, despite the occasional media campaigns. (Think of the mechanisms that might be involved in a market—advertisements and open distribution networks, for example.)

On this view, *banning* a market *promotes* lifesaving values by avoiding the visible contingencies in a sales system where life is saved only because money changes hands. Banning the market may also reinforce ideas of personal integrity and of the evil of using persons simply as means to benefit others. On the seller’s side, the ban avoids what might be perceived as unfair choice opportunities that not only cause utilitarian losses (to certain parties, at any rate) but create possibilities of moral culpability (as well as moral heroism). The communicative impact of a ban on sales would thus seem either to mask the impairment of lifesaving values because of the role of other values and interests, or actually to promote lifesaving values by avoiding a system in

256. See the discussion of “the ethically distasteful ‘free market’ [organ] sale concept” in Charles B. Carpenter et al., “*Free Market*” *Approach to Organ Donation*, 310 *NEW ENG. J. MED.* 395, 395-96 (1984) (letter to the editors). See also Lane, *supra* note 31, at 243 (citing MICHAEL WALZER, *SPHERES OF JUSTICE* 102 (1983)) (“Not market exchange, but forced and coerced choices are the enemy of human choice. . . . What is degrading is ‘desperate exchange’”). On organ sales generally, see SHAPIRO & SPECE, *supra* note 3, at 823-28; on organ shortages, see *id.* at 767-70. According to press reports, organ sales occur with some frequency in various parts of the world. See, e.g., Charles P. Wallace, *For Sale: The Poor’s Body Parts*, *L.A. TIMES*, Aug. 27, 1992, at A1. Continued improvement in controlling the problem of organ rejection might compound the too-much-choice problem (such as it is) by rendering a market for organs far more effective in saving lives.

which life is saved through the apparent contingencies of wealth or attractiveness and through the vulnerabilities of sellers.

Yet this account reflects only one aspect of a complex inquiry into learning effects. For some, the very perception of preventable loss of life in a nonmarket regime may overwhelm a variety of countervailing impressions.²⁵⁷

3. *Government Payment or Provision*

Consider now a system of government commitment to providing or funding organ transplantations, as with renal disease.²⁵⁸ (This example can also be applied to artificial organ implantation.) Here, we have formally evidenced to ourselves our commitment to lifesaving—there is an official fealty to it. This is so despite the obvious contingencies that remain. Yet this message can easily be overridden if these contingencies are substantial and known to be so. If the resource remains very scarce, medical and other exclusions are likely to be quite expansive, and many patients will be found “too sick” for treatment or too lacking in adequate home support to ensure its effectiveness.²⁵⁹ Still more, the program may deal only with patients needing certain organs (kidneys and hearts, for example). Why should these patients be better off than others needing other organs?²⁶⁰

For individual patients, then, there is no strong assurance of treat-

257. See Epstein, *supra* note 13, at 14 (“Do we want a set of unpersuasive ethical objections to seal the needless death of thousands? Perhaps live organ sales will help. If so, then we should ignore our present squeamishness. Too many lives are at stake to do anything less.”).

258. The Social Security system funds treatment for terminal renal disease—both hemodialysis and kidney transplantation. 42 U.S.C. § 426-1 (1988).

259. See Note, *Scarce Medical Resources*, 69 COLUM. L. REV. 620, 649 (1969); AARON & SCHWARTZ, *supra* note 108. Heart transplantation is now being funded on a limited basis by the U.S. Government. See *Criteria for Medicare Coverage of Heart Transplants*, 51 Fed. Reg. 37,164 (1986), and 52 Fed. Reg. 10,935 (1987) [hereinafter *Criteria*] (specifying criteria for heart transplants—medical condition, family support, etc.); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS* 85-91 (1986) (discussing medical and other criteria, including “lifestyles” that reduce chances for successful transplants, social support networks, etc.).

When new health care funding occurs in certain forms, there may be a narrowing of “exclusion” criteria and an expansion of “inclusion” criteria. The kidney disease program itself may be an example of this: its use has expanded far more rapidly than originally anticipated. See generally SHAPIRO & SPECE, *supra* note 3, at 745-47, and SHAPIRO & SPECE, *supra* note 1, at 289-90.

260. Some courts have ruled that transplantation of organs other than hearts must be funded by states participating in Medicaid, depending on a finding of “medical necessity.” See, e.g., *Pittman v. Secretary, Florida Dep’t of Health and Rehabilitation Serv.*, 998 F.2d 887 (11th Cir.) (holding that state must pay for Medicaid recipient’s liver-bowel transplant), *cert. denied sub nom. Agency For Health Care Admin. v. Pittman*, 114 S. Ct. 650 (1993).

ment opportunities. If all this is widely known and viewed as a disreputable feature of the government program, it is hard to see a clear gain in life-affirming communications arising from it.

The direction of government movement may also affect the reading of the regulatory system. If government is getting out of the business rather than going into it, various supposed gains and losses may be more or less emphasized: each direction highlights different things.²⁶¹ Thus, getting out of the business and allowing matters to be governed by a market may seem more disaffirming of life than simply continuing with a market system. (This is a point that may apply in other contexts involving an act-omission distinction.)

It turns out again, then, that it is hard to trace communicative impacts, and so it is hard to confirm the claim that the contingencies of choice may erode the strength of certain values involved in the choice. (The shadowy existence of a black market for organs also complicates the matter.)²⁶² For all the confusion, however, it seems clear that there are some important differences between reinforcement of a life-ethic through a market and through central direction.

B. *The Artificial Heart*²⁶³

There are different degrees of government involvement in lifesaving, and so different sorts of value communications. It is one thing to provide a national health service or national health insurance to deal with all medical needs. It is another to pay for care "disease-by-disease." It is still another actually to select and exclude individual patients for treatment, whatever the criteria.²⁶⁴ The problems of disease selection and patient selection have led some to argue for government noninvolvement in choosing diseases and patients because of expected negative value reinforcements: the government, in choosing diseases or patients, would be rank-ordering lives and perhaps endorsing or re-

261. Cf. Tversky & Kahneman, *supra* note 97, at 458 ("The experience of a change for the worse may vary if the change is framed as an uncompensated loss or as a cost incurred to achieve some benefit."). Compare Sunstein, *supra* note 5, at 225, 227, 230 (discussing the "endowment effect"—i.e., the effect on preferences of the initial allocation of an entitlement).

262. See Wallace, *supra* note 256, at A1.

263. On the issues concerning development and funding of the artificial heart, see generally INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, *THE ARTIFICIAL HEART: PROTOTYPES, POLICIES, AND PATIENTS* (1991).

264. See Clark Havighurst et al., *Strategies in Underwriting the Costs of Catastrophic Disease*, 40 *LAW & CONTEMP. PROBS.* 122, 134 (1976); *supra* note 17 (discussing Oregon plan).

jecting certain human traits as the basis for awarding continued life. As Clark Havighurst and his colleagues argue:

Because direct government involvement in catastrophic medical care raises the prospect of inordinate spending in very many cases pursuant to the lifesaving imperative, it is arguable that government should seek to remain in the background as much as possible, playing its role in such a way as to avoid the destructive symbolic effect of its identification with specific human suffering. This would mean carefully selecting among a variety of agencies and types of procedures for decisionmaking, deferring as much as possible to nongovernmental action, and giving government a generally low profile.

Our sense is that government ought, if possible, to discharge its responsibilities without placing itself in the position of having to accept apparent responsibility for every delayable death and preventable hurt. Such distancing of government from decisionmaking is directly at odds, however, with a widely held belief that openness, explicitness, and accountability are always virtues which should not be compromised.

Nevertheless, deep governmental involvement may have high costs, including not only potentially excessive dollar outlays but a moral and political toll as well. . . . The broader goal is to help individuals and society cope more effectively with the reality of inevitable death and suffering without holding their government somehow to blame.²⁶⁵

These are important considerations. Suppose, however, that the cat is already out of the bag. We have already responded to the kidney failure drama by funding treatment through social security.²⁶⁶ Many persons are able to formulate or understand the question of why we routinely save kidney disease victims by funding kidney transplants but severely restrict the supply of heart transplants.²⁶⁷ (The fact that kidneys are paired and heart transplantation is more risky than kidney transplantation may not be viewed as a complete answer.) Although the government is not selecting individual patients, it is selecting patient groups. Government inaction may thus be perceived as an act of not-doing; some flowers are watered, others are not.²⁶⁸ If lives are being

265. Havighurst et al., *supra* note 264, at 143-44, 157-58, 178.

266. On the origins of the problem of distributing scarce kidney disease treatment resources, see JAY KATZ & ALEXANDER M. CAPRON, *CATASTROPHIC DISEASES: WHO DECIDES WHAT?* (1975); SHAPIRO & SPECE, *supra* note 3, at 740-872; Sanders & Dukeminier, *supra* note 164, at 360-86. See *supra* note 254 (discussing funding of kidney disease treatment under Social Security).

267. On federal funding of heart transplantation, see generally Criteria, *supra* note 259.

268. See Shapiro, *supra* note 1; see also DANIELS, *supra* note 3, at 227 (observing an inequity between the roughly comparable treatments of renal dialysis and heart transplants and arguing that this effect makes "the public policy decision seem arbitrary and indefensible—*ad hoc* at best"); *id.* at 228 (discussing a possible counter-productive "lesson" that might be learned from denying transplants in isolation from general implementation of the fair equality of opportunity principle").

lost for irrelevant reasons, lifesaving is a contingency, and not very important. The general backdrop of government funding of medical services adds to the aura of culpable failure to act in specific cases. If so, deciding policy disease by disease is not a series of discrete, independent steps.

If government fails to act in the arena of heart disease, then, we have the spectacle of relatively identifiable persons dying whose circumstances do not seem to differ relevantly from others who are saved. Perhaps this helps account for the government's decision to remove the insulating "experimental"²⁶⁹ label from heart transplantation and to provide funding for it through Social Security on a limited basis. The artificial heart has not created this sort of pressure yet, presumably because of its manifest risks and questionable benefits:²⁷⁰ the circumstances are not yet on a par with kidney transplantation or even heart transplantation. Yet a storm broke when Dr. William C. DeVries, a major figure in artificial heart implantation, left a public institution, the University of Utah, to work for the private Humana Heart Institute.²⁷¹ Why so? Did critics see this move from the public to the private as inconsistent with a devotion to noncontingent lifesaving—or at least lifesaving not contingent on market matters?

As we saw, however, commodifying medical services is not without its distinct value reinforcement benefits (as well as certain simple efficiency gains). It reinforces certain aspects of autonomy, for one thing. And a market system does not *on the face of it* exclude people from medical care because of their kinship ties, race, ethnicity, or membership in some group. To the extent that observers believe the market in

269. There are serious issues in determining why distribution of accepted medical therapies should be different from those of experimental therapies, but this problem is left aside here. See generally JOHN F. KILNER, WHO LIVES? WHO DIES? 211-20 (1990) (discussing distribution when resources are experimental); Andrew F. Shorr, *AIDS and the FDA: An Ethical Case for Limiting Patient Access to New Medical Therapies*, 14 INST. RES. BULL. 1 (1992). For an account of distributing experimental gene therapy, see Charles Marwick, "Desperate Use" *Gene Therapy Guidelines Ready*, 269 JAMA 843 (1993) (outlining procedure for expeditious approval of gene therapy for dying patients).

270. See generally Beverly Merz, *Artificial Hearts: An Uneasy Marriage of Machinery and Flesh*, MED. WORLD NEWS, May 27, 1985, at 40.

271. See Matt Clark, *A Surgical Star Jumps Ship*, NEWSWEEK, Aug. 13, 1984, at 65 (quoting Dr. Don E. Detmer, University of Utah spokesperson) ("There is no question that we as a society have decided to put medicine in the marketplace . . ."). Cf. Judith Andre, *Blocked Exchanges: A Taxonomy*, 103 ETHICS 29, 42-43 (1992) (discussing language of sales and asking what has been sold in given transactions—time, effort, ability, freedom).

fact reflects or compounds discrimination based on these traits, however, the message of equality is of course attenuated.

C. *Orphan Diseases*²⁷²

Some disorders are so rare that the "market" for research allocates very modest resources to them. Perhaps this is as it should be. If a dollar spent on research for disease X would help ten persons and a dollar spent for disease Y would equally help only one and the diseases are equally destructive in every respect—including socially—the sensible allocation seems obvious. To illustrate the point, ask what a person behind the Rawlsian "veil of ignorance"²⁷³ would be willing to spend on researching which diseases?

Of course, in real life diseases and research outcomes cannot easily be evaluated in this way, but the private research market (e.g., pharmaceutical company research) and government grant systems are hardly irrational in favoring the many over the few. What special "minority rights" would justify government interference favoring the rarer disease? Indeed, why comply even with private requests for donations to orphan disease research when other donations will help more persons (again assuming equal payoffs)? Is the existing orphan disease program—which authorizes programs to fund development of drugs, medical devices, and medical foods "for rare diseases and conditions"—just a matter of caving in to special interest groups?

Maybe, but we need to look again at the facts of human learning processes to find explanations for what seems to be irrational conduct, and to ask whether in fact it is irrational. There is another perspective on orphan diseases, one that focuses on the appearance of arbitrary "unfairness" in suffering from a disorder that affects few others.²⁷⁴

272. The U.S. government has established an Orphan Products Board. "to promote the development of drugs and devices for rare diseases or conditions," 42 U.S.C. § 236(b) (1988 & Supp. 1992), and has authorized programs to defray various costs in developing drugs, medical devices, and medical foods "for rare diseases and conditions." 21 U.S.C. § 360ee (1988 & Supp. 1992). See generally Veronica Henry, *Problems with Pharmaceutical Regulation in the United States: Drug Lag and Orphan drugs*, 14 J. LEGAL MED. 617, 628-37 (1993).

273. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971). Persons behind the veil of ignorance do not know their personal social standing, abilities, conceptions of the good, risk preference patterns, and various other particular facts about themselves. Nor do they know certain specific facts about their society. *Id.* at 137. They are thus "obliged to evaluate principles solely on the basis of general considerations." *Id.* at 137.

274. Cf. Friedman, *supra* note 28, at 125 ("We often say a situation is unfair, even when there is nobody to blame it on. We say it is unfair when a tornado wrecks one person's house and 'spares his neighbor's.'").

Why should person A, who is as badly off as person B, get nothing just because her disease is rarer than B's? On this admittedly narrow but understandable view, the explanation (not necessarily a justification) for diverting resources seems clearer. We are reinforcing ideas of fairness, equality and community by ironing out nature's random injustices. We are evidencing to ourselves our concern for individual worth.

Yet is it worth it? It is uncertain what the payoff is in trying to reinforce ideas of fairness, equality and community by publicly allocating resources to rare disorders. It is also uncertain what the costs are of repudiating this urge. Human cognitive errors and weaknesses may well be responsible for much harm and should often be resisted. Racial prejudice is one example, a perversion of the inevitable process of thinking in categories. When our actions, however, appear to track common patterns of thinking—our sympathy for the victims of uncommon maladies, for example—it is not so clear what error is, or what measures we should take, if any, to try to move our clumsy cognitive processes toward greater "rationality."

Still, research allocations should be informed by the basic comparisons of research benefits outlined above and comparing these benefits with the benefits and costs of value reinforcement through funding orphan diseases. The mistake is in not walking all the way around the cathedral. Perhaps this is self-induced error—a way of avoiding the hard facts of numbers so that they do not weigh against taking the opportunity to reinforce basic values. This willful blindness phenomenon arises in many contexts.²⁷⁵

*D. Lotteries for Distributing Scarce Medical Resources*²⁷⁶

The domain of principle has not yielded fully satisfactory techniques for distributing scarce medical resources.²⁷⁷ Randomization

275. It turns out that research on certain orphan diseases has aided gene therapy research. Franklin Hoke, *Gene Therapy: Clinical Gains Yield Wealth of Research Opportunities*, 7 THE SCIENTIST, Oct 4, 1993, at 1 (noting that research on rare genetic disorders yields "proof of concept"). On the other hand, gene therapy is itself often directed at orphan diseases. In the aggregate, however, the development of gene therapy techniques that are applicable to a wide variety of disorders affecting many persons carries us out of the classic orphan disease domain. Cf. EVE K. NICHOLS, *HUMAN GENE THERAPY V* (1988) ("Genetic diseases, though individually rare, when taken as a group have a large impact, affecting about five percent of infants in the United States.").

276. See generally BARBARA GOODWIN, *JUSTICE BY LOTTERY* (1992).

277. See generally CALABRESI & BOBBIT, *supra* note 240; SHAPIRO & SPECE, *supra* note 3, at 834-49.

techniques are occasionally discussed as means of dealing with the indeterminacies or unacceptable outcomes of applying substantive principle (e.g., lifesaving contingent on a judgment concerning the patient's merit).²⁷⁸

Suppose, then, we had a lottery for artificial hearts or even donated hearts (assuming better control of organ rejection). When the lottery system speaks, what does it say? It implements and seems to endorse a form of equality of opportunity, although problems in fairly selecting the participants may seriously impair any perceived reinforcement of this form of equality. Does it endorse lifesaving? Only if the lottery is seen as a temporary measure pending an increase in supply? (If the government, for whatever reason, does not want to increase the supply, the lottery may expose this simply by enduring.) Lotteries may overall reinforce the idea of contingency of lifesaving, the contingency resting this time on chance rather than whim or a considered evaluation of individual merit or social worth. If life is important, how can it rest on chance?²⁷⁹ On the other hand, if lotteries are compared to markets or kinship systems, what then? Is the affirmation of life greater, lesser, or different in some qualitative way? As we saw, life may be preserved for different reasons, using different procedures: lifesaving alone does not tell us if "life values" are "impaired" or "reaffirmed."

Do lotteries also represent the abandonment of reason? And if so, does lifesaving in a lottery fail to reaffirm life because lifesaving choices are made "without reason?" Compared to what—merit selection? For some observers, reason itself reveals the indeterminacies of reason and suggests the use of random processes in saving lives. For others, it does seem like the "abandonment of reason," but this can be reconstructed into a more accurate claim: it represents *giving up* on analyzing substantive principle as applied to individuated personal condition, and instead embraces fungibility. Perhaps our general failure to

278. See, e.g., George Annas, *Allocation of Artificial Hearts in the Year 2002: Minerva v. National Health Agency*, 3 AM. J. LAW & MED. 59 (1977); James F. Childress, *Who Shall Live When Not All Can Live?*, 53 SOUNDINGS 339 (1970); see also PAUL A. FREUND, EXPERIMENTATION WITH HUMAN SUBJECTS xvii (1970) (quoted in GERALD R. WINSLOW, TRIAGE AND JUSTICE 103 (1982)) ("The more nearly total is the estimate to be made of an individual and the more nearly the consequence determines life and death, the more unfit the judgment becomes for human reckoning . . ."); WINSLOW, *supra*, at 103 ("On this view, truer testimony to the dignity and worth of each individual's life is borne when human judgment about the relative value of it is kept to a minimum.").

279. In view of Freund's and Winslow's remarks, see *supra* note 278, perhaps the question should be turned around: if life is important, how (in certain cases) can it rest on anything other than chance?

use lotteries²⁸⁰ is explained by our abhorrence of human fungibility—an aversion even stronger than our aversion to choosing among specific persons. Such choices can, after all, be muddied up to avoid the appearance of selection based on human worth assessment. Again, it is not clear what the consequences of conditioning ourselves to accept human fungibility in important matters might be. As we saw, there are aspects of fungibility that promote fairness, equality, and autonomy—and thus some aspects of personhood.

*E. Surrogate Motherhood*²⁸¹

Finally, a word on “surrogate motherhood.” In the most common transaction, a woman agrees to bear a child for a married couple, the husband being the artificial insemination donor.²⁸² The wife is either unable to reproduce, or cannot have a safe pregnancy, or is at risk for transmitting a genetic disorder. Some surrogacy cases involve “gestational surrogacy,” where the woman bears a child who is the genetic offspring of another woman.²⁸³ The whole idea of surrogacy in any form, particularly commercial versions, has been much criticized. What contribution, if any, do the ideas of contingency and social learning make in evaluating surrogate motherhood contracts?

The dominant (but not exclusive) image of human parenthood is the birth of a child to “natural” parents who keep it. A standard exception is adoption, whether by relatives or strangers. In adoption,

280. For examples of apparent medical lotteries, see Lynn Smith, *Rare Treatment for Premature Infants*, L.A. TIMES, July 2, 1985, § V, at 1 (premature baby suffering from respiratory disease syndrome treated with surfactant, found in amniotic fluid of mature fetuses; “[d]octors ‘were literally drawing names out of a box,’ [the father] said. Then one came ‘waving a card saying ‘She’s going to get it! She’s going to get it!’”); Sheryl Stolberg, *A Lottery With Very High Stakes*, L.A. TIMES, Jan. 6, 1994, at A1 (“Two friends united by MS are among patients seeking a scarce but promising new drug. Sharon drew No. 319, Alison 59814. Such inequities frustrate both the lucky ones and those who can only wait and hope.”).

281. For an earlier discussion, see Shapiro, *supra* note 15, at 363-68.

282. See, e.g., *In re Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988) (holding surrogacy contract invalid, but awarding custody to the “hiring” parents, with visitation rights for the surrogate mother).

283. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (upholding a gestational surrogacy contract). See generally Radin, *supra* note 198, at 1925-36; *Colloquy: In re Baby M.*, 76 GEO. L.J. 1717 (1988); John J. Mandler, Note, *Developing a Concept of the Modern “Family”: A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 (1985). See also *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992) (refusal by supposed father to accept baby with severe impairments; later determination that husband of surrogate was the genetic father; cause of action stated by surrogate mother against lawyer and others for negligence in arranging and monitoring the transaction).

whatever money changes hands is ordinarily not counted as profit or benefit—just expense money. Even this exception is somewhat troubling: giving up a child challenges the noncontingency of the obligations of care and affection we think parents owe their offspring, and selecting a child for future care and affection may rest on the child's traits and so also challenges this noncontingency.

Where physical objects change hands for money, we deal in the contingencies of the market. Yet it is one thing that widgets are kept or not kept and something else that a child is kept or not kept.²⁸⁴ To transfer the child in association with receiving money mixes up our paradigms by transferring their elements around—whether we ultimately call it “baby-selling” or not. It suggests an attitude of contingency of care and affection by the birth mother (probably whether she is the genetic mother or not). After all, she is giving up her child for nonstandard reasons. Historically, the main acceptable reasons were being single (and perhaps very young) and/or being unable to care for the child because of disorder, defect, or extreme poverty. Observing the surrogate transaction leads to associating the money exchange with unacceptable contingency of care and affection. Our minds connect and assimilate children to widgets—fungible commodities.²⁸⁵ This seems a special risk for other children of the surrogate mother who see their newborn sibling transferred, and perhaps for the transferred child. Even if we ultimately reject the association as weak, the association is there, and indeed *should* occur at some point to anyone able to discern abstract similarities and differences. Our very *aptitudes*, as well as deficits, create these value reinforcement problems.²⁸⁶

284. Cf. MICHAEL WALZER, SPHERES OF JUSTICE 100-108 (1983) (discussing blocked exchanges—such as the sale of human beings, marriage and procreation rights, love and friendship; what money can buy—the sphere of money). See generally Andre, *supra* note 271, at 38-40, 41 (discussing treating someone as a means only; child who knows she cost more or less than other children); Radin, *supra* note 198, at 1925-36.

The claim that surrogacy transactions in general violate the Kantian injunction against using persons *simply* as a means seems doubtful, particularly when one considers that such transactions involve a network of moral agents and frameworks, but the inquiry is not pursued here. For a brief discussion, see Michael H. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, 28 U.S.F. L. REV. 647, 664-67 (1994). For a discussion of Kant's formula, see generally THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 38-57 (1992).

285. Cf. Shepard, *supra* note 158, at 1322 (“We generalize from one situation to another not because we cannot tell the difference between the two situations but because we judge that they are likely to belong to a set of situations having the same consequence”). But how is that judgment of likelihood itself made?

286. Daston & Gigerenzer, *supra* note 246, at 1094 (quoting MARGOLIS, *supra* note 246, at

This analysis helps explain loose talk of turning infants into “commodities.” Nonenforcement of surrogate motherhood contracts (a regulatory inhibition excepting them from the usual contract rules) avoids associating the status of being a person with the fungibility,²⁸⁷ finiteness, and general unimportance of commercial things.

This appears, however, to be a case where the supposed needs of value reinforcement are not overwhelming. Surrogate contracts ought to be enforced because *on balance* they do not display enough compromise of the ideal of noncontingent affection and respect for persons to justify nonenforcement, given the benefits gained: the formation of a nuclear family embodying traditional parent-child bonds.²⁸⁸ The contracts, at least from that perspective, make vivid the intensity of the surrogate parents’ desire to produce life *and the human relationships generally associated with such reproduction*.²⁸⁹ In that way, the transactions reinforce life-affirming values.

There are, of course, risks other than those involving commodifica-

105) (“[T]he same processes that are responsible for our cognitive successes—our facility in handling patterns in faces, languages, places, and even entirely artificial things like chess and concert music—are also to blame for our cognitive failures.”).

287. Recall, however, the difficulties in interpreting “fungibility”. Being nonfungible—and being a person—are consistent with *certain* aspects of being commodified. *See supra* note 198.

288. There are of course circumstances that suggest morally questionable attitudes in a surrogate motherhood transaction—e.g., a particular surrogate’s dominating desire for monetary gain, combined with a limited sense of responsibility for prenatal care. The extent of this problem is not clear. *Cf. Andre, supra* note 271, at 39 (noting that biological mothers in surrogacy have considered both money and availability of a family that desires and is able to care for child). Some may believe that a custodial mother unwilling to suffer the rigors of pregnancy when she could (relatively) safely do so isn’t sufficiently devoted to motherhood. When a question arose in *In re Baby M* as to how safe it would be for the genetic father’s wife to undergo pregnancy because she may have had multiple sclerosis, the court noted its belief that “[h]er anxiety appears to have exceeded the actual risk.” 537 A.2d 1227, 1235 (N.J. 1988).

289. JEANETTE EDWARDS ET AL., *TECHNOLOGIES OF PROCREATION* viii (1993) (“For many of [the contributors to this book], procreation is not just about how human beings come into being—it is also about how relationships come into being, and relationships that have an influence not just on early life but throughout a lifetime.” (emphasis added)). Of course, this cuts more than one way: the nature of the relationship may prove harmful to some parties in some ways from the outset. *Cf. Sarah Franklin, Making Representations: The Parliamentary Debate on the Human Fertilization and Embryology Act, in TECHNOLOGIES OF PROCREATION, supra*, at 96, 128-29:

[new reproductive technologies produce] “new conceptions of kinship and relations,” [which brings] new ways of understanding relatedness, new implications of relatedness, new joys of relatedness, and new fears about the dangers of relatedness, or of bringing new relations into being.

It is for this reason that a sense of loss, threat and anxiety is so often palpable in the parliamentary debate [in Britain], as in public discourse more widely

Id.

tion and the erosion of noncontingent bonds. For example, an unregulated market in surrogacy—or indeed any assisted reproductive technology—runs some risks of “egalitarian demoralization” arising from limited access. Moreover, where exotic technologies such as in vitro fertilization are used, such a market may appear to elevate a professional elite to positions of substantial power.²⁹⁰ Yet these matters are left aside here.

One problem with decisively refuting the “commodification” argument is that *some* thought is required for observers to see that surrogate parenthood is different from standard commercial transactions.²⁹¹ Most observers do not reflect on all their perceptions and usually do not seek to alter them. It takes cognitive effort to make such revisions, particularly because this may entail identifying and reconstructing our frameworks for perception and evaluation.²⁹²

F. Regulation and the Promotion of Evil

One striking illustration of “regulation as language” concerns programs designed to promote some good or mitigate some risk, but in ways that seem to encourage, further, compound or ratify an evil. Examples include distributing clean needles to addicts (saving their lives at the apparent cost of participation or complicity in illegal drug use) distributing condoms or birth control information to students, using data from unethical experiments or research methods, and using fetal tissue from elective abortions as part of medical therapy or investigation. Paradoxically, the greater the good (other things being equal), the greater the problem of evil. More specifically, the more important the benefit (e.g., saving lives), the greater the demand for it, and the more effective and therefore important the evil becomes. The result is intensified scrutiny of the underlying evil.

It is easy to multiply the examples in a wide variety of public and nonpublic contexts, many far removed from problems of medical or other technology: the use of illegally obtained evidence; the selection of

290. See BONNICKSEN, *supra* note 182, at 86 (“Self-regulation places the IVF elite at the helm, which or may not be in the society’s best interests, depending on the values held by the elite.”).

291. Note the idea of incomplete commodification. Radin, *supra* note 198, at 1933-36.

292. See MARGOLIS, PATTERNS, *supra* note 93, at 122 (observing that entrenched thought and behavior patterns cannot be easily turned off). Of course, they do change as Margolis later points out. *Id.* at 170-71; 172-76 (discussing acquisition of new habits of mind and the discovery and “contagion” of radically new ideas).

criminals or evildoers for rewards or high appointments; permitting such persons to garner rewards of any kind (whether or not directly associated with their criminality or evil). Even matters as superficially innocuous as performing or listening to Wagner's music or watching Woody Allen's movies have generated public disputes.²⁹³

Where biomedical technology is in use, the good-from-evil problem may arise with some frequency, as several of the examples given suggest. Consider the view that it is an evil for certain transactions to take place in the form of market exchange. Examples include providing tissue and organs for transplantation and the transfer of custody of children (as in surrogate motherhood and open selling of children). Whatever good comes of the transaction, then, is tainted: the purchaser-patient is lesser, more venal, for having paid value in this form to save her life. So also is the seller diminished, even if her family is thereby kept off the streets. The nuclear family resulting from a surrogate transaction, as well as from a more overt baby sale, is on this view also tainted.

A comprehensive description or evaluation of this notion of "deriving good from evil" is not needed here. The point is simply that it may be an underappreciated lens through which to try to understand the disputes surrounding certain social practices. In any event, it is just one variable underlying the concept of regulation as communication; investigating the notions of compounding, ratifying, inspiring, or being con-

293. See Robert M. Martin, *Using Nazi Scientific Data*, 25 *DIALOGUE* 403 (1986); John A. Robertson, *Fetal Tissue Transplants*, 66 *WASH. U. L.Q.* 443 (1988); Robert D. Truog & Troyen A. Brennan, *Participation of Physicians in Capital Punishment*, 329 *NEW ENG. J. MED.* 1346 (1993); Richard Bernstein, *The de Man Affair*, *N.Y. TIMES*, July 17, 1988, 6, at 6 (discussing Paul de Man, Ezra Pound, and Martin Heidegger); Henry Chu, *Free Condoms Now Just a Fact of Life at High Schools*, *L.A. TIMES*, July 6, 1993, at B1; Richard Paddock, *S.F. Will Provide Drug Users with Clean Needles*, *L.A. TIMES*, Mar. 16, 1993, at A3; Chuck Philips, *Guns N' Roses to Stick With Manson Song on Album*, *L.A. TIMES*, Dec. 8, 1993, at F1 (song written by Charles Manson); Robin Rauzi, *Love (and Death?) of Woody's Art*, *L.A. TIMES*, June 12, 1993, at F1; Laurence Vittes, *Tour of Duty Never Ends for Mehta*, *L.A. TIMES*, Aug. 23, 1993, at F1 (disputes over Zubin Mehta's playing of Wagner's music in Israel in 1981). Several recent cases reflect various problems in "compounding" evil. See, e.g., *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 112 S. Ct. 501 (1992) (invalidating statute requiring that income of person accused or convicted of crime that is earned from works describing the crime must be deposited in escrow accounts for benefit of the crime's victims and of the person's other creditors); *Commonwealth v. Leno*, 616 N.E.2d 453 (Mass. 1993) (holding that a necessity defense is not available to charge of possessing apparatus for controlled substances for distribution of clean needles to prevent AIDS); *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (App. Div. 1994) (holding that condoms cannot be distributed in public schools over parental objection without an opt-out provision); *Spokane County Health Dist. v. Brockett*, 839 P.2d 324 (Wash. 1992) (holding that needle exchange program is permissible under Washington law).

taminated by evil must be part of a more inclusive moral analysis. The two broad avenues of inquiry in this domain track the common (and somewhat frayed) distinction between consequentialist and nonconsequentialist normative orientations. The opposition to needle exchange and condom distribution often focuses on the risk that the disapproved behavior will increase in incidence because of the learning effects of the public distribution programs—programs that openly acknowledge certain practices and, in a simple sense, further them by providing tools that facilitate the practice by making it safer.

Opposition to use of data generated by Nazi scientists is less forward looking. It is a stretch to think that using these particular data (assuming that they are indeed useful)²⁹⁴ will encourage scientific malpractice. On the other hand, the use of any tainted data may “encourage” future lax practices. The center-stage argument is often that using the fruits of the evil entails one’s complicity in it. In addition, such use insults the victims, and taints or stains the users, beneficiaries, and the resulting good itself.²⁹⁵ Furthermore, as suggested, the greater the good done (say, lifesaving), the worse the problem of evil: its bene-

294. See generally Robert L. Berger, *Nazi Science—The Dachau Hypothermia Experiments*, 322 NEW ENG. J. MED. 1435 (1990) (questioning the value of the data on methodological grounds).

295. On the complicity branch of argumentation concerning fetal tissue, compare James Tunstead Burtchaell, *University Policy on Experimental Use of Aborted Fetal Tissue*, INST. RES. BULL., July-Aug. 1988, at 7, with B. Freedman, *The Ethics of Using Human Fetal Tissue*, INST. RES. BULL. Nov.-Dec. 1988, at 1. See generally James F. Childress, *Disassociation From Evil: The Case of Human Fetal Tissue Transplantation Research*, 16 SOC. RESP.: BUS., JOURNALISM, L. MED. 32 (1990) (critically evaluating complicity argument). For an account of views on the “transmissibility of evil,” see David Gelman, *A Resistance to Reason*, NEWSWEEK, Nov. 29, 1993, at 79 (discussing the “irrational fear of AIDS patients,” and describing implicit beliefs in “sympathetic magic”—the transmission of characteristics—whether moral or physical—on contact.). See also PAUL RICOEUR, *THE SYMBOLISM OF EVIL* 25-46 (Beacon ed., 1967) (discussing defilement—along with the connected ideas of impurity, infection, and stain—and its relation to evil); John B. Pryor & Glenn D. Reeder, *Collective and Individual Representations of HIV/AIDS Stigma*, in *THE SOCIAL PSYCHOLOGY OF HIV INFECTION* 263, 264-66 (John B. Pryor & Glenn D. Reeder eds., 1993) (stigma as social contaminant). Pryor & Reeder note that “[t]he social contamination of a stigma may even spread to objects that are somehow associated with the stigmatized so that the physical possessions of marked individuals also may be viewed as tainted.” *Id.* at 265.

The problem of transmission of evil forms one portion of the familiar problem of state action. For example, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the court found state action where a restaurant that excluded African-Americans was located on public land within a public parking building. It is possible that in some domains of special constitutionally cognized evils—e.g., racial discrimination—the burden of establishing state action is lessened. *Contra* *Jackson v. Metropolitan Edison Co.*, 410 U.S. 345, 373-74 (1974) (Marshall, J., dissenting) (denying that standards for finding state action vary with different constitutional claims).

fits are more powerful and visible, and its importance is enhanced. (Both consequentialist and nonconsequentialist arguments may embrace a form of “balancing” in these domains. Consequentialist arguments must of course address claims about the risk of increasing the incidence of evil or harmful conduct; nonconsequentialist arguments, in some forms, should consider the possibility of reducing the incidence of breaches of duties to prevent harms.)²⁹⁶

It is easy to dismiss various aversions to social or private practices as irrational, perhaps resting on magical beliefs about the “transmission” of evil or dirt. For example, one study reports that some research subjects are reluctant to drink a glass of their favorite beverage after it has been stirred by a new, unused fly swatter. They conclude that a sense of disgust can influence decisions “where people may recognize that they have no rational account for their reaction.”²⁹⁷

Yet if the example is shifted to, say, the use of Nazi data, where there is little chance of encouraging similar experiments or rewarding the original researchers, the sense of transmitting a stain does serve a purpose: avoiding the risk of an incremental acceptance of the evil and a blunting of our sensibilities by accepting the work product of the evildoers.

Of course, this is hardly a knockout argument, and in many cases it seems very weak. Even so, analyzing “association with evil” suggests that many people guard against weakness of will and slippery slopes by

296. Recall once again Nozick’s reference to the “utilitarianism of rights,” *supra*, note 49, and think of a parallel utilitarianism of duties. The idea here is that an increase in the incidence of breaches of duty (not to use drugs) should be compared with the evil of unprevented harm and duties to avoid such harm. Recent work in fact indicates that distribution of clean needles is effective in preventing some cases of AIDS. See, e.g., Philip J. Hilts, *Giving Addicts Clean Needles Cuts Spread of AIDS, U.S. Study Finds*, N.Y. TIMES, Oct. 1, 1993, at A21; John K. Watters et al., *Syringe and Needle Exchange as HIV/AIDS Prevention for Injection Drug Users*, 271 JAMA 115 (1994).

297. See Donald A. Redelmeier et al., *Understanding Patients’ Decisions: Cognitive and Emotional Perspectives*, 270 JAMA 72, 75 (1993):

[A]lmost everyone continues to claim reluctance to drink another glass of their favorite juice into which a dead, sterilized cockroach has been dipped and removed. Under these circumstances, people change the account of their rejection by ultimately concluding that there must be something inherently bad about cockroaches. Yet, one third of these subjects are also reluctant to drink a third glass of their favorite juice after it has been stirred by a brand new fly swatter. Apparently, just the association of fly swatters with an offensive entity, such as a cockroach, accounts for the negative response. Hence, disgust can influence decisions in situations where people may recognize that they have no rational account for their reaction.

Id.

avoidance: foregoing actions thought to teach the wrong things because they link the "clean" with the "polluted."

The point to retain is that we may affect attitudes and dispositions through the operation and observation of highly visible community programs, whether governmental or private.²⁹⁸ Verifying such learning effects seems extremely difficult, and of course does not yield a final normative answer.

VIII. CONCLUSION

The thesis here is simple: count everything that counts. Regulation creates perceptions from which observers may draw inferences, knowingly or not, about the purposes and values underlying government action. Whether we call it "language" or "communication," this process involves learning that reinforces or attenuates values. If regulation as language or communication affects value learning, this is a benefit or cost, depending on what is learned. If it is a benefit, it aids in explaining the existence and persistence of a given regulatory system, and in justifying it as well. Regulation as communication cannot, however, justify all regulation. It may reinforce inappropriate values, and there may be other costs—for example, decreased availability of certain commodities.

This learning perspective also suggests the benefits and costs of nonregulation. If we wish to maintain autonomy through nonregulation, for example, we should consider the value risks that arise because a system of free choice renders certain critical transactions contingent. Lifesaving and other healthcare transactions are major illustrations.

Whether value reinforcement or attenuation is a loss or gain of course depends on normative theory, which may tell us if certain things have been over- or undervalued. Whether, however, one is for enhancement or attenuation of given values, one should be aware of the full range of regulatory effects, and not attend exclusively to questions relating to the production and distribution of goods and services. We ought not cut off inquiry too soon, even if we presumptively favor mar-

298. Cf. BARNETT, *supra* note 19, at 90. ("[L]egal doctrine appears to be a dependent variable, affected by social circumstances but not appreciably affecting them."). This view does not gainsay the suggestions made here. Barnett acknowledges the "symbolic" effects of legal doctrine, and no claim is made here about origins of or revolutions in major social preferences. If something "symbolic" is going on, this can reinforce (or attenuate) such preferences and produce consolidating (or impairing) effects on the behavior of various individuals. Symbolism is not simply a null process.

ket solutions.²⁹⁹ Perhaps we should also take advantage of instructional opportunities and more self-consciously consider the communicative aspects of regulation as part of its purpose. In any event, we are well-advised to note the idea of regulation as communication without having settled in advance all questions of what regulation should be communicating or teaching.

These matters of communicative impact are less well established than economic theories suggesting inefficiencies from certain forms of regulation. The placement of the moral "burden of proof" may thus dictate whether we regulate or not. Should we rely on the well-supported economic theories showing that much regulation is inefficient, or on the more speculative view that regulation is a tool for value reinforcement? Answering that requires normative theory, but the only normative recommendation here is that regulatory theory be more complete. "The conclusions of economics must be linked to the moral commitments that drive public policy."³⁰⁰ Despite the possibility of "observer effects" and the risk of reinforcing the idea of human manipulability, we may wish to include the learning (and other) effects of regulation in our assessment of it. It is not irrational to take such speculation seriously if it is informed by plausible models such as learning theory, even though their application is at a high level of generality.³⁰¹

299. Cf. Michelman, *supra* note 10, at 34 (arguing that those committed to private property should nevertheless keep investigating the matter when faced with matters that seem to call for correction).

300. Hausman & McPherson, *supra* note 6, at 673.

301. Cf. PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW 20 (Kenneth R. Foster, David E. Bernstein & Peter W. Huber eds., 1993) (citing D. Savitz et al., *Scientific Standards of Criticism: A Reaction to "Scientific Standards in Epidemiologic Studies of the Menace of Daily Life"* by A.R. FEINSTEIN, 1 EPIDEMIOLOGY 78 (1990)):

Some controversies described in this volume took years to resolve; others continue after years of investigation with no certain prospects of resolution. Scientists view ambiguity simply as an invitation to further study.

The problem is with the use of science in human affairs and the law. Juries and policy-makers must decide on the basis of ambiguous scientific (or pseudoscientific) data, often in the face of great public concern. Most scientists would agree that, depending on the circumstances, policy makers might properly take action even though the scientific evidence about a risk is incomplete. In the words of Savitz et al. . . . : "Physicians and policy makers should consider both the costs and benefits of actions, bearing in mind the uncertainties in causal inference and the impossibility of perfect decision rules.

Id. The editors conclude, as they must, that "[i]n the end, phantom risk is a problem of the law and not science." *Id.* at 443. And, of course, of moral theory also.

The problem of uncertainty in the verification of broad social-scientific claims is sometimes explicitly addressed in judicial opinions. Recall the problems of (dis)confirming the risks of ob-

scenity. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court deferred to Georgia's judgment that there was a connection between obscene material and antisocial behavior. Because obscenity is said by the Court to be categorically excluded from the domain of the First Amendment, the rational basis test applied. *Id.* at 60-61. *See generally* Schauer, *supra* note 235, at 761, 760-770 (discussion of acting on "some" scientific evidence and on "non-scientific" evidence in asserting a possible causal relationship between exposure to favorable depictions of sexual violence and increased acts of sexual violence).

See generally Sunstein, *supra* note 1, at 823-24 ("A society might identify the kind of valuation to which it is committed and insist on that kind, even if the consequences of the insistence are obscure or unknown. . . . I do not claim that the expressive effects of law . . . are decisive or that they cannot be countered by a demonstration of more conventional bad consequences.").