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Dissecting the Two-Handed Lawyer: Thinking Versus Action in Business Lawyering

Jeffrey M. Lipshaw*

Business clients sometimes refer derogatorily to their “two-handed” lawyers, implicitly distinguishing between the thinking that leads up to a decision and the decision itself. A “two-handed lawyer” is one who can analyze a problem on one hand and on the other hand, but tosses the actual decision back to the client. The observation invokes something fundamental about objective information, subjective judgment making, and the commitment to action. “Thinking like a lawyer” is a prototype of the rationally analytical mindset residing at one end of the mental continuum, and the entrepreneur’s impatience with allocating the risk of failure is a prototype of the commitment to action residing at the opposite end. If leaping is the metaphor for the business decision, then the systematic and dispassionate “two-handed” assimilation of data through rational analysis—the lawyer’s stock in trade—plays a crucial role. The leaper uses that analysis to assess distances and capabilities. But the decision to leap is something quite different. The leaper’s subjective experience of the “aha” moment of a business decision (or any decision, even when made by lawyers) defies scientific reduction. It is really only accessible through the subjective lived experience of the decision-maker. Deciding is more like action than thought.

*In his iconic *The Reflective Practitioner*, the late Donald Schön criticized a mode of thinking he called *Technical Rationality*. Prototypical legal analysis is an exemplar of Schön’s *Technical Rationality*, applied methodically and systematically as a means of helping others to understand their circumstances and to optimize their positions in light of risk and uncertainty. Prototypical entrepreneurs and investors, however, are obliged to decide and to act. The mental process that leads to action is deeply subjective, personal, intuitive, and often *ad hoc*. Understanding that in difficult cases it is possible to offer as many reasons for as against the proposed action, the most effective business lawyers do not merely analyze and offer “two-handed” alternatives. Instead, they put themselves in the position of the decider and understand what it means to take the leap of a business decision. This article is a reflection on the reasons for lawyerly “two-handedness” and some preliminary thoughts on overcoming it. The*

* Associate Professor, Suffolk University Law School. The author would like to thank Andy Perlman, Nancy Rapoport, Sean O’Connor, Michael Madison, Joan Heminway, Usha Rodrigues, Ian Weinstein, and Brian Bix have provided helpful comments. Larry Kramer and Paul Gowder listened to me describe the thesis and pushed back thoughtfully. I also appreciate the patience of the attendees at a Pace University Law School faculty workshop and a 2012 Law & Society Association panel on entrepreneurship.

ffective toolkit for getting beyond rational analysis to action includes attributes such as epistemic humility, epistemic courage, self-awareness, and the willingness to accept responsibility for the consequences of one's decisions.

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I. INTRODUCTION

As a lawyer, a professor, and a former business executive, I am fascinated by how lawyers and their business clients approach the moment in the decision-making process when analysis needs to end and action needs to be taken. My interest is in those nuanced before-the-fact judgments often required of transactional lawyers and counselors—where the facts are fluid, directorial control is limited, and consequences are uncertain.¹ Do we buy or not? Do we invest or not? Do we file a lawsuit or not? Do we settle or not? The stereotypical reaction of business people is that their lawyers are far more adept at analysis than decision. Explained one corporate counsel with regard to his outside counsel, using an oft-heard colloquialism, “The thing I hate most is a ‘two-handed’ lawyer, one who says ‘you could do this, but on the other hand . . .’ I want a lawyer who understands what I need and has a point of view that helps me come to a conclusion. I’m not looking for more problems.”²

This is not a critique of “thinking like a lawyer” per se, because the difficult

1. I am not speaking here of after-the-fact backward-looking judgments made by judges or jurors within the artificial construct of litigation theater. I do not mean to suggest that those are easy, either theoretically or practically, and an implication that they are categorically distinct from those I discuss here is undoubtedly overstated. The literature on the application of rules or principles to antecedent fact situations for the purpose of reaching an adjudicative outcome is too rich for fair summary here. Examples include ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND LIFE* (1991); STEVEN L. WINTER, *THE CLEARING IN THE FOREST: LIFE, LAW, AND MIND* (2001); and Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000). See the recent comparison of rule-based decision-making versus the application of virtue ethics in Frederick Schauer, *Must Virtue Be Particular?*, in *LAW, VIRTUE AND JUSTICE* 265 (A. Amaya & H.L. Ho eds., 2013).

Nor do I want to understate the role of forward-looking judgment in litigating and trying cases. There lawyers are authors and directors, constructing stories out of a fixed past according to prescribed formal and substantive motifs, assigning roles to the actor-witnesses, and seeking to induce the adoption or suspension of belief in the audience of jury or judge. This also requires tough decisions under substantial uncertainty. For example, we took a chemical patent infringement case to trial once, and one of the potential jurors was a chemist from a large chemical company, and likely to be a substantial influence in deliberations. Do you keep him on the jury or not? Do you call a shaky witness or not? Do you ask the question for which you do not know the answer or not? As a criminal defense lawyer, do you have your client take the stand or not? As a personal injury defense lawyer, do you respond to the plaintiff’s damages case or not? The analogue to my thesis about the interaction of information, judgment, and action in the litigation context would be the relationship between, for example, jury selection consultants now plying their services and trial lawyers who might act on that research.

2. Tom Phillips, *Talking Shop: Leon Shelley, Westfield Shoppingtowns*, *THE LAWYER* (Mar. 16, 2009), <http://www.thelawyer.com/talking-shop-leon-shelley-westfield-shoppingtowns/137153> article. For a sampling of other references to the “two-handed lawyer,” see also D. Michael Risinger & Lesley G. Risinger, *Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y. L. SCH. L. REV. 869, 891 n.66 (2012); Craighton Goeppele, *Second This! A Look Back at My Secondment*, 17 BUS. L. TODAY 31, 32 (2008); Ronald W. Davis, *Antitrust Analysis of Mergers, Acquisitions, and Joint Ventures in the 1980s: A Pragmatic Guide to Evaluation of Legal Risks*, 11 DEL. J. CORP. L. 25, 51 (1986); David Walk, *Choice of Law, Punitive Damages, and Harry Truman*, *DRUG & DEVICE LAW* (Feb. 17, 2010), <http://druganddevicelaw.blogspot.com/2010/02/choice-of-law-punitive-damages-and.html> (attributing the “one-handed/two-handed” distinction to a comment Harry Truman made about economists).

question of how our minds deal subjectively with the objective data of the world affects analytical professional minds of all stripes.³ I used to participate as both lawyer and business executive on corporate management teams that made these kinds of important decisions about business strategy and tactics.⁴ These were the heady days of “total quality,” “statistical production control,” and “lean production.” In the business environment that followed the debunking of traditional mass production “command-and-control,”⁵ my enlightened operational colleagues no longer relied on mere intuition but on data. I was sure that making decisions using evidence was superior to ignoring the evidence and relying on preconceived notions, ideology, or even conventional wisdom.⁶ Yet I also sensed the pendulum had swung too far, and that there was something missing at the heart of data-driven management.

Smart people want to think that more information, more data, and more disclosure produce better decision-making. That seems so obvious, *ceteris paribus*, as to be unworthy of further comment. Mere information, however, is at least two orders removed from decision and action. First, we have to analyze the information. I am sure we are incapable of stepping away from ourselves and letting data magically dictate a decision. Kant observed that “thoughts without content are empty; perceptions without concepts are blind.”⁷ In other words, if all you have is a coherent theory, but it fails to correspond to the objective reality, then the theory is of little value. On the other hand, a mass of data, even if incontrovertibly objective, tells us nothing without a subjective mind that classifies and

3. Based on little more than my observation, I am willing to assert this is a prevalent problem for all specialized functions, like human resources or finance or environmental affairs, which serve businesses. It did not surprise me, when I was talking about the thesis of this paper with a friend who is a toxicologist recently retired after thirty-seven years with a major international chemical company, that he had the same experience over the course of his career in making business decisions that involved toxicological issues.

4. My brief was not merely to assess the legal implications of what we were deciding, even though that was part of my job. Like most in-house lawyers who are part of a team running a business, I was always wearing two hats.

5. For the classic exposition of the difference between lean production and mass production, see generally JAMES WOMACK, DANIEL T. JONES, & DANIEL ROOS, *THE MACHINE THAT CHANGED THE WORLD* 21-69 (1990).

6. For a recent taste, see JEFFREY PFEFFER & ROBERT I. SUTTON, *HARD FACTS, DANGEROUS HALF-TRUTHS & TOTAL NONSENSE: PROFITING FROM EVIDENCE-BASED MANAGEMENT* 3-6 (2006) (attributing Cisco’s unusually successful track record in digesting acquired companies “without heartburn” to its “systematic examination of evidence about what went right and what went wrong in other companies’ mergers”).

7. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 193-94 (Paul Guyer & Allen Wood trans., Cambridge Univ. Press 1998) (1781). I have altered the Guyer & Wood translation in accordance with my view that “intuitions” in their translation refers to perceptions or “sensible intuition,” and not to intuitive judgment, as we would use the term. *Id.* at 193. The original German of this famous phrase is “Gedanken ohne Inhalt sind leer, Anschauungen ohne Begriffe sind blind.” Guyer and Wood have translated the word “Anschauungen” as “intuition,” but my understanding is that it would be equally correct to translate it as “perception.” Indeed, other translators have done so. See JOHN ALEXANDER SELBIE & LOUIS HERBERT GRAY, *ENCYCLOPAEDIA OF RELIGION AND ETHICS: VOL. IX, MUNDAS-PHYRGIANS* 722 (1917).

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puts order to the data.⁸ The old school wisdom may have had both outmoded business concepts and inaccurate or incomplete data, but it was inconceivable that the new school could be making things better merely by the assimilation of better data. There had to be new concepts as well that the new school theorists were using to organize the data. To paraphrase Kant, subjective judgment without objective data is empty; objective data without judgment is blind.

Second, we have to decide on a course of action and then act in accordance with the decision. Even exquisite judgment based on keen analysis is not the same thing as the commitment to action. My purpose here is to consider why the nature of thinking like a lawyer lends itself to “two-handedness.” It is not a criticism of the lawyer’s reflective or deliberative stock-in-trade, but an intense reflection on the difference between thinking and acting, leading first to the conclusion that deciding is more like acting than thinking, then to a consideration of some implications of that resemblance.⁹ I thus explore the relationship of rational analysis—both objective data and the subjective judgments we make about the data—and the commitment to acting on that analysis. In his iconic *The Reflective Practitioner*, the late Donald Schön criticized a mode of thinking he called Technical Rationality.¹⁰ In law and regulation, this mode of thinking is precisely the objective, rational, and reductive analysis to which legal science has aspired for over one hundred years. If leaping is the metaphor, then the systematic “two-handed” assimilation of data through rational analysis—the lawyer’s stock in trade—plays a crucial role. The leaper uses that analysis to assess distances and capabilities. But the decision to leap is something quite different. The leaper’s subjective experience of the metaphoric weightlessness at the moment of a business decision (or any decision, even when made by lawyers) defies scientific reduction. It is really only accessible through the subjective lived experience of the decision-maker. In short, deciding is more like action than thought.

8. For an accessible summary of Kant’s view that mere observation does not lead to the generation of hypotheses, see KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 249-61 (1963).

9. In a conversation that had nothing to do with this paper, an executive search consultant, somebody in the business of recruiting people who make decisions, pointed out something that had not previously occurred to me: the word “decide” has its root in the Latin for “to kill,” as in to kill off alternatives. Indeed, he is right. My dictionary says the following with respect to the word itself: “<L *dēcidere*, lit., to cut off, equiv. to *dē-* DE- + *cidere* (comb. var. *caedere* to cut); see SCISSORS.” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 374 (1971). With respect to the root –CIDE, the etymology is starker. It is “a learned borrowing from Latin meaning ‘killer,’ used in the formation of compound words: insecticide. [late ME < L –*cīda* cutter, killer, equiv. to –*cīd-* (comb. form of *caedere* to cut, kill) + *a* –ER¹].” *Id.* at 266. This is certainly consistent with the metaphor of decision as action.

10. See generally DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1985).

Something fundamental about different mindsets is going on, of which lawyers, on one hand, and business decision-makers (such as entrepreneurs), on the other, are prototypes. It is hardly surprising that legal education, with its emphasis on objective after-the-fact judgmentalism, finds a sympathetic partner in prediction-seeking social science, whether of the rational actor or more nuanced variety. Why? Because it is exactly what lawyers' lawyers, whether transactional or litigative, are supposed to do: predict the legal effect of actions in terms of their likelihood of being deemed, after-the-fact, the proximate cause of something bad or good. Prototypical legal analysis is an exemplar of Schön's Technical Rationality, applied methodically and systematically as a means of helping others to understand their circumstances and to optimize their positions in light of risk and uncertainty.

Prototypical business decision-makers, however, are obliged to decide and to act. The mental process that leads to action is deeply subjective, personal, intuitive, and often seemingly ad hoc. Not surprisingly, these mindsets can be ships passing in the night. My suspicion for a long time has been that lawyers engage in a form of naïve realism or attribution error¹¹ when encountering dealmakers, entrepreneurs, and business people generally. If you look at your business client as a black-box monad, you are likely to attribute your own affective experience (or lack thereof) to the client's motivations or concerns without considering that the inner experience and circumstances of the client are significantly different than your own. In other words, our job as lawyers is to explain and blame (in retrospect) the causes of the uncontrollable and unpredictable, or to use some legal science prospectively so as to avoid the circumstance in which our clients might be the objects of that after-the-fact blame.

Compare legal and business perspectives in very early stage investing, for example. The almost purely business issues include things like pre-money valuation,¹² how extensively the investor will participate in management of the enterprise, and the time the investor expects to exit (i.e. cash out the investment) by way of IPO or acquisition. A more mixed law and business issue would be something like the conditions under which the investor may unilaterally force an exit, but the drafting of such provisions is routine, and the real issue is whether the right will exist or not. Much of the lawyers' wrangling is over matters that are of little present concern to the entrepreneur because they are about what to do and how to allocate the pain if the venture has limited or no success. These matters include the representations and warranties and the anti-dilution clause in the term sheets. And when the visionary entrepreneurial client is wholly uninterested in the allocation of the risk of failure, it must be because she is just weird, flighty,

11. See *infra* note 25.

12. In venture capital lingo, the "pre-money" valuation is the company's market value as determined by the investor before it invests.

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unorganized, naive, ethereal, or whatever.

What often passes for interdisciplinary Technical Rationality when legal theory intersects with business is economic science, whether of the rational actor or behavioral variety. Even behavioral economics, however, with all of its insights about the mental processes people actually seem to employ, is of limited value in understanding the lived experience of the business decision-maker in the throes of the decision process. In the balance of this essay, we as lawyers, legal educators, and students will engage together in a personal reflection on the decision-making process but *not* as Technical Rationalists. The reason for this particular approach is that, in my long experience as an outside lawyer and the inside general counsel to very large businesses, the best business lawyers understand in difficult cases it is possible to offer as many reasons for as against the proposed action. They do not merely deliberate and offer “two-handed” alternatives. Instead, they put themselves (at least mentally) in the position of the decider and understand what it means to take the leap of a business decision.

In Part I, I discuss the limits of the objective approach to decision-making that grows out of behavioral economic insights. That approach predominates not only in the legal thinking about decision-making, but in business and management theory as well. It is now largely beyond dispute that people fall victim to regularly observed heuristics and biases that lead to less than fully rational decision-making.¹³ I argue that these applications of behavioral economics in law and business still fail to come to terms with subjective decision-making. They necessarily require an objective foundational fulcrum, namely, someone else’s *a priori* normative assumption of what constitutes rational behavior.

I am instead asking you, the reader, to reflect about what goes on, internally or subjectively, when *you* have to decide. In Daniel Kahneman’s terminology, if *you* apply the regularities of behavioral economics to *yourself* as a matter of what he calls “slow” System 2 thinking, that is, assess *your own* heuristics and biases created by your “fast” System 1 thinking, I have no doubt that you may well achieve far deeper levels of reflection.¹⁴ Kahneman’s theoretical model of thinking is itself a product of Technical Rationality. But there is no technical solution

13. An exhaustive work on the subject as it relates to the legal profession is PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* (2010). Were I to offer a course on the subject of judgment and decision-making for lawyers, I would gladly use this masterful treatment as a text; nevertheless, it fully supports my assertion about the limitations of behavioral economics, as it too fails to come to terms with the subjective experience rather than the objective analysis of decision-making. Another fine treatment of heuristics and biases in the lawyer-client counseling relationship is DAVID A. BINDER, PAUL BERGMAN, PAUL R. TREMBLAY, & IAN S. WEINSTEIN, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH*, 431-40 (3d ed. 2012).

14. DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 20-24 (2011). I realize what follows may have an

to our own personal de-biasing, even when armed with as powerful a model as Kahneman provides.

In Schön's terminology, the rigor of Technical Rationality works for problem solving, but the practitioner's *problem setting* precedes problem solving. The first task in problem setting is the sorting out of the real world mess to determine which technically rational solution works best. It requires the kind of reflection that mere rationality (even Kahneman's System 2 "slow" thinking) can turn quickly into an infinite regress. My discussion will not be a criticism of objective behavioral science (or any other aspect of Technical Rationality) as much as a dissection of its inherent inability, because of this regress, to provide the subjective decision-maker with the means to choose a rule of action in the moment of that particular decision. The disclosure scheme of the Securities Act of 1933, whereby potential investors purportedly get the information they need to make a rational decision, is a prime example. Neither more information by way of disclosure nor more analysis gets us out of that infinite regress of rational thinking. If we do engage in reflection before action, we must simply choose a rule of action and act.¹⁵ Not surprisingly, the empirical data on disclosure remedies is that they do not seem to cure the so-called "bounded rationality" that is a tenet of behavioral economics.

In Part II, I explore the limits of the application of rational thought, something that is the lawyer's stock in trade, to the objective data of the world. I choose to focus on investment and entrepreneurial decisions. It would not be a stretch to suggest sophisticated investors understand that the market is a system operating under such a complex array of *causal* laws that their operation is beyond the ability of human beings to divine.¹⁶ Nevertheless, under a variant of a thought experiment known as a Newcomb problem, such investors or entrepreneurs might well simultaneously decide to act in a way that is consistent with an effort to beat the market. Usually this occurs when they rely on their own or their advisers' past success as a predictive indication of future success, despite the truism that past success is not a predictor, much less a guarantee, of future success.

air of impertinence. Professor Kahneman is a Nobel Prize winner, and I am merely a lawyer-turned-teacher. As I read his book, I noted how often I agreed with his observations and admired his insights. In particular, I believe he is making a case for exactly the kind of epistemic humility I advocate here. A prime example is his assessment of "many people who 'knew well before it happened that the 2008 financial crisis was inevitable.'" His deconstruction of what it means for someone to say they "knew" something about an uncertain future when they turn out after the fact to be right is profound. "What is perverse about the use of know in this context is not that some individuals get credit for prescience that they do not deserve. It is that the language implies that the world is more knowable than it is. It helps perpetuate a pernicious illusion." *Id.* at 201. Nothing here is really a criticism of the work. It is my attempt to struggle with the questions, perhaps unanswerable, that he leaves unanswered.

15. Brian Bix reminds me that it begs important questions of philosophy to assume that one has or should have a "rule" prior to action. Hence, I have limited this to instances of explicit reflection.

16. The most popular conception of this view is the "random walk," popularized by Burton G. Malkiel in his book *A RANDOM WALK DOWN WALL STREET* (1973). The (controversial) point is that stock prices are not predictable, any more than a drunkard's next step is predictable. See generally LEONARD MLODINOW, *THE DRUNKARD'S WALK: HOW RANDOMNESS RULES OUR LIVES* (2008).

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I consider ways in which lawyers might grapple with the limits of rationality from the inside out when it comes to counseling or regulating others' decisions to invest or to commit to a business. In other words, objective knowledge is something categorically different from subjective choice. Over the last one hundred years, philosophers have suggested two different basic epistemologies, one of which demands that we engage with the world scientifically and objectively, and the other of which demands that we face the world critically and subjectively. The former is positivistic, technical, and rational; the latter disdains rationality as the basis of choice. The two epistemologies rarely cross paths in the philosophical literature, but I have seen them clash in the real world. "Paralysis by analysis" is the fundamental source of the folklore that lawyers are the "Vice Presidents of 'No.'"¹⁷ Donald Schön, himself a philosopher, began a contemplation of real world implications of this epistemological divide. I want to expand it for lawyers and business people. Doing any business well involves something more than objective knowledge. In the first instance, it requires respecting and incorporating the best rationality can hope to provide about what is real in the objective world. The effective practitioner recognizes, however, that rational assessment of information can only go so far. Sooner or later, there is a point of decision. Then we act.¹⁸

In Part III, I consider some of the implications of the differences among objective knowledge, subjective decision, and the commitment to action, particularly for lawyers who counsel in the context of business decisions. The point here is not to argue against the value of human rationality, but only to take our lawyerly faith in it down a peg when it comes time to translate the objective analysis to

17. "Business attorneys are often considered the 'vice-presidents of No,' says Jeffrey A. Sonnenfeld, associate dean of executive programs at Yale School of Management." Mike France, *A Compelling Case for Lawyer-CEOs*, BUS. WK., Dec. 13, 2004, at 88. "The tension between lawyers and business people is part of the folklore. Lawyers complain that business people do not plan carefully enough against future contingencies; business people complain that lawyers' caution interferes with valuable deals." Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW.U. L. REV. 91, 126 n.102 (2000) (hereinafter "Eggleston, et al."); see also JAMES C. FREUND, ANATOMY OF A MERGER 4 n.1 (1975) ("A recent advertisement in the Wall Street Journal for a book entitled WINNING THROUGH INTIMIDATION contained the following text: 'Have you ever had a deal blow up solely because of an attorney? . . . [Y]ou must face the reality that attorneys have been, are, and, unfortunately, probably always will be a major obstacle in just about every significant business transaction that takes place . . . [Y]ou *must* develop specific techniques . . . for protecting your flanks from the deal-killing expertise of the other side's attorney.'").

18. An experienced criminal defense lawyer pointed out to me, in connection with this particular distinction, that the practice of making evidentiary objections in court was far more akin to System 1 to System 2 thinking. That seems right to me. See Scott H. Greenfield, Comment to Jeff Lipshaw, *Deciding Whether the Best Lawyers Have the Most Excellent "Slow Brains" Takes Something Other than a Slow Brain*, THE LEGAL WHITEBOARD (Feb. 11, 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2013/02/deciding-whether-the-best-lawyers-have-the-most-excellent-slow-brains-takes-something-other-than-a-s.html#comments>.

subjective decision and then to action. The first matter, then, is coming to terms with the reality that the ability even to hear our clients is affective rather than cognitive. In other words, the state of mind necessary to set the problem appropriately precedes analyzing the situation rationally (or “slowly”) to solve it. Wisdom may end in reason, but it begins in a kind of epistemic humility.

The second matter is to consider how analysis itself, conducted rationally, can sometimes lead the analyst to believe two contradictory propositions (as in the Newcomb problem). This is a variant of what the philosophical and psychological literature refers to as the paradoxical phenomenon of *self-deception*. For lawyers, it seems to me, self-deception is a matter of giving in to self-interested beliefs combined with the power of rationality that powers the justification of those beliefs. How do you fight that one-two punch of motivation and reason? I suspect this too involves reflection that begins with a kind of humility about what we know and a question of our own motives. It is self-awareness, but again, I mean by that more specifically an emotional state that precedes and permits reflection.¹⁹

Finally, I consider the relationship of analysis and action. Information and rational analysis only go so far. Even if one flips a coin, the commitment to proceed in accordance with the flip is more akin to an act than a thought. Acting, unlike mere thinking, entails “epistemic courage.” We live and decide in a one-way arrow of time divided by the moment of decision. If you are a leaper, you stand up for what you think you know, and take responsibility for the consequence of your act of leaping without after-the-fact re-creations of the reasons for the action. It is something business lawyers need to understand about the limits of dispassionate two-handed advice.²⁰

II. BEHAVIORAL SCIENCE, DISCLOSURE REMEDIES, AND INNER EXPERIENCE OF DECISION-MAKING

A. The Objectivity of Behavioral Science

As lawyers, we counsel actors. We take account of information and organize it rationally, usually laying out alternatives and predicting legal consequences if the actors act in accordance with the alternatives. Generally speaking, however, it is the actor who must commit to action and then act. We are on the outside giving what seems to be objectively rational advice. The question is whether the decision-making actor, looking at that advice from the inside out, will be capable

19. For a discussion of the role of self-awareness in mediating difficult issues of ethics in the corporate setting, see Barry Castro, *Knowing Ourselves*, 4 BUS. ETHICS Q. 181 (1994).

20. I do not know how to teach epistemic humility and epistemic courage. I think, perhaps, we can create educational environments in which students would come to experience these virtues. That is the subject of another essay. Jeffrey M. Lipshaw, *What's Going On? The Psychoanalysis Metaphor for Educating Lawyer-Counselors*, 45 CONN. L. REV. 1355 (2013).

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of an equivalent objectivity, even if he understands the heuristics and biases to which behavioral economics predicts he will be affected. The answer, I contend, must necessarily be “no.”

Behavioral economists use rational thought to make lawlike predictions about what appears to be the irrationality of others. They study the seemingly poor choices other people make instead of the choices objective and rational process would dictate.²¹ It is an assessment of rationality from the outside in. For a third party observer of the choice to suggest a remedy for the apparent irrationality, she must assume a base rationality from which the subject of the observation has varied. Moreover, the third party observer has to assume that what she believes is rational is not itself the product of heuristics and biases that cause others not to choose rationally. Indeed, trying to assess one’s own rationality without such an assumption would lead to an infinite regress under which one could never be sure that any conclusion about anything was something other than the result of one’s own heuristics and biases.²² As I apply this to my experience of judging other people’s judgments, it is easy for me to tell you how to go about de-biasing yourself. Try de-biasing yourself, however. If you have ever been caught on the horns of an important dilemma, you will know implicitly it is another thing altogether, in the moment of judgment that is the leap from information to action, to sort out your own biases and heuristics as though you were another consciousness observing yourself.²³ Indeed, the behavioral experiments show that people are willing to attribute bias to others based on abstract theories of bias while using their own internal reflection to conclude they themselves are not biased.²⁴ My intuition is

21. Daniel Kahneman’s own definition of rationality as coherence or internal consistency supports this. His argument characterizes “rationality as coherence,” demanding a consistent adherence to logical rules, is simply inapplicable to the operation of the human mind. KAHNEMAN, *supra* note 14, at 411. His point is well taken: “Humans are not well described by the rational-agent model.” What is implicit in his observation is that System 1—“thinking fast”—and System 2—“thinking slow”—are both theoretical models of mental activity. I have no doubt Kahneman would agree that a theory of the mind—itsself a product of System 2 thinking—needs to be both rational under his definition of internally consistent *and* correspondent to the observed data. As Robert Nozick observed, rationality in the sense of principled thinking, even in pursuit of its own biases, is still the best means there is of any hope at all of seeing the world in a less biased way. NOZICK, *infra* note 76, at xii-xiii. It is Kahneman’s rational System 2 thinking about System 1 thinking that is the basis for his groundbreaking insights.

22. An example of a sophisticated application of behavioral economics to a real problem was the assessment of manufacturer manipulation of consumers’ perception of products for purposes of proposing a different product liability standard. The authors recognized that the objective economic model needed to incorporate a dynamic account of certain actors’ recognition of other actors’ heuristics and biases; as such it attempted to “unravel the motivations and impulses lying *behind* such behavioral phenomena.” Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 638 (1999). Even that, however, was not an attempt to assess the inner experience of the consumer making the decision.

23. BINDER, ET AL., *supra* note 13, at 435 n.52.

24. Joyce Ehrlinger, Thomas Gilovich, & Lee Ross, *Peering into the Bias Blind Spot: People’s Assessment of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1 (2005). There is some

that good judgment requires engagement with this process of figuring out whether one is fooling oneself from the inside out, and not just the outside in.

Such engagement is more easily proposed than done. Is it possible to believe you are objective when you are not? Is it possible to believe you can assess your own objectivity?²⁵ This is indeed a conundrum with which even the Nobel laureate²⁶ father of behavioral economics, Daniel Kahneman, still struggles, describing confidence in one's own judgment as the "illusion of validity."²⁷ And he still has no good answer for the struggle, other than to recognize that it is easier to recognize others' cognitive errors than one's own.²⁸ Here I challenge our fixation on objective rationality, whether bounded or unbounded, and confront from the inside out (as it were) the ultimate and irreducible mysteries of subjective judgment. A rational account of rationality that fails to account for the paradoxes to which subjective rationality can lead dances around, or ignores or defers the hardest possible questions of judgment. With the utmost due respect for Kahneman's ground-

experimental evidence that lawyers are less affected than clients by framing, anchoring, and equity-seeking effects when it comes to assessing options in litigation. See Chris Guthrie & Russell Korobkin, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 113 (1997).

25. The behavioral scientists describe a phenomenon they term *naïve realism*, "the conviction that one perceives objects and events 'as they are'—in other words, that there is an objective reality to which one's perceptions correspond in a more or less one-to-one manner . . ." Emily Pronin, Thomas Gilovich, & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self versus Others*, 111 PSYCHOL. REV. 781, 783 (2004). This illusion of objectivity is the basis for attribution error, in which people tend erroneously to misinterpret behavior as motivated by a person's fundamental characteristics (or lack thereof) rather than the circumstances in which the other person finds herself. See Leaf Van Boven, Akiko Kamada, & Thomas Gilovich, *The Perceiver as Perceived: Everyday Intuitions about the Correspondence Bias*, 77 J. PERSONALITY & SOC. PSYCHOL. 1188 (1999). I think this naïve realism and attribution error occasionally affects legal academics studying what lawyers and business people actually do. See *infra* note 56 and accompanying text.

26. More precisely, the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel, awarded in 2002. *All Prizes in Economic Sciences*. NOBELPRIZE.ORG (Jul. 14 2012), http://www.nobelprize.org/nobel_prizes/economics/laureates/.

27. Kahneman describes what makes this an illusion. "The confidence we experience as we make a judgment is not a reasoned evaluation of the probability that it is right. Confidence is a feeling, one determined mostly by the coherence of the story and by the ease with which it comes to mind, even when the evidence for the story is sparse and unreliable." Daniel Kahneman, *Don't Blink! The Hazards of Confidence*, N.Y. TIMES SUNDAY MAGAZINE, Oct. 23, 2011, available at <http://www.nytimes.com/2011/10/23/magazine/dont-blink-the-hazards-of-confidence.html>, adapted from KAHNEMAN, *supra* note 14.

28. As Kahneman acknowledges on the penultimate page of his book, he did not intend it to be a "how to" for decision-makers.

Except for some effects that I attribute mostly to age, my intuitive thinking is just as prone to overconfidence, extreme predictions, and the planning fallacy as it was before I made a study of these issues. I have improved only in my ability to recognize situations in which errors are likely And I have made much more progress in recognizing the errors of others than my own The upshot is that it is much easier to identify a minefield [of cognitive illusion] when you observe others wandering into it than when you are about to do so. Observers are less cognitively busy and more open to information than actors. *That was my reason for writing a book that is oriented to critics and gossipers rather than to decision makers.*

Id. at 417 (emphasis added).

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breaking work, his assessments are still scientific and objective, and his conclusion about the interplay of data, intuition, and judgment still do not wholly capture our own inner experience of the “illusion of validity.”

Sound, intuitive professional expertise and judgment, in Kahneman’s view, “is learned from prolonged experience with good feedback on mistakes” as long as (a) the environment is sufficiently regular to allow reliable predictions, and (b) professionals have the opportunity to learn cues from regularities in the data.²⁹ In thinking about all the hardest decisions I have ever made, I am hard-pressed to deny the relevance of such experience to my professional or personal intuitions. I have no doubt that my contemplated action will be more informed, more subtle, and more nuanced if I stop to consider whether it has been based on the quick, automatic, intuitive, and emotional operations of Kahneman’s System 1, or the effortful mental consideration characteristic of his System 2.³⁰ Nevertheless, the infinite regress still exists when it comes time to take the actual leap of decision. I have to decide whether to choose the System 1 answer or the System 2 answer.³¹ I can bounce the issue off of a friend or colleague. I can remember having made earlier mistaken decisions with good feedback. I may consider whether I am presently subject to a framing effect, or commitment bias, or any of the other well-established heuristics. I can question my confidence in my own expert intuition, and whether my present proposed course of action is based on the evidence or prejudice. Nevertheless, this is all merely more data available to me just before I take the leap of choosing A or B. Once again, my perception of objective data interfaces with my subjective application of concepts, with the leap to decision or action being no more reducible than before.³²

29. Kahneman, *supra* note 27.

30. KAHNEMAN, *supra* note 14, at 20-24.

31. System 2 thinking about the relationship between itself and System 1 thinking is complex at the very least. System 2 is the source of contemplative reason. It “articulates judgments and makes choices, *but it often endorses or rationalizes ideas and feelings that were generated by System 1.*” System 2 thinking often keeps us from acting on the cognitive error generated by System 1. But it is hardly clear that Kahneman himself knows when to choose the System 2 over the System 1 conclusion: “System 2 is not a paragon of rationality. Its abilities are limited and so is the knowledge to which it has access. We do not always think straight when we reason, and the errors are not always due to intrusive and incorrect intuitions.” He observes, “System 1 is indeed the origin of much we do wrong, but it is also the origin of much we do right—which is most of what we do. Our thoughts and actions are routinely guided by System 1 and are generally on the mark.” *Id.* at 415-16 (emphasis added).

32. This could be otherwise characterized as an exploration of wisdom as it applies to these kinds of decisions. Wisdom as a subject of inquiry goes back at least to Aristotle. Recently, it has been the subject of investigation in groups such as the Berlin Wisdom Project, established by Paul B. Baltes at the Max Planck Institute for Human Development in the 1980s. See Paul B. Baltes & Jacqui Smith, *The Fascination of Wisdom: Its Nature, Ontogeny, and Function*, 3 *PERSP. ON PSYCHOL. SCI.* 56 (2008). Baltes and Smith note one characterization of wisdom “is knowing how, where, and when to take risks and to deal with uncertainty.” *Id.* But wisdom is a difficult subject to pin down systematically, as philosophers have generally agreed that its acquisition “requires time and effort and that it involves some combination of education,

Behavioral psychology and its application in modifying the assumptions of rational choice economics are demonstrably insightful. The question is whether behavioral psychology's insights can actually lead decision-makers or policy determiners to make better decisions under conditions of significant uncertainty, where someone has not already decided what the rational outcome ought to be. My claim is that an affirmative answer would require an Archimedean fulcrum of objective rationality that is not available to the decision-maker. Put another way, behavioral insights are useful when somebody knows best. Are they useful when the decision is so novel or complex that nobody knows best? In the absence of a pre-determined assumption about rationality, can or will a heretofore-biased individual shed her biases merely upon demonstration that they exist, and thus be capable of an objectively rational decision?³³ The answer is no. Here, I want to suggest that is the case by way of a critique (not a criticism) of leading theoretical applications of behavioral science to macro- and micro-decisions in, respectively, public policy and management.³⁴

Nudge, by Richard Thaler and Cass Sunstein, is a recent and popular argument for the application of behavioral science to macro-policy choices.³⁵ Its demonstration that decision-makers choose wrongly based on heuristics and biases is old news.³⁶ The authors' novel argument is that there is a middle ground of "libertarian paternalism" in which "choice architects," i.e. people who "indirectly influence the choices other people make,"³⁷ use a series of principles derived from behavioral science by which they "can improve the outcomes for their human users."³⁸ My issue with *Nudge* is not with what it says, which strikes me as generally sensible, but with what it fails to address. There are at least two of these

practice, apprenticeship, personal experience, and deliberate reflection about life matters." *Id.* at 57.

33. For a critique of behavioral economics as the source of paternalistic regulation, see Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003).

34. I have previously made a similar claim about Adrian Vermeule's attempt to resolve the infinite regress of adjudicative judgment through application of behavioral science. VERMEULE, *supra* note 1, at 2, 3, 168. Unlike the authors discussed here, Vermeule actually tries (unsuccessfully, in my view) to argue there is a reductive solution to the regress. See Jeffrey M. Lipshaw, *The Epistemology of the Financial Crisis: Complexity, Causation, Law, and Judgment*, 19 S. CAL. INTERDISC. L.J. 299, 346-50 (2010).

35. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

36. There are myriad sources for basic learning about the prototypical heuristics and biases, but Daniel Kahneman's recent book, written for a popular audience, ought to be authoritative for our purposes here. He provides accessible discussion of biases like the over-confidence in small samples, KAHNEMAN, *supra* note 14, at 109-18, anchoring and framing, *id.* at 119-28, the availability heuristic, *id.* at 129-36, conjunctive fallacy, *id.* at 156-65, outcome bias, *id.* at 199-208, prospect theory, *id.* at 278-88, endowment effect, *id.* at 289-99, hindsight bias, *id.* at 202-04, and others. In a seminal article on the application of behavioral economics to law, Thaler and Sunstein previously argued that mere information short of prescription was unlikely to change behavior significantly. Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1533 (1998) ("The prescription to 'provide more information' is striking in its spareness. Behavioral analysis suggests this prescription is far too spare.").

37. *Id.* at 83.

38. *Id.* at 100.

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issues.

First, the nudges only work where a choice architect has already concluded what the optimal or rational outcome is, and sets in place means of countering the expected heuristics and biases of the decision-maker. The prototype of this is the often-observed problem that employees will make predictably naïve investment decisions (such as holding too much of their own company's stock). The choice architects have hard portfolio management data demonstrating that, without nudges, employees will tend to make decisions not in their best long-term interest.³⁹ Those kinds of decisions strike me as life-significant, but theoretically trivial. The really hard judgments are ones in which there is no choice architect, or there is no data available to a choice architect. Or even if there were such data, it would fail to be dispositive to the decision-maker in the face not just of risk, but of uncertainty. For example, a CEO and a board of directors know that the company's base business is becoming commoditized, and that they need to decide on alternative strategies. One proposal is to make a series of business investments that fundamentally changes the strategic niche of the company (for example, a specialty chemical company previously primarily selling additives to plastic manufacturers might decide to leverage its limited consumer chemical business). In this kind of case, no choice architect has previously concluded what the optimal or rational outcome needs to be. Someone will likely be able to assemble data, the interpretation of which will support any pre-existing heuristic or bias for or against the proposal. No doubt all the tools of System 2 thinking will get employed in an effort to reach an evidence-based decision. But the decision, no matter how well researched or debated, will still be some choice architect's leap into the unknown.

Second, there is an infinite regress that Thaler and Sunstein never discuss. Who are the choice architects for the choice architects?⁴⁰ The fact is there are

39. *Id.* at 118-31.

40. For example, this is implicit in the Brest & Krieger discussion of the mixture of intuition and deliberation in decision-making: "We solve thousands of little problems and make thousands of decisions every day. Given God-like cognitive powers and infinite time, we could apply a deliberative model to all of these actions. But under conditions of bounded rationality, we rely mostly on intuitive decision making." BREST & KRIEGER, *supra* note 13, at 23. While I have no issue at all with their characterization of ordinary day-to-day decision-making as a mixture of intuition and deliberation (which distinction might well be unduly binary), the implicit epistemology here denies or ignores the infinite regress by assuming, under perfect conditions, deliberation (or explicitly rational analysis) would prevail over intuition. My reaction is exactly the opposite. Even under circumstances of perfect information, we will still reach a point in which deliberation hits a dead end or an impasse involving two or more equally plausible algorithms to apply to the problem. At that point, do we use intuition or deliberation to choose? Is the rule by which we choose intuition or deliberation to be based on intuition or deliberation? The renowned mathematician and physicist, Roger Penrose, argues this is an evolutionarily selective capability related to human consciousness. As Penrose observes, if one knows which algorithm is necessary for the solution of a problem, then one must have seen the problem before. But what happens when the problem is wholly new, and we must

none, because the choice architects must necessarily start with the untestable assumption that there is an objectively correct outcome. The fact that Thaler and Sunstein have to make the argument that “Behavioral Scientist-Kings” should have the power to place the nudge factors means that choice architects have rejected other philosophical choices. Indeed, they acknowledge that the nudge factors are not without controversy: “libertarian paternalism” is to some insufficiently libertarian and to some insufficiently paternal.

On the micro level, to what extent can a subjective decision-maker use objective behavioral science to assess her own heuristics and biases? Theorists have addressed this in both business and law. Max Bazerman, unlike Thaler and Sunstein, focuses not on “choice architects” making policy decisions, but business managers who want to “de-bias” in the interest of making better judgments.⁴¹ Here again, Bazerman demonstrates conclusively that managers generally make decisions under the influence of heuristics and biases. The telling point, however, is Bazerman’s exposition of the steps that one might take to de-bias. Indeed, Bazerman’s own research indicates that de-biasing is inordinately difficult. He offers only alternative heuristics for the aspiring “objective” manager.⁴²

It is hardly surprising that behaviorists like Thaler, Sunstein, and Bazerman propose sensible pragmatic solutions to intractable tough calls, reflecting the lack of any theoretically reductive (i.e., ultimately principled or objective) answer to the problem of de-biasing. There is no rule for the interpretation of a rule. We recognize the infinite regress in trying to find rules to interpret a rule that says no more, for example, than “decide in a way that is just.” What is the rule for finding rules for deciding in a way that is just? The infinite regress continues all the way down. The ultimate solutions are simply more heuristics. They may be higher order heuristics, and feel more satisfying than pure intuition at the lower order, but there is just no way one will ever prove that they are *better* than that pure intuition.⁴³

decide which algorithm to use? Penrose says, “Somehow, consciousness is needed in order to handle situations where we have to form new judgments, and where the rules had not been laid down beforehand.” ROGER PENROSE, *THE EMPEROR’S NEW MIND: CONCERNING COMPUTERS, MINDS, AND THE LAWS OF PHYSICS* 529-34 (1999).

41. MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION-MAKING*, (6th ed. 2006).

42. *Id.* at 193-96. Brest & Krieger are also discouraging when it comes to the prospect of de-biasing egocentrism, BREST & KRIEGER, *supra* note 13, at 262, anchoring, *id.* at 272, and hindsight bias, *id.* at 276, but slightly less so when it comes to confirmation bias, depending on the methodology employed, *id.* at 289.

43. Hans Albert describes this process as merely a refinement of the old presuppositions:

The belief that one can radically purge the mind of prejudices is an illusion, which takes its revenge by the fact that in cognitive enterprises embodying such attempts to purify our belief systems “down to the bare boards,” the old presuppositions tend to reappear, but now in the guise of more self-conscious, self-evident, and thus apparently better grounded truths.

HANS ALBERT, *TREATISE ON CRITICAL REASON* 55 (Mary Varney Rorty trans.) (1985).

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B. The Theory and Practice of Disclosure

Disclosure regulation is the natural outgrowth of nudge-like libertarian paternalism, and epitomizes dispassionate two-handedness. The disclosure document, like prudent counseling, says in essence, “here’s everything we know about the benefits, the costs, and the risks of the activity you are about to undertake. On one hand, very good things could happen. On the other hand, very bad things could happen. But the decision is yours.” From the standpoint of behavioral science, if we know that people have predictable heuristics and biases, the rational solution would be to confront the subject with information, and expect that the information will cause reflection that counters the original intuition resulting from the heuristics and biases. It is a reasonable mediation between, on one hand, complete *laissez-faire*, or on the other, merit regulation or prescription, themselves objectionable for their paternalism.

The theory must be that the heretofore-biased individual will experience an epiphany of cathartic rationality when confronted with evidence in the form of putatively objective factual material or risk assessment, and will take action in accordance with that rationality. Disclosure is, however, a solution that, like the cognitive theory from which it derives, simply does not concern itself with first person experience of the subject decision-maker who is the object of the disclosure, and who must act upon the information. The remedy’s perspective is from the outside in, leaving the mystery of judgment and decision in its black box. In short, if simply providing more information is all there is to better decision and action, disclosure would work a lot better than it does.

The empirical work on the effectiveness of disclosure as a prophylactic remedy against irrational action is voluminous and varied. Without purporting to do an exhaustive survey, I nevertheless suggest that the use of information as a regulatory device works better the more “macro” the problem is. That is, if we focus on making an entire market more efficient or transparent, we do not need to assess the interface of information and assessment in the individual minds of individual selves. If, across thousands of investors and analysts, the faculty of judgment averages out, and if decisions to buy and sell are relatively transparent, then it seems reasonable to adjudge the impact of more or less information on the market as a whole without worrying too much about how individual minds go about assessing it.⁴⁴ And, indeed, a quick review of empirical studies of the macro effects of disclosure suggests, not surprisingly, that information and transparency are good

44. This is the efficient capital market hypothesis, or ECMH. Whether markets are truly efficient in practice (as opposed to economic theory) is a matter of some controversy, and there are continua not only of the degree of efficiency but of scholars ranging from true believers to skeptics. I opt for a sensible middle

things.⁴⁵

Trying to assess the impact of disclosure on individual subjects, however, invokes all of the potential deviation from rationality that inspired the work on behavioral economics.⁴⁶ Looking at individual decisions objectively, that is from the outside in (rather than focusing on the individual's experience of making a decision), we have reason to be less sanguine about the ability of mere provision of additional warnings, notices, or information to make a meaningful difference in any consumer context. Empirical studies seem to bear that out.⁴⁷ As an example, Professor Florencia Marotta-Wurgler followed the clickstream of 47,399 households to eighty-one Internet software retailers to test whether those who shop for software online are more likely to read the license agreement when it is more prominently disclosed. Her hypothesis was that if increased contract disclosure were to matter anywhere, it would be in an online consumer setting where search and access costs are so low. Her findings instead were (a) degree of dis-

ground. As my colleague Joe Franco observes, "While securities prices of public companies are unquestionably information sensitive, the mechanisms by which information is incorporated into securities prices are diverse and may involve significant disparities between market prices and fundamental value. *Even scholars skeptical of robust market efficiency claims acknowledge a significant, albeit less determinate, relationship between information and price formation.*" Joseph A. Franco, *A Consumer Protection Approach to Mutual Fund Disclosure and the Limits of Simplification*, 15 STAN. J. L. BUS. & FIN. 1, 34 (2009) (emphasis added) (citing Ronald J. Gilson & Reiner H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984)).

45. Here is a sampling of the studies. Dan S. Dhaliwal, *Disclosure Regulations and the Cost of Capital*, 45 S. ECON. J. 785 (1979) (empirical study concluding that mandatory segment reporting reduces the cost of capital for affected firms); William R. Baber & Angela K. Gore, *Consequences of GAAP Reporting Requirements: Evidence from Municipal Debt Issues*, 83 ACCT. REV. 565 (2008) (study showing lower debt costs for municipal bond offerings where states mandate GAAP accounting); Brian J. Bushee & Christian Leuz, *Economic Consequences of SEC Disclosure Regulation: Evidence from the OTC Bulletin Board*, 39 J. ACCT. & ECON. 233 (2005) (study showing that smaller firms not previously filing with the SEC incurred significant costs from newly required disclosures, forcing them off the OTC Bulletin Board, but previously filing firms and newly compliant firms experienced positive stock returns and significantly increased liquidity).

For a critique of efforts to measure the effectiveness of voluntary disclosure, see Philip G. Berger, *Challenges and Opportunities in Disclosure Research—A Discussion of "The Financial Reporting Environment: Review of the Recent Literature,"* 51 J. ACCT. & ECON. 204 (2011).

46. This distinction between macro effects of information on efficient market and micro effects on individual investor decision-making is precisely the one on which Professor Franco relies in arguing that mere disclosure (as opposed to a more pro-active consumer protection approach) is insufficient when it comes to the average investor's assessment of mutual fund manager performance. See Franco, *supra* note 44, at 42-48.

47. See, e.g., David Weil, et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL. ANAL. & MGMT. 155 (2006) (examining the design and impact of financial disclosure, nutritional labeling, workplace hazard communication, and other disclosure systems; concluding that transparency policies are effective only when the information they produce becomes "embedded" in the everyday decision-making routines of information users and information disclosers); G. Ray Funkhouser, *An Empirical Study of Consumers' Sensitivity to the Wording of Affirmative Disclosure Messages*, 3 J. PUB. POL'Y. & MKTG. 26 (1984) (suggesting that in real-life situations the impact of affirmative disclosure messages on consumer behavior may not be very great); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"?* 78 U. CHI. L. REV. 165 (2011).

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closure had almost no impact on the rate at which consumers read license agreements, and (b) those that did read the disclosure were equally likely to purchase the software product regardless of the one-sidedness of the contract.⁴⁸

The usual response where regulators see their function not as limiting choice, but as promoting informed choice, is to hope that disclosure will cure an information asymmetry or, as in *Nudge*, affect observed heuristics or biases. That is a tough nut. To be effective, the solution has to create informed choice in complex and emotion-laden decisions—whether to engage in managed investment, to buy index funds, or to use leverage (sub-prime or otherwise) to buy a home—without significantly limiting choice.⁴⁹ For example, assume that unscrupulous mortgage brokers who originate but do not hold loans might well have an incentive to prey on borrowers.⁵⁰ Professor Lauren Willis assesses the interface between broker and borrower, asking whether more information would level the playing field, and observing that “[t]he current information-based legal paradigm confuses disclosure with knowledge, understanding, and rational choice.”⁵¹ Her intuition is that the *Nudge*-like liberal paternalism by way of disclosure (as opposed to substantive choice limitation), even if it purports to address heuristics and biases, will fail fully to answer this question: can a mere increase in available information unleash within unsophisticated sub-prime borrowers their own capability of making free choices, of being autonomous agents, and making decisions that reflect their own preferences?⁵²

I agree with her inclination toward a pragmatic pluralism over theoretical purity (whether rational choice theory or behavioral economics) in the search for sensible solutions to a social problem.⁵³ Note, however, that Professor Willis’s critique only addresses the ability of subprime borrowers to understand rationally the disclosures about such loans and their own heuristics and biases, even when assertive and confident experts in consumer behavior counterbalance the lender’s messages.⁵⁴ I suspect such borrowers, like fully informed sophisticated investors,

48. Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?* NYU L. & Econ. Res. Paper No. 10-54, (forthcoming, *J. INT’L & THEORETICAL ECON.*), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713860 (2010).

49. Or for a student to incur college debt. Mandated disclosure has surfaced as a proposed remedy for the current concern over students’ abilities to pay off the loans they take out to go to college. *Editorial: Full Disclosure for Student Borrowers*, N.Y. TIMES, May 23, 2012.

50. I confess still to being befuddled why any ultimate lender who actually has to recoup principal and interest would ever “prey” on a borrower who is likely not to be able to repay the loan. But I concede that a laissez-faire system permits such originators to exist.

51. Lauren E. Willis, *Decision-Making and the Limits of Disclosure: The Problem of Predatory Lending*, 65 MD. L. REV. 707, 828-33 (2006).

52. *Id.* at 831-33.

53. *Id.* at 833.

54. *Id.* Imagine a subprime borrower reading Kahneman’s closing piece of advice in the *New York Times*

will nevertheless continue both to act in a way that objective observers would see as irrational and to find reasons to justify their actions. As I suggest in what follows, I believe there is even another step in the mental process, and that is the borrower's commitment to action. That commitment to action is something that we *experience* as actors more than we understand as rational analysts.

C. *The Inner Experience of Business Decisions*

The failure of disclosure as a remedy to behavioral heuristics and biases is particularly evident when we try to apply it to that special breed of "irrationally" undiversified investor—the entrepreneur. Manuel Utset wrote a thorough behavioral economic analysis of the relationship between entrepreneurial founders and venture capitalists. Not surprisingly, his conclusion was that founders (like subprime borrowers) displayed biases such as over-optimism, and suffered from asymmetric information in negotiating terms with more objective venture capitalists.⁵⁵ Nevertheless, when it came time to suggest a means for de-biasing, Professor Utset had little more than cognitive solutions, like disclosure and persuasion, to cure what is fundamentally a non-cognitive problem. He correctly concluded that "overcoming a party's over-optimism is not as simple as recognizing its existence." His argument that there is an analogue between effective disclosure of workplace hazards and disclosure of entrepreneurial risk strikes me as typical of the pervasiveness of Technical Rationality in legal theory, even when it applies to practice.⁵⁶

Sunday Magazine version of his account, and applying it to somebody who insists she should not be taking out the loan:

In general, however, you should not take assertive and confident people at their own evaluation unless you have independent reason to believe that they know what they are talking about. Unfortunately, this advice is difficult to follow: overconfident professionals sincerely believe they have expertise, act as experts and look like experts. You will have to struggle to remind yourself that they may be in the grip of an illusion.

Kahneman, *supra* note 27. This is difficult, and perhaps impossible advice to follow! Our confidence in our own judgment whether to take assertive and confident people, like experts on subprime lending, at their own evaluation should depend on whether the "lay judgment about professional judgment" environment is sufficient regular to allow reliable predictions, and whether in making such judgments we lay people have had the opportunity to learn cues from those regularities.

Fred Schauer touches on this regress in his assessment of humility as a virtue in decision-making (suggesting that a virtuous decision-maker may well want to fall back on rules rather than particularized assessments). At some point, the decision-maker has to decide whether or not to use rules. I suggest there is no rule for such decision. If there is a rule for such decision, then applying that rule will require a decision whether it applies. And so on. *See* Schauer, *supra* note 1, at 272-74.

55. *See* Manuel Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45. Professor Utset characterized the typical founding entrepreneur as "over-optimistic," *id.* at 100-03, "over-confident" (indeed to the point of "blindness to the need for more information"), *id.* at 103-04, better at innovating than running a company, having "poor management skills," and lacking "business savvy," *id.* at 92-93, and having "bounded rationality" (cannot predict the future very well), *id.* at 114 n.228.

56. *Id.* at 161-63. It also strikes me as an example of naïve realism, where the naiveté is on the part of

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Trying to understand the entrepreneurial mindset by way of the lawyerly (or law and economics) mindset starts with a fundamental misconception. Objective analysis misses the point that the essence of entrepreneurship involves the entrepreneur's subjective lived experience "as actor in an unscripted temporal performance who continually encounters novelty."⁵⁷ The inner experience of the entrepreneur has been described thus:

He or she is in the moment, a participant in a performance, responding to cues as they occur, attempting to impose structure on events as they are received into consciousness, making them intelligible. It is a gestalt structure, more complex than the sum of its component parts. Yet, in spite of its complexity, experiencing includes some key elements. The most important of these is the notion that experiencing transcends cognition and involves the interaction of emotions, feelings, and bodily reactions.⁵⁸

This kind of research and theory is in its early stages, but what it is trying to understand is far less capable of being modeled in the kinds of algorithms common to economic or legal analysis. In particular, the entrepreneurial experience occurs in an uncertain environment "where the individual has relatively little control over conditions and outcomes," and where the problems are novel, i.e., the

the economist theorist attributing his view of objective reality to others. See Pronin et al., *supra* note 25. I have written about this in other contexts, particularly the suggestions that the actual inner decision-making processes of the actor take place with a calculation of "joint surplus" available to both of the parties involved in a negotiation. See Jeffrey M. Lipshaw, *Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation*, 46 WILLAMETTE L. REV. 139, 141-42 (2009); *Models and Games: The Difference between Explanation and Understanding for Lawyers and Ethicists*, 56 CLEV. ST. L. REV. 613, 642-49 (2008).

57. Michael H. Morris, Donald F. Kuratko, Minet Schindehutte, & April J. Spivack, *Framing the Entrepreneurial Experience*, 36 ENTREPRENEURSHIP THEORY & PRAC. 11 (2011):

If entrepreneurship is fundamentally experiential, we know surprisingly little about the nature of the experience. What is it like to be "in the moment" as a venture takes form? . . . As a lived experience, we highlight the critical role played by idiosyncratic events are frequently uncontrollable and unpredictable. Lichtenstein et al. (2007) make it clear that such events are at the essence of entrepreneurship, and give rise to patterns and punctuating moments.

Id. at 11, 16.

58. Morris et al., *supra* note 57, at 21.

entrepreneur needs to deal with “novel circumstances unconnected to his past experiences.”⁵⁹ Indeed, noted scholars of entrepreneurship, including Nobel laureate Herbert Simon,⁶⁰ have suggested that entrepreneurs engage in a form of reasoning unlike, say, bankers (and presumably lawyers).⁶¹ Professor Saras D. Sarasvathy describes this as “effectual reasoning,” as distinguished from “causal reasoning.” In the latter, the goal is fixed, and the banker’s or the lawyer’s thinking process directs itself to the accomplishment of the goal. In the former, the means of accomplishing tasks are the givens, and the entrepreneur sets goals in accordance with the means available to effectuate them.⁶²

Donald Schön comes to a similar conclusion, but more broadly about all professional decision-making.⁶³ He traces the relationship of technical knowledge to “knowing-in-action,” a kind of knowing that is inherent in the action itself, and which the actor cannot explain because it is action and not thinking.⁶⁴ When we think about those actions, our thinking is not the same as Technical Rationality; it is instead a subjective contemplation Schön calls “reflection-in-action.” Technical Rationality “leads us to think of intelligent practice as an application of knowledge to instrumental decisions.”⁶⁵ Reflection-in-action is neither pure thought nor unthinking action. It is akin to the effectual reasoning Professor Sarasvathy describes. The problems the professional encounters are often unique,

59. *Id.* at 16-17.

60. *See supra* note 26. Simon received his prize in 1978.

61. *See* D.K. Sarasvathy, Herbert A. Simon, & Lester Lave, *Perceiving and managing business risks: differences between entrepreneurs and bankers*, 33 J. ECON. BEHAV. & ORG. 207 (1998).

62. According to Professor Saras Sarasvathy,

[T]he anatomy of a decision involves

- a given goal to be achieved or a decision to be made (usually well structured and specific),
- a set of alternative means or causes (that can be generated through the decision process),
- constraints on possible means (usually imposed by the environment), and
- criteria for selecting between the means (usually maximization of expected return in terms of the predetermined goal).

Clearly, this structure assumes a decision process involving causation. A decision involving effectuation, however, consists of

- a given set of means (that usually consists of relatively unalterable characteristics/ circumstances of the decision-maker),
- a set of effects or possible operationalizations of generalized aspirations (mostly generated through the decision process),
- constraints on (and opportunities for) possible effects (usually imposed by the limited means as well as by the environment and its contingencies), and
- criteria for selecting between the effects (usually a predetermined level of affordable loss or acceptable risk related to the given means).

Saras D. Sarasvathy, *Causation and Effectuation, Toward a Theoretical Shift from Economic Inevitability to Entrepreneurial Contingency*, 26 ACAD. MGMT. REV. 243, 249 (2001).

63. As should or will be clear, I think *all* deciding is fundamentally different from *all* analysis.

64. SCHÖN, *supra* note 10, at 49-69.

65. *Id.* at 50

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and do not easily fit within the ordinary categories of the technical knowledge that was the subject of professional training.⁶⁶

[S]omething falls outside the range of ordinary expectations. . . .
[T]he practitioner allows himself to experience surprise, puzzle-
ment, or confusion in a situation he finds uncertain or unique
. . . . He carries out an experiment which serves to generate both
a new understanding of the phenomena and a change in the sit-
uation.⁶⁷

I boil it down to the following: when we decide something, it is something fundamentally different than rational thought; decision is action.⁶⁸ In the professional context, it is action upon which the practitioner may reflect, but the reflection is effectual; it is “not limited to a deliberation about means which depends on a prior agreement about ends.”⁶⁹ As Schön describes it, the practitioner “does not separate thinking from doing, ratiocinating his way to a decision which he must later convert to action. Because his experimenting is a kind of action, implementation is built into his inquiry.”⁷⁰ Disclosure can be two-handed; rational thought that integrates, synthesizes, and assesses the disclosure can be two-handed, but the inner experience of commitment to action, as well as action itself, cannot.

III. RATIONALITY AND ITS PARADOXES, KNOWLEDGE, AND DECISION

A. *The Limits of Inner Rationality*

My point thus far is that dispassionate, objective analysis of the foible of human reasoning misses something about the inner experience of decision-making and action based on such decisions, even in the professional context. My experience is that lawyers and legal academics get uncomfortable with the bottomlessness of talking about inner experience; it gets perilously close to unscientific and perhaps even irrational metaphysics.⁷¹ We lawyers like foundational authorities, our “rules of recognition,” and to be able to reason our way causally from those

66. *Id.* at 62-63.

67. *Id.* at 68.

68. Even expert intuition is thought rather than action, though it may certainly contribute to the reflection-in-action that Schön describes. In Kahneman’s characterization, experts develop knowledge in an environment of sufficient regularity whereby they “recognize situations and generate quick and accurate predictions and decisions.” That may be fast thought, but it is still thought. KAHNEMAN, *supra* note 14, at 243.

69. *Id.*

70. *Id.*

71. See Jeffrey M. Lipshaw, *Contract Formalism, Scientism, and the M-Word: A Comment on Professor Movsesian’s Under-Theorization Thesis*, 35 HOFSTRA L. REV. 23 (2006).

foundations to a practical conclusion. Whether or not it is really possible “to think like a lawyer,” there is little doubt that thinking in a particular way is our stock in trade. The Carnegie Report said exactly that.⁷² Our professional image, in Donald Schön’s coinage, is as the most rational of Technical Rationalists.⁷³ In Daniel Kahneman’s coinage, we are professional System 2 thinkers.

But mere thinking is only part of being a professional. I recall one of my law firm mentors telling me, as I began to get frazzled in the tumult of a difficult business acquisition closing, that our job was to be “cool in pinstripes.” I also recall thinking during that same deal that my job was to be an intellectual counterweight to the client. When the client wanted to go fast, my job was to slow him down. When my client thought hope was lost, my job was to figure out why it was not. After a long professional career in which I have managed to support my family well by way of this rational, logical, System 2 thinking, I would be the last person to suggest that it not continue as the primary tool in the lawyer’s toolbox. Nor do I particularly want to make lawyers reason like entrepreneurs. Rather, I want the lawyerly mind to confront directly the limits of rational analysis, and the counter-intuitive possibility that even careful rational analysis (as distinct from rationalization) can be a fruitful source of self-deception. In other words, thinking rationally is a necessary but not a sufficient condition for being a two-handed lawyer. To be fully two-handed, one must also distance oneself from the action that is decision. Or conversely, to be one-handed, sometimes we just have to stop thinking and act.⁷⁴

Knowing the resistance I have gotten from many of my colleagues when discussing this, my challenge to you, the reader, is to engage with me in an exploration of how you and I think rationally, decide, and then commit to action from the inside out, rather than the outside in. Our exploration will not be so much the observation of others’ behavior in making decisions, but our internal experience of the decision-making process and the commitment to action. This is a subject

72. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (SUMMARY) 5 (2007):

In particular, most law schools emphasize the priority of analytic thinking, in which students learn to categorize and discuss persons and events in highly generalized terms. This emphasis on analysis and system has profound effects in shaping a legal frame of mind. At a deep, largely uncritical level, the students come to understand the law as a formal and rational system, however much its doctrines and rules may diverge from the common sense understandings of the lay person.

73. SCHÖN, *supra* note 10, at 45-48.

74. What follows is a dissection of rationality, presented for the purpose of demonstrating not its futility in weighing alternatives, but its limitations in translating that cogitation into action. Although it is beyond the scope of my discussion here, there is support in brain science for the proposition that deciding to do something is markedly different than reasoning about it. See ANTONIO DAMASIO, EMOTION, REASON, AND THE HUMAN BRAIN (1994) (demonstrating that certain damage to the pre-frontal cortex does not impede a person’s conscious reflection on alternative solutions to a problem, but causes the person nevertheless not to be able to decide on one; theorizing that “somatic markers” in the pre-frontal cortex, more akin to emotion than reason, are the source of the ability to decide).

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heretofore more often developed by philosophers than social scientists, and, not surprisingly, the most developed account of such experience as a systematic process is in terms of the inner experience of thinking rationally. I fully accept (for purposes of this discussion) the general consensus about what it means for a decision-maker to be rational. As we will see, however, even the most rational assessment of rationality leads to paradoxes of decision that appear to require answers that come from somewhere other than the rational analysis itself.⁷⁵

As the philosophers might say, objective data is “real” and the subjective processing of that data is “rational.” The real is what happens in the world—the inexorable and objective operation of cause-and-effect. In other words, the real is how things actually work. The rational is the conclusion to which subjective individual minds reason about how things should work. In connection with decision-making, rationality has to do with predicting how things will turn out based on forms of reasoning—deductive, inductive, and abductive, for example—under which we make judgments about patterns in observable data and the likelihood of those patterns continuing in the future. The observations are the “percepts;” the rationality provides the concepts.

What is rationality? Reasoning how things *ought* to work is a matter of moving from reasoned hypothesis to theory to “lawlike” statements about the world as it is (for example, in physical science, the “laws” of thermodynamics; or in social science, the “law” of supply and demand). Rationality is the uniquely human power to employ this process of reasoning “to investigate and discover anything and everything; it enables us to control and direct our behavior through reasons and the utilization of principles.”⁷⁶ As Robert Nozick observed, rationality involves the judgment that data yields generalizations that are more than merely accidental, and thus “constitute our license to travel from given data to predictions or expectations about further data.”⁷⁷ This is as true for descriptions of the physical universe as it is for normative judgments: “what licenses us to travel to a further judgment on the basis of previous ones is that the previous ones all fall under a normative general principle.”⁷⁸ These generalizations are principles; as Nozick describes them, they “are transmission devices for *probability* or *support*, which flow from data or cases, via principle, to judgments and predictions about

75. Kent Bach, *(Apparent) Paradoxes of Self-Deception and Decision*, in SELF-DECEPTION AND PARADOXES OF RATIONALITY 163 (Jean-Pierre Dupuy ed., 1998) (“Paradoxes of decision stretch the limits of rationality, by identifying rational decisions that principles of rationality cannot justify or by exposing conflicts in principles of rationality themselves.”).

76. ROBERT NOZICK, *THE NATURE OF RATIONALITY* xi (1993).

77. *Id.* at 4.

78. *Id.* at 5.

new observations or cases whose status otherwise is unknown or less certain.”⁷⁹

Better descriptive and normative judgments, in this view, are those more susceptible to justification by application of principles and evidence. “Principles can guide us to a correct decision or judgment and to control for personal factors that might lead us astray.”⁸⁰ Nozick gives a hopeful account of lives guided by principles. In his conception, rationality is more than principles used in the resolution of intellectual problems.⁸¹ Rationality—in the form of a set of coherent principles—can guide interpersonal dealings,⁸² allow one to define one’s own integrated and coherent personal identity,⁸³ aid in overcoming temptations to short-term action that have long-term negative consequences,⁸⁴ and provide symbolic meaning to actions (in which the nature of the decision itself and not just its consequence has utility).⁸⁵ The problem, of course, as Kent Bach observes, is that life is far more complex than the simplifications necessary for principled generalizations about principles,⁸⁶ and Nozick is too wise not to recognize how difficult it is to apply principles coherently in the effort to live a principled life.⁸⁷ We seem to value our own rationality. Deriving principles, and living by them, seems important to us, and guides us to some end (Nozick calls this the teleological function of principles) that we would not achieve merely by acting randomly.⁸⁸ What, then, is the problem? People may have incompatible principles so strongly asserted that social institutions are torn apart. Is compromise a principle? If so, is that a contradiction in terms?⁸⁹

Nozick clearly recognizes that the goal is to live our lives well and make decisions that are not random, but he touches on the infinite regress lying at the heart of any attempt to act fully by principle. He asks, “Does that mean, then, that we must employ some principle to decide when to employ a principle: And what

79. *Id.*

80. *Id.* at 8.

81. *Id.* at 4-9.

82. *Id.* at 9-12.

83. *Id.* at 12-14.

84. *Id.* at 14-26.

85. *Id.* at 26-35.

86. Bach, *supra* note 75, at 185-86.

87. Sartre certainly expressed a similar view on the experience of making decisions, if not the process in JEAN-PAUL SARTRE, *EXISTENTIALISM IS A HUMANISM* (Carol Macomber trans., 1997). In this view, we exist first (as part of the natural world) and then create our own essence. As Sartre said famously, “That is what I mean when I say that man is condemned to be free: condemned because he did not create himself, yet nonetheless free, because once cast into the world, he is responsible for everything he does.” *Id.* at 29. I suspect Sartre would be impatient with this discussion of rationality (i.e., living a principled life). He reaches a conclusion I think lies at the heart of every attempt (like Kant’s Categorical Imperative) to reduce decision-making to its foundations: “If values are vague and if they are always too broad in scope to apply to the specific and concrete case under consideration, we have no choice but to rely on our instincts.” *Id.* at 32.

88. NOZICK, *supra* note 76, at 39-40.

89. *Id.* at 36-37.

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makes that situation one to be guided by principles rather than something else?”⁹⁰ As Kant recognized, this is the imponderable at the heart of judgment: there is no rule for the application of a rule.⁹¹ In Nozick’s articulation, it is an irresolvable circularity. It is possible to reason our way to principles of decision, but there are alternative principles of reasoning, and the choice among them could depend on which principle of decision to apply.⁹²

Perhaps the most direct philosophical confrontation with the limits of rationality without a concomitant rejection of the concept of truth itself is “critical rationalism,” developed by Karl Popper and a number of his students, most significantly Hans Albert.⁹³ The core proposition of critical rationalism is that classical rationality of any kind (whether based in reason or experience) is ultimately a search for an Archimedean foundation or justification and is a fruitless drive for certainty over truth.⁹⁴ Albert referred to this as the Münchhausen Trilemma, “the thought that any attempt to justify a belief must end in one of three unsatisfactory ways: a vicious regress, a brute assumption, or circular reasoning.”⁹⁵ Hence, critical rationalism acknowledges the limits of justification and discourse, opting for “a modest and self-critical rationalism.”⁹⁶ Any belief not subject to criticism is dogma, and the point of critical rationalism is to avoid dogma.⁹⁷

The inescapability of the Trilemma (with which Nozick was clearly wrestling) is evident even from Albert’s assertion that critical rationalism is itself a *fallible hypothesis* (rather than a justified first principle).⁹⁸ In other words, one needs to consider whether the ultimate presupposition of critical rationalism is itself a dogma that deserves criticism. Indeed, critical rationalism is not without its own ultimate presuppositions, whether or not it calls them that. Critical rationalism still takes as foundational the idea of truth, but views truth as something that can only be “ever more closely approximat[ed]” by the process of criticism. “To do that,” writes Albert, “we must sacrifice the drive for certainty which lies at the root of the classical doctrine, and accept the price of permanent uncertainty about

90. *Id.* at 37.

91. KANT, *supra* note 7, at 268-69.

92. *Id.* at 135. Münchhausen’s Trilemma, described *infra* notes 94-95 and accompanying text, is at work. The attempt to reach a foundational principle has led to regress or circularity, leaving only brute intuition as the source of the principle.

93. POPPER, *supra* note 8; HANS ALBERT, *TREATISE ON CRITICAL REASON* (Mary Varney Rorty trans., 1985).

94. ALBERT, *supra* note 93, at 12-16.

95. Michael Williams, *Why (Wittgensteinian) Contextualism Is Not Relativism*, 4 *EPISTEME* 93, 96 (2007); ALBERT, *supra* note 93, at 18-19.

96. John R. Wettersten, *Karl Popper and Critical Rationalism*, INTERNET ENCYC. PHIL. (2010), <http://www.iep.utm.edu>.

97. ALBERT, *supra* note 93, at 47-48.

98. *Id.* at 47.

whether our theories will continue to be confirmed, and thus maintained, in the future.”⁹⁹ That is an appealing but difficult agnosticism, as Albert himself demonstrates.¹⁰⁰ As humans, we seem to be hardwired to value structure over disorder, even if it means taking some foundational presupposition on faith for the sake of having any structure at all.¹⁰¹

Not surprisingly, then, we face situations in which principles and rules, the tools of rationality, simply fail to give us clear answers.¹⁰² I want to focus on a thought experiment known as a Newcomb problem because it reveals the limits of rationality and the possibility of self-deception in matters as mundane as making investment decisions. In what follows, I will describe the original Newcomb problem, its application to a historical issue of belief in Calvinism, and, finally, its application to the investment decision. The question we are asking is this: if one believes that market movements are causally determined under conditions too complex ever truly to be known (at least in the time frame of the investment decision), why would one still engage in investment behavior based not on actual causal relationships, but on probabilities suggested solely by evidence of past market movements?

99. *Id.* at 44.

100. Compare, for example, Quine’s empiricism, which Albert would contend, I suspect with some irony, is dogmatic in its own way. Quine disdained the primacy of any concept (i.e. reasons developed by virtue of meaning and not empirical fact). Under this conception, nothing that is the product of reason is foundational. W. V. Quine, *Two Dogmas of Empiricism*, in MARTIN CURD & J.A. COVER, *PHILOSOPHY OF SCIENCE: THE CENTRAL ISSUES* 280, 298 (W.W. Norton & Co. 1998). Albert accepts the theoretical pluralism of insights from metaphysics and experience, condemning “the dogmatizing of experience, which is the basic danger of empiricist thought, just as the dogmatizing of intuition or reason may be said to be the permanent danger for intellectualism.” ALBERT, *supra* note 93, at 69.

Note that Albert also rejected the existentialism of Sartre and others. The connection is that, like Albert, Sartre was unable to reason his way to a foundational basis for decisions. *See supra* note 87. Albert acknowledged there was a basis for seeing knowledge based on cognition and decisions based on value as different, but denied they were dualistic, or that values were immune from critical examination. Constructing theories of knowledge requires making decisions about the value of some theories over others, and the cognition of what is has some connection to what we decide ought to do. In other words, there are “bridge principles” between ethical values and scientific knowledge. ALBERT, *supra* note 93, at 94-101.

101. *Id.* at 67.

102. For a critique of rational choice theory as it applies to the internal process of judgment, see Ron A. Shapira, *Saving Desdemona*, 22 *CARDOZO L. REV.* 1771 (2001):

Our shared cultural assets provide numerous examples of individuals who acted upon conflicting drives, usually facing a dangerous temptation while soberly assessing its risks. For instance, Lot’s wife turning back to witness the destruction of Sodom, or the sailors of Odysseus (Ulysses) escaping the Sirens’ song (both examples involve a temptation to receive potentially harmful information). Some, like Lot’s wife, acted obliviously, while others were able to resist temptation and act moderately. Yet it is not the final reaction that puzzles us, but the very experience of unresolved internal conflict. If people acted according to the presumptions of classical economic theory, sailors would never have had to put wax in their ears; they would have simply decided, one way or another, how to respond to the Sirens’ song. But humans (however blessed by the gods they may be) do not always end their deliberations with final conclusions. They may still waver between alternatives, or be subject to momentary currents and drifts, just like the ship they sail in.

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Example 1 (The Two Box Problem). The original Newcomb problem was proposed by William Newcomb and popularized by Nozick. A superior being, called the Predictor, has placed two boxes in front of the rational subject, Chooser, and has offered Chooser a choice. Box 1 is transparent and holds \$1,000. Box 2 is opaque, and the Predictor has placed into it either nothing or \$1,000,000. Chooser may choose Box 2 only, or both Box 1 and 2. But the Predictor has a highly developed ability to predict Chooser's actions, and Chooser knows it. If Predictor has predicted that Chooser will choose Box 2 only, the Predictor has put \$1,000,000 in the box. If the Predictor has predicted that Chooser will choose both boxes, then the Predictor has put nothing in Box 2. In short, Chooser knows that by picking both boxes, she is certain to get \$1,000. If she picks Box 2 only, that would seem to be evidence of the predetermination that she was meant to get \$1,000,000.¹⁰³

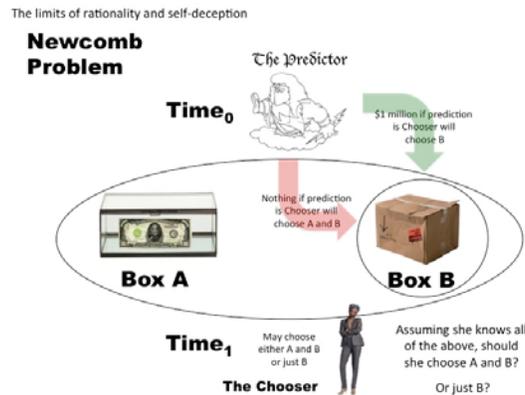


Figure 1

The debate between a “one boxer” (call her Eve for “evidentialist”) and a “two boxer” (call him Cos for “causalist”) goes something like this. Cos says, “I’m going to pick both boxes because I’m sure to get \$1,000. What the Predictor has done is done. Nothing about my present choice at T_1 can change what happened in the past at T_0 . So it may be that there’s \$1,000,000 in the box, even if I select both boxes.” Eve replies, “No, I’m going to pick only Box 2, because the evidence (i.e. the sign that is my inclination to pick only Box 2) is that if I pick both boxes the Predictor would have predicted that, and I won’t get the \$1,000,000. But if I pick one box, the Predictor would have predicted that, and I will get rich.” Cos responds, “Eve, that’s irrational. You can’t change the past by what you do now.” Eve counters, “The reason you won’t get the \$1,000,000 is because your picking the two boxes is evidence that you were predetermined not to get it.” And on and

¹⁰³ NOZICK, *supra* note 76, at 41-42.

on.¹⁰⁴

Example 2 (The Calvinist Problem). In Calvinist doctrine, God has determined before each individual's birth whether or not the individual is chosen for salvation or damned for all eternity. Nothing the individual does in his or her lifetime can change this decree. The divine selection, however, manifests itself through signs in one's lifetime, one of which is testing one's faith by way of material success in a profession, which success requires a lifetime of hard work. Cos says to Eve, who insists on striving for material success as a sign that she is saved, "Why should I bother striving? The decree is already fixed, and neither you nor I can change it. So why not opt for a life of leisure and trust fate that you will also have eternal salvation?"¹⁰⁵

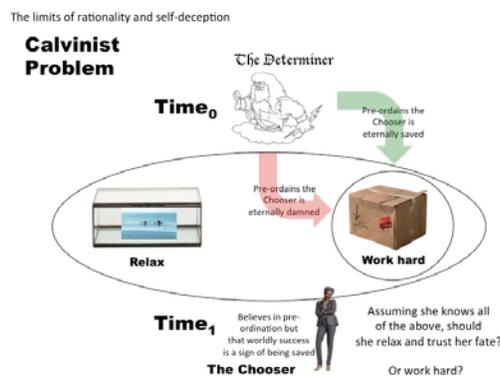


Figure 2

Each of these problems highlights a problem in rational choice theory. The world is operating according to its own independent mechanisms of cause-and-effect, already set in place by the Predictor or the Determiner. There is a probabilistic but no discernible causal relationship between a choice that the individual makes in the face of those mechanisms and the resulting state of the world. The usual dictum of rational choice—that one maximizes one's mathematical expected utility—would act as Eve does: choose Box 2 only and work hard because conditional probability would suggest that course. This is called the evidentialist approach, and it follows traditional or orthodox rational choice theory. The "evidentially expected utility" or "EEU" of an action is the weighted sum of the expected utilities of outcomes based on their conditional probability of the outcome given the action.¹⁰⁶ The alternative, adopted by most rational choice theorists (and

104. Bach, *supra* note 75, at 173. I have paraphrased Bach's rendition of this debate. See also NOZICK, *supra* note 76, at 46.

105. Jean-Pierre Dupuy, *Rationality and Self-Deception*, in DUPUY, SELF-DECEPTION AND PARADOXES, *supra* note 75, at 113, 121-22.

106. NOZICK, *supra* note 76, at 42-43. Conditional probability is the probability of one proposition being true given the truth of another proposition. Assume that for the 2012 entering class, our law school accepted 900 students out of 1,500 applications. Among the 1,500 applications, there were 300 from Ivy League

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Cos), is to follow causal decision theory, and to acknowledge that the evidential approach does not hold in instances like these.¹⁰⁷ The causal approach views the outcome as conditioned on the action (“causally expected utility” or “*CEU*”), but as in this case, the probability of the outcome given the condition is 100%.¹⁰⁸ As we would expect as a result of the Münchhausen Trilemma, the paradox at the heart of the Newcomb problem remains unresolved.¹⁰⁹

Moreover, it seems unlikely to be. Nozick takes the Newcomb problem two steps further, and expresses the unresolvable dilemma symbolically. He first suggests the rational approach to any decision would be to develop a decision value (*DV*) algorithm for an action *A* that incorporates weighted confidence of the actor in the evidentially expected utility approach versus the causally expected utility. If the weighted confidence of the former is *We* and the later is *Wc*, then the formula for decision value incorporating both would be:

$$DV(A) = Wc \times CEU(A) + We \times EEU(A)$$

The second step is to add the possibility that the utility of the action is merely symbolic, in accordance with Nozick’s view that some actions have meaning apart from their expected outcomes, and that meaning can be expressed as its own form of utility. Hence, the complete formula for the optimal weighting of decision value would be:

$$DV(A) = Wc \times CEU(A) + We \times EEU(A) + Ws \times SU(A)$$

graduates. Among the Ivy League graduates, 270 were admitted. If we know that Mary has been accepted student, what is the probability that she graduated from an Ivy League school?

H = the proposition that she was an applicant from the Ivy League

E = the proposition that Mary was accepted

The probability of H given E is defined as $P(H/E) = P(H \& E)/P(E)$, assuming both terms of this ratio exist and $P(E) > 0$. The probability that she was both admitted and an Ivy League applicant, $P(H \& E)$ is 270/1,500 or 18%. The probability that she was admitted, $P(E)$, is 900/1,500 or 60%. The probability of the hypothesis she was an Ivy League grad, given that she was admitted, $P(H/E)$, is .18/.6 or 30%. The probability of the converse, that she was admitted given she was an Ivy League grad, $P(E/H)$, is equal to $P(H \& E)$ divided by $P(H)$, the unconditional probability within the applicant pool that she was an Ivy League grad. So $P(E/H) = .18/(300/1,500) = .18/.2 = 90\%$.

107. Dupuy, *supra* note 105, at 119-20.

108. Nozick, *supra* note 76, at 43.

109. Nozick concludes:

Despite these and other technical elaborations—backtracking subjunctives, explicit incorporation of tickles and meta-tickles, the ratifiability of decisions, and so forth—and despite attempts to show the problem is irremediably ill defined or incoherent, the controversy continues unabated. No resolution has been completely convincing.

Id. (footnote omitted).

As Nozick observes, the value of this conception is that it allows the actor to express differing level of confidence in particular modes of principled decision-making when undertaken in different cases. It avoids taking sides in the “causal-ist-evidentialist” debate. Instead of “formulating the one correct and complete set of principles to be applied unreservedly in all decision situations,”¹¹⁰ the decision theorist rationally hedges his bets. This is not just because “we have yet to find the knockdown argument for the one that is correct,” but also because a complex world indeed does seem to offer many situations like the Newcomb problem (or other paradoxical situations) in which EEU-based decision-making is preferable to CEU decision-making, or vice versa.¹¹¹ I want to make a stronger statement than Nozick appears to have been willing to make. There is no knockdown argument because principled rationality approaches a metaphoric limit. It spins down the infinite regress when it comes time to make the decision because there is no rule by which we can determine how to weight our confidence as between causal expected utility and evidential expected utility.

My intuition is that we regularly face Newcomb problems, of which one, like the decision to gamble in casinos or the racetrack, is the decision to invest in remote businesses and markets over which we have no control. Bazerman’s answer to the question invokes behavioral finance, the application of the heuristics and biases of behavioral psychology to investment decisions, attributing the perceived irrationality of widespread managed investing on the ability of brokers and investment advisers to play on biases like overconfidence, optimism, the willingness to deny random events as random (and regression to the mean), anchoring, status quo, procrastination, and prospect theory. Claire Hill suggests the better explanation may be justifiability of the decision under the “acceptability heuristic.”¹¹² All those explanations seem incomplete to me. I am not aware of investment decisions being previously characterized as a Newcomb problem, but the parallel seems apt. I am thus going to propose a third version of the Newcomb problem. (See Figure 3.)

110. *Id.* at 46.

111. *Id.* at 46-47.

112. Claire A. Hill, *Justification Norms Under Uncertainty: A Preliminary Inquiry*, 17 CONN. INS. L. J. 27 (2010). Professor Hill’s analysis is insightful, suggesting that under the “acceptability heuristic” it is less important that a decision is optimal, and more important that it is justifiable. The folk term for the acceptability heuristic is no doubt “CYA” and I agree that it is widely observable in institutional decision-making. For a general counsel, it often arises in the context of hiring a law firm for a “bet the company” litigation or acquisition assignment. One may easily justify the decision to hire a Wall Street law firm over an alternative (say, a well-regarded but far less expensive firm in a Midwestern city) with the thought that “nobody will second-guess this decision.” Understanding that heuristic, however, from the perspective of someone outside looking in does not make it any easier to decide, when faced with the decision, from the perspective of the decision-maker inside looking out.

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Example 3 (The Managed Investment/Index Fund Problem). I am obliged first to establish that the financial markets operate in a way such that the analogy between the Market, on one hand, and the Predictor or the Determiner, on the other, is appropriate. Hence, some preliminary discussion of causation and determinism in social science is necessary, because I am not suggesting something like Laplace's scientific determinism: "the idea that the state of the world at the present determines precisely the manner in which the future will unfold."¹¹³

The limits of rationality and self-deception

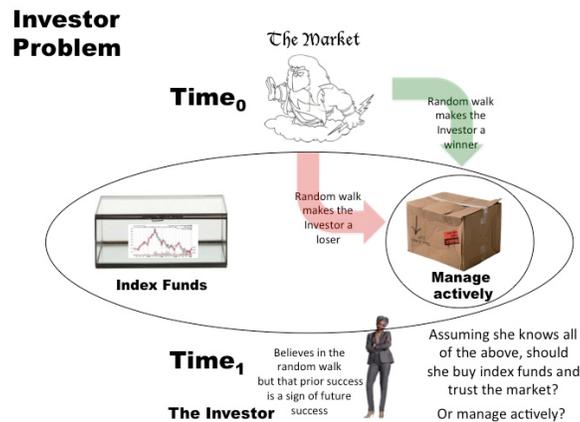


Figure 3

Financial markets are complex collective interactions of thousands or millions of specific individuals (or computerized trading programs). Systems like these, that are the result of human interactions, are not wholly goal-seeking like the individuals who comprise them, and as to which we could attribute a direct cause. Nor are these human systems quite like moving billiard balls that have no subjective purposes or goals. They could, however, be systems that appear as self-regulating (say, like a thermostat) for which nevertheless "the mechanisms are real, understood, and causal."¹¹⁴ The great breakthrough of Hume and the empiricists was to posit causal explanation in science not as some divine or metaphysical force, but merely as observed regularity or "constant conjunction."¹¹⁵ In the Humean conception, there is no necessary reason why the billiard ball always caroms in precisely the same way when struck with precisely the same force at

113. MLODINOW, *supra* note 16, at 192

114. Stephen P. Turner, Cause, the Persistence of Teleology, and the Origins of the Philosophy of Social Science, in *The Blackwell Guide to the Philosophy of the Social Sciences* 21, 30 (Stephen P. Turner & Paul A. Roth, eds., 2003).

115. ALEXANDER ROSENBERG, *PHILOSOPHY OF SOCIAL SCIENCE* 8-9 (2d ed. 1995).

the same angle, but it always does. That, and nothing more in the way of unobservable metaphysics, *is* the causal relationship between the striking ball and the target ball.

Again, we have no problem attributing a deterministic cause to the billiard ball movements, assuming we know the present state of the world immediately before they move. Nevertheless, the world is far more complex than a billiard table. There is an asymmetry to the attribution of direct causation that makes it far easier to explain the past than to predict the future. The classic example of this is the tracing of the movement of a single water molecule in entire container of water. The molecule will follow an aimless path. If we trace all of its Brownian motion collisions with other molecules, we can explain exactly why it is where it is now. But that is because we know which other molecules with which it actually collided. But to predict the future movement, we would need information on all the other molecules in the container, and “an almost unimaginable number of mathematical calculations, far greater in scope and difficulty than the list of collisions necessary to understand the past.”¹¹⁶

Attribution of direct causation neither to purposeful individual human beings nor to mechanical systems, but to social institutions like financial markets, is even *more* difficult. As Alexander Rosenberg asks and answers, “Why should meaning, purpose, goal, and intention, which have no role elsewhere in science, have the central place they occupy in social science? The obvious answer is that people, unlike (most) animals, vegetables, and minerals, have minds, beliefs, desires, intentions, goals, and purposes.”¹¹⁷ To the extent that a social science (like the study of financial markets) seeks to find causal laws rather than “rough-and-ready” generalizations, there are factual impediments. Any outcome may be the result of one of innumerable combinations of causes. The “causal factors that are individually necessary and jointly sufficient to bring about a particular effect will usually be so numerous that we cannot uncover them.” Hence, “[e]xact laws underwriting social phenomena will probably be complex beyond our ability to grasp.”¹¹⁸

In other words, the price movements in financial markets are causally determined in terms of a relationship between the present state of the world and what will happen in the future. The problem, of course, is that the present state of the world is too complex ever to presume, à la Laplace, that one could actually identify the direct causal factors in the movement of either an individual price or a market index from one moment to the next. Hence, serious study of price movements gets expressed in terms of correlation, which is no more than a statistical

116. MLODINOW, *supra* note 16, at 197. No doubt it would a moderately trivial matter for a physicist to predict the entire array of sixteen billiard ball movements in the initial break, given knowledge of the angles and force of the cue ball. And my guess is that a pool shark knows enough about the key relationships to be able to sink the one or two balls she needs on the break. For the rest of us, it looks random.

117. ROSENBERG, *supra* note 115, at 25.

118. *Id.* at 177-78.

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relationship between sets of variables, expressly in terms of the probability that there is a relationship. It is a truism that mere correlation does not imply causation. But the demarcation between direct cause and mere correlation is not black and white. Direct causation is akin to correlation on steroids: the constant conjunction is so universal as to be spoken of as a law.¹¹⁹ For example, our view of the relationship of supply and demand of a good to the price of a good is that it is something more than mere correlation between volumes and prices; it is the *law* of supply and demand in the sense that we can attribute a direct causal relationship between the rise in price and the fact that there are more potential buyers than potential sellers of the good.

119. So-called “radical Bayesians” see no need to make any assumptions about direct causation. They view Bayes’ Theorem as the means by which a subjective rational actor should use conditional probabilities to update one’s beliefs in hypotheses, theories, and laws of nature in light of new evidence.

Whether to accept Einstein’s general theory of relativity is a classic example. Assume before anyone has observed the phenomena of light traveling through the curved space predicted by general relativity, we assign a low probability to Einstein’s general relativity hypothesis, expressed perhaps as $P(H_1) = .1$. (All of these values are arbitrary simply to demonstrate the point.) The conditional probability of the light curving, assuming the hypothesis is true, expressed as $P(E/H_1)$, is very high, given that is what the hypothesis predicts. So let us assign a value to $P(E/H_1)$ of .7. This means necessarily that the conditional probability of the evidence of light curving but not being attributable to H_1 is .3. Now a surprising bit of evidence comes in, namely, a first single empirical observation of light curving (as indeed occurred in 1919). Bayes’ Theorem allows us to update the conditional probability of the hypothesis being true, or the extent to which we should revise our belief in the hypothesis, given the new evidence.

$$P(H_1/E) = \frac{P(E/H_1) * P(H_1)}{P(E)}$$

$$P(H_1 \text{ true}/\text{light curves}) = \frac{P(\text{light curves}/H_1 \text{ true}) * P(H_1 \text{ true})}{[P(\text{light curves}/H_1 \text{ true}) * P(H_1 \text{ true})] + [P(\text{light curves}/H_1 \text{ false}) * P(H_1 \text{ false})]}$$

$$P(H_1/E) = \frac{.7 * .1}{(.7 * .1) + (.3 * .9)}$$

$$P(H_1/E) = \frac{.07}{.07 + .27} = .34$$

$$P(H_1/E) = .21$$

Intuitively what this tells us is that no matter how improbable general relativity is (only a 20% chance), it is still twice as deserving of our confidence, given the new evidence, as it was before.

Suppose four more independent experiments take place and we see light curving as expected each time. This simply increases our confidence in the truth of H_1 as follows:

$$P(H_1/E_1, E_2, \dots, E_5) = \frac{P(E_1/H_1) * P(E_2/H_1) * \dots * P(E_5/H_1) * P(H_1)}{P(E_1, E_2, \dots, E_5)}$$

$$= \frac{.7^5 * .1}{(.7^5 * .1) + (.3^5 * .9)}$$

$$= \frac{.017}{.0192}$$

$$= .89$$

In short, the more independent evidence we get, the more confidence we have in the hypothesis. I will not get into the criticisms of Bayesian rationalism here, not the least of which is the extent to which there needs to be judgment in the assignment of the various probabilities.

Thus, in considering the interface of information and judgment in the subjective mind of an investor, I am willing to posit there is a causal link between past and future performance of the stock market or between the past and future equity value of particular companies, but it is so complex and attenuated that we cannot say what it is.¹²⁰ Why? Because it depends on uncontrolled human behavior as to which we have not uncovered the causal laws, and even if we knew the causal laws, we would neither have sufficient data nor be able to carry out the calculations.¹²¹ Nothing an individual does can change this level of complexity. What we observe as randomness is not the absence of direct causal influences, but the fact that calculating them is beyond human (or computing) capability. The “will” of the market, as it were, is as inscrutable as the “will of God.” Predicting the market’s movement in a deterministic way is simply beyond our ken and our control (like the will of God).

There are, however, probabilistic relationships between past and future performance, and investment success is generally taken as a sign that an investor has the “gift,” and is more likely to be successful in making investment decisions. What we know we can control is the method and particularly the *cost* of investing. Eve seeks out an investment adviser with a record of past success, pays her a 1% advisory fee, as well as all of the brokerage costs of buying and selling shares.

120. Saras Sarasvathy and Nicholas Dew offer an alternative model I believe is consistent with this thesis in the context of the creation of new markets . . . What is the source of the watershed under which an extant technology, such as the Internet before 1994, becomes the basis of a market never before considered? Sarasvathy and Dew propose it is a variation on Nelson Goodman’s famous “grue” paradox of induction. The proposition “all emeralds are green” is inductive. There has never been an instance of a non-green emerald. But imagine that, as of a future date, all emeralds will be blue. Hence, emeralds have a quality of “grue” in which they are green before that date, and blue afterwards. Our observations are as consistent with the proposition “all emeralds are grue” as they are will the proposition “all emeralds are green.” Looking backwards, we may well, by inductive reasoning, see a pattern that we would describe as “green.” But that observation is just as consistent with a future radical shift in which the pattern is “grue.” The Sarasvathy/Dew thesis is that entrepreneurs tend to perceive markets as “grue,” and to operate outside of the causal reasoning that would only perceive such markets as “green.” They are successful by way of a commitment to effectual rather than causal reasoning. *See* Sarasvathy, *supra* note 55.

The effectual commitment overcomes *objective ignorance*—namely, . . . ‘true’ uncertainty (ignorance of what probabilities to assign) and the more recent problem of isotropy (ignorance of the relevance of particular pieces of information to the problem at hand)—by first limiting the actor to the known (who I am, what I know, and whom I know) and the possible (what I can actually do); and then making the selection within this small set dependent upon the next stakeholder who makes an actual commitment to transform this set in a particular way. The effectual commitment further overcomes *intersubjective ignorance*—namely, the lack of knowledge about how opportunistic or trustworthy the other party to the interaction is—by proceeding strictly on the basis of actual commitments, even to the exclusion of other possible commitments; and finally, it turns *subjective ignorance*—i.e., goal ambiguity into an asset, that enables the known and the actually possible for each individual actor to be embodied into effectual commitments that specify what the new artifact—i.e. the new market—will be.

Saras D. Sarasvathy & Nicholas Dew, *When Markets are Grue*, <http://effectuation.org/sites/default/files/GrueMarkets.pdf>.

121. MLODINOW, *supra* note 16, at 194-95.

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Cos says, “Why bother? What is past is past, and indeed, movements of the market are a matter of causal determinism beyond our ability to predict reliably. Have you read any of the empirical work on the ability of investment managers to outperform market benchmarks consistently?¹²² Do you realize how much it costs to manage actively?¹²³ Why would a rational investor ever make the decision to do anything other than avoid the costs of management and trust the market to create wealth?”¹²⁴

Any investor who selects a successful manager rather than buying index funds so as to track precisely the gains and losses of any particular market is a Newcomb problem evidentialist whom causal rationalists would consider irrational. That is, the gambler or investor has to be thinking he or she is capable of beating the market at the same time he or she knows the market is the product of deterministic laws beyond the capability of human beings to divine. In the long run, we cannot beat it any more than we can beat death. The behavioral economics answer to this problem requires us to believe that we have a hard-wired illusion—we just cannot help seeing objective reality through biased filters, even when we are aware of the biasing filters. Daniel Kahneman refers to this phenomenon as an “illusion of skill” under which “investors, both amateur and professional, stubbornly believe that they can do better than the market, contrary to an economic theory that most of them accept, and contrary to what they could learn from a dispassionate evaluation of their own personal experience.”¹²⁵ Kahneman attributes the illusion to overconfidence in high-level skills, and the illusion that they have validly trans-

122. For a summary of the work demonstrating that active management, far from outperforming the market, in fact consistently lags the market when measured over the long term, see Franco, *supra* note 44, at 36-42.

123. No doubt Cos would be quoting the following to Eve as well:

John Bogle, a legendary innovator in the field of investment management (and sometimes industry critic), has argued emphatically that costs should be the most important factor to investors rather than short-term performance figures because of the significant body of research casting doubt on the ability of investment managers to consistently (or persistently) outperform market benchmarks.

Id. at 38, citing John C. Bogle, *The Relentless Rules of Humble Arithmetic*, 61 FIN. ANALYST J., Nov.-Dec. 2005, at 22.

124. BAZERMAN, *supra* note 41, at 103-06. Whether anybody actually has the capability of mastering probabilistic correlations between past or present states of the financial markets, on one hand, and the future, on the other, has been the subject of intense popular debate since the onset of the financial meltdown of 2008-09. Authors like Leonard Mlodinow, *supra* note 113, at 198-200, and Nassim Nicholas Taleb argue passionately that investors regularly and mistakenly attribute direct causal meaning to patterns of past movements in stock prices or market indices that are random in the asymmetry sense noted above. The past movements are perhaps capable of explanation, but trying to predict from them is always a matter of probably expected, not causally expected, outcomes. See NASSIM NICHOLAS TALEB, *FOOLED BY RANDOMNESS* (2005).

125. KAHNEMAN, *supra* note 14, at 217.

lated their ability to adjudge a single company's business prospects into a judgment about the accuracy of the stock price.¹²⁶

I wholly concur in Kahneman's empirical observations, but want to take up where he left off. It would seem that a trader's dispassionate evaluation of personal experience ought to be able to overcome illusions created by System 1 thinking, particularly in light of our experience that we can indeed use our principles, as Nozick tells us, to overcome short-term temptations. Rational decision theory sounds like a perfectly reasonable System 2 method of assessing the subjective and inner process of choice. But the application of rational decision theory applied to business decisions leads to a choice between (a) a rejection of evidentially expected value based decision making in favor of an impossible-to-calculate causally expected value,¹²⁷ and (b) an arguably illusory belief in the validity of the evidentially expected value.

As I discuss in the next section, it is sensible to continue our System 2-style reconciliation of knowledge (disclosed information) and decision (acting on that information) somewhere other than rational decision theory.

*B. "Not to Decide is to Decide and Not to Act is to Act:" Decision as Action
Rather than Knowledge*

For all its power, reason has not yet found the answer to paradoxes within rationality itself. It is not just that those paradoxes still exist; it seems to me they will never go away, and that is something with which we must come to terms. Nor has rationality been able to account for the imagination required to come up with alternative hypotheses that become the basis of reasoned rejection of previously accepted principles. As Robert Nozick observed, "It is not a mechanical matter to formulate the alternative statement most worth considering—relativity is an alternative to Newtonian mechanics, but only Einstein managed to formulate it—or sometimes even to know that it is an alternative, a conflicting and incompatible statement."¹²⁸ In short, this is not a problem for which I have an answer, nor is it one I expect would ever result in an answer that comes from any kind of rational reduction.

Kahneman's dichotomous model of System 1 and System 2 thinking is precisely the kind of rational reduction we would expect from System 2 thinking. It

126. *Id.*

127. Kahneman agrees that causal explanations of markets are more the result of our after-the-fact "tendency to construct and believe coherent narratives of the past" than a result of actual ability to make causal predictions. He refers to this as the "illusion of valid prediction." KAHNEMAN, *supra* note 14, at 218. Reality is complex, and "emerges from the interaction of many different agents and forces, including blind luck, often producing large and unpredictable outcomes." *Id.* at 221.

128. NOZICK, *supra* note 76, at 172.

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is eminently clear that Kahneman himself has no System 2-like formula for deciding when to employ System 1 intuitions or System 2 reflections.¹²⁹ The irony arises when we juxtapose Kahneman's wisdom with Schön's. The task Schön took on was to reconcile the kind of System 2 thinking—Technical Rationality—that forms the theoretical basis of professions like law with the kind of System 1 intuitive judgments that practitioners themselves could not explain. It is no coincidence that the pivotal chapter in Schön's book is entitled "From Technical Rationality to Reflection-in-Action."¹³⁰

What is fascinating about this is that there is nothing new under the sun in Kahneman and Schön. Over the last one hundred years, two philosophical themes have arisen, one that exalts scientific, objective knowledge (i.e., positivism) and one that exalts subjective decision (i.e., existentialism). Positivism emphasizes knowledge and objectivity, stressing its foundability and rationality, while dismissing decision and commitment to subjectivity as uninteresting. Existentialism stresses decision with its free and undetermined nature, and emphasizes its irrationality. It declares scientific knowledge uninteresting because of its objectivity. Positivism exalts rational analysis of facts; existentialism exalts irrational existential choice. Hans Albert observed, "These are orientations that hardly differ at all on the dichotomy between knowledge and decision, but adopt radically different points of view in their evaluation of it."¹³¹ Albert is a student of Popper, so he is interested in the epistemology of science, and he wants to knock down the dichotomy. And so he does: the free and autonomous individual's personal responsibility for moral decision in the face of an authority is no different than the same individual's responsibility for deciding what is worthy of being called knowledge.¹³²

In general, and not just in the context of making business choices like whether to invest or to go forward with an entrepreneurial vision, does more knowledge actually make it easier to decide a hard question? Brian Ribeiro has pondered why deep and fundamental disagreements in hard philosophical cases persist.¹³³ He concludes that they "confront us with an unresolved, and seemingly unresolvable,

129. "When we can replace human judgment with a formula, we should at least consider it." KAHNEMAN, *supra* note 14, at 233.

130. *See supra* notes 63-67, and accompanying text.

131. ALBERT, *supra* note 93, at 75-76.

132. POPPER, *supra* note 8, at 34-35. Popper's answer is to live with an agnosticism about any truth, to reject any assertion that truth is or can be manifest by any authority, to regard the sources of truthful assertions as manifold and unfathomable, to take refutation of plausible assertions as more helpful than the source of their truth, and to remain open to the possibility of such refutation. *Id.* at 11, 32-38. This is no mean feat. It requires one to believe that truth is at once beyond human authority and yet that even inspired groping for such truth carries no divine or metaphysical authority. *Id.* at 39.

133. Brian Ribeiro, *Philosophy and Disagreement*, 43 CRÍTICA 3 (2011).

challenge to the rationality of philosophical discourse, thereby raising the spectre of worrisome philosophical skepticism.”¹³⁴ What is a hard case? It is not one in which one of the interlocutors is ignorant of a critical fact (e.g., an argument about the temperature in which one person has access to a thermometer and the other does not), uneducated (e.g., a child who believes that a stork has brought his baby sister), or under a cognitive liability (e.g., someone who simply does not have the mental capacity to understand a mathematical proof).¹³⁵

A hard case is instead one like Wittgenstein posed in his *On Certainty*, and which I can restate in my own experience. I have friends in the legal academy whose access to information, education, and intelligence are unimpeachable. Nevertheless, they are Catholics or Mormons, and undoubtedly believe things that I am quite sure no amount of reasoned persuasion could cause me to believe. Wittgenstein’s (and derivatively Ribeiro’s) assessment was that this kind of disagreement is incapable of reconciliation. Instead, a change in belief of one of the interlocutors requires conversion. “If reconciliation is to occur, then one of us must forsake reason-giving, (non-rationally) reject our old rule, and (non-rationally) accept a new rule, thereby ending the dispute.”¹³⁶ Granted Ribeiro is talking about big, long-term, metaphilosophical issues, like idealism versus empiricism, and remains agnostic whether all hard cases are incapable of resolution short of conversion. But I am willing to posit that we commonly encounter these hard cases, and that the Münchhausen trilemma requires that we take a leap of faith or abjure any faith at some point in our thinking, or in our thinking about the thinking. If there is indeed a point at which the reasoning process founders on the way to a foundational fulcrum, and we are talking about faith, then it is not much of a stretch to think of decision-making as metaphoric conversion.

Disclosure remedies are essentially rational, scientific, and objective because they assume knowledge is inversely proportional to disagreement. If knowledge goes up, disagreement will go down. That is certainly consistent with those strands of philosophical orientation over the last one hundred years or so that eschew metaphysics—positivism (in its more and less extreme variants) and the so-called linguistic turn. Those are the strands that most thoroughly pervade mainstream legal thinking.

Existentialists, on the other hand, are less impressed (epistemically speaking) with objective knowledge and more focused on understanding subjective experience. To focus on the subjective experience of an investor, her choices and narrative as it were, is to bring a perspective not unlike that of the critical legal theorists. This is a decidedly uncomfortable place to be as a legal or public policy

134. *Id.* at 3.

135. *Id.* at 5-6.

136. *Id.* at 8-9, citing LUDWIG WITTGENSTEIN, *ON CERTAINTY*, trans. Denis Paul & G.E.M. Anscombe (Blackwell, 1969).

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theorist, because it moves away from positive analysis into the realm of existential narrative.¹³⁷ In short, it takes elements of critical legal theory out of its usual purview of speaking truth to power, and into the subjectivity that everyone, whether powerful or powerless, experiences in deciding rather than knowing.

In short, both positivism and existentialism capture insights about how individuals act subjectively in an objective world, but just as philosophical positivism falls short in its ability to capture all of subjective experience, so too the disclosure remedies of positive law fail to capture the subjective judgments that such disclosure may or may not trigger. Even with what purports to be full disclosure or due diligence, how can I be sure what I ought to do? The answer is that I cannot be sure, because in the expurgated version of the common phrase, “stuff happens.” That means always having to choose what to do next, even if the only thing I know is that I have a choice. It is up to me to do the best I can, in the face of some considerable despair about the limits of my knowledge, to do the best I can. For if I do not, or even if I do, only I am responsible. I use the word “despair” deliberately, as Sartre used it: “[Despair] means that we must limit ourselves to reckoning with only those things that depend on our will, or on the set of probabilities that enable action.”¹³⁸

Two contemporary analytical philosophers confront this despair of analysis in the face of action. Allen Gibbard attempts to reconcile natural fact, i.e., that which *is*, and is capable of being called true or false, with the normative quality of “ought” statements. In other words, humans have evolved to think and to plan,

137. I use the word “narrative” deliberately. Critical legal theory turned to “narrative,” a subjective rendering of individual experience, because of a shared perception that positive analysis either did not capture the “truth” of how some groups interacted with the legal system, or that positive analysis was itself a reflection of oppressive institutional power. As a result, “narrative” has an anti-theoretical, anti-systematic, anti-scientific, non-rigorous connotation within much of legal academia. Apart from the political connotations, “[i]n academia, the presumption of order, and hence theoretical explanation, is the sine qua non of any conversation; a discussion that seems ‘anti-theory’ or unduly capacious must avoid the charge that it is simply ‘lazy thinking masquerading as theory’ or, worse, mere brute ipse dixit of Dean [Robert] Scott’s *bête noir*, the ‘wise man.’” Jeffrey M. Lipshaw, *Contract as Meaning: An Introduction to “Contract as Promise at 30,”* 45 *SUFFOLK L. REV.* 601, 606 (2012). Hence, to be taken seriously, even the irreducible needs to be “theorized.” The translation of lawyerly thinking to action is no exception. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 *J. LEGAL EDUC.* 313, 316-17 (1995) (advocating the employment of cognitive science over “narrative” in explaining seemingly irreducible qualities like judgment, wisdom, and expertise).

138. SARTRE, *EXISTENTIALISM IS A HUMANISM*, *supra* note 158, at 34-35. The passage continues:

Whenever we desire something, there are always elements of probability. If I am counting on a visit from a friend who is traveling by train or trolley, then I assume the train will arrive on time, or the trolley will not derail. I operate within a realm of possibilities. But we credit such possibilities only to the strict extent that our action encompasses them . . . In the final analysis, when Descartes said, “Conquer yourself rather than the world,” he actually meant the same thing: we should act without hope.

so thinking and planning how to make decisions about what to do must be part of the natural order.¹³⁹ Thus, “from a basis that excludes normative facts and treats humanity as part of the natural world, [he] explain[s] why we have normative concepts that act much as normative realists proclaim.”¹⁴⁰ For my purposes, Gibbard’s critical insight aligns with the distinction between thought and action. Normative concepts, in his view, arise out of the natural fact that we make plans. But what we come to believe we ought to do, rather than having some metaphysical genesis, really is no more than what we actually do. Hence, “[t]he notions of plan and belief have their limits.”¹⁴¹ A person encounters a bully, and the question is whether to defy him. Gibbard says, “For a crucial sense of ‘ought,’ I say, the following holds: if you do accept, in every relevant aspect of your mind, that you ought right now to defy the bully, then, you will do it if you can. For if you can do it and don’t, then some aspect of your mind accounts for not doing it—and so you don’t now plan with every aspect of your mind to defy him right now.”¹⁴²

To Gibbard, as to Sartre, there really is no “ought” in a manner of mental calculation or planning that intervenes between the natural world and your decision; your decision *is* your action, and both are natural facts. Kent Bach reaches a similar conclusion in connection with rational decision paradoxes of the Newcomb problem variety. Rational decision theory represents a theoretical idealization of how people decide. But even more fundamentally, there is a real question whether decision is the product of any reflection at all. Bach says, “My eleven-year-old daughter appreciated this when I asked her, ‘What problem is everyone faced with at every waking moment?’ She immediately answered, ‘The problem of what to do next.’”¹⁴³ In short, philosophers, psychologists, cognitive scientists and others give much thought to dissecting the decision-making process in terms of the evaluation of alternatives, but in real life we are always settling what to do next because we are always *doing* something next.¹⁴⁴

This is not to say that even impulsive entrepreneurs never reflect. I am not making an empirical claim about entrepreneurial reflection. The critical point for the reflective lawyer assisting in the careful and rational evaluation of alternatives is to understand the limits of the evaluation. Evaluation is a thought process. But not to decide is to decide, not to choose is to choose, and not to act is to act.¹⁴⁵

139. ALLEN GIBBARD, THINKING HOW TO LIVE xii (2003).

140. *Id.*

141. *Id.* at 153.

142. *Id.*

143. Bach, *supra* note 75, at 185.

144. *Id.* at 186. Bach says this explains why we tend to be satisficers rather than maximizers. “[W]e do what it occurs to us to do unless it immediately occurs to us not to.”

145. Brian Bix asks whether I have mixed into my point about the limits of thought (versus the commitment to action) the conventional point about the distinction between fact and value. In other words, reflection on disclosed information may provide a more solid empirical grounding for reasoned choice. Still, no amount of disclosure can tell the decision-maker whether she ought to act, whether she wants to

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IV. WHAT TO DO: RECONCILING KNOWLEDGE AND ACTION IN BUSINESS DECISIONS

If knowledge is something fundamentally different than decision, if thinking about a problem, even with the most subtle Kahneman-inspired System 2 slow reflection, leaves us despairing at the end of the thought process of any certainties other than it is time to take the leap, if all the disclosure in the world will not cure the problem of uncertainty, what of it? I suggest we, as lawyers, will be more effective as teachers, counselors, and regulators if we take a page from the existentialists and critical scholars and consider the limits of that objective rationality when the time comes to act. I return to Donald Schön's demonstrations of knowledge, knowing-in-action, and reflection-in-action. There is a "just do it" aspect of decision-making: the "leap." Translating knowledge into action is itself a matter of action. In other words, this is a reflection on the differences between, on one hand, what we do as lawyers when we think deeply and rationally about a potential decision, incorporating all the best information with the best possible analysis, and, on the other, what clients have to do when we throw all of that analysis over the transom.

In what follows, I propose three modest additions to the business lawyer's (and business lawyer educator's) reflective toolkit, all of which are far more affective than cognitive. The first is the adoption of an attitude of epistemic humility—being conscious of the affective underpinnings of wisdom and learning versus knowledge and analysis—when considering the reasons that others act. The second is related: a willingness to consider our capabilities of very rational self-deception, and to develop self-awareness about the possible limits of our own subjective views.¹⁴⁶ The third is the opposite side of the epistemic coin: having the courage to act and the willingness to accept responsibility for the consequences of one's decisions in an uncertain world.

A. The Affective Limits of Knowledge and Technical Analysis

My first epiphany about my epistemic arrogance as a lawyer took place almost

take the risk, whether she ought to keep her promise, whether she ought to sacrifice long-term for short-term gain, etc.

This is a subject worthy of its own extended discussion, but my intuition is that fact/value is less an empirical "distinction" than a conceptual polarity about subjective belief. That is, the concepts (or "rules" or "definitions") we create about which of our beliefs are of fact and which are of value are indeed distinct. And we are capable of finding real world (or "empirical") examples or prototypes of each that demonstrate the explanatory power of the concepts. Nevertheless, applying the "rule" of fact or the "rule" of value to hard cases in between the ends of the polarity leaves us with exactly the same problem if we were required to decide whether something is a matter of fact or a matter of value, and then to act on that decision.

146. In the word of Robert Burns, "O wad some Power the giftie gie us/ To see oursels as ithers see us." Robert Burns, *To a Louse*, <http://www.robertburns.org/works/97.shtml>.

twenty-five years before the publication of the Carnegie Report.¹⁴⁷ In addition to noting the emphasis on analysis and formal systems that shape the legal frame of mind, the Report tells us generally that the young lawyer in practice often continues to think “like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.”¹⁴⁸

One of my first solo assignments a year or so out of law school was to handle a lawsuit Conrail had filed against a client in the metals industry. The client had shipped material to a customer, and paid the rate quoted by Conrail’s sales agent. Conrail’s subsequent audit revealed that the client had underpaid the rate applicable to the route the traffic had taken. Conrail sued for the difference, citing the longstanding principle that carrier rate misquotations are not a defense against legal actions by carriers seeking to collect undercharges.¹⁴⁹ My contact at the client was the grizzled freight manager, who insisted that the appropriate defense came from something he called the “Red Book.” He insisted there was an exception to the rule when the carrier had misrouted the traffic contrary to the shipper’s instructions. I looked high and low in the usual case reporters for any indication that such a rule existed, and simply discounted what this “school of hard knocks” graduate was telling me. I had another strategy anyway. I requested the shipping records in discovery, and when Conrail did not produce them, hounded it with discovery motions.¹⁵⁰ In the meantime, the old traffic manager, no doubt with some amusement, tried to persuade this bright young whippersnapper that there was a dispositive answer to the issue. And it turns out he was right. There *was* a Red Book, and the answer to the issue was in I.C.C. Conference Ruling 214.¹⁵¹ But for the longest time, I simply could not see it because of what the behaviorists call the *bias blind spot*: “The tendency to believe that one’s own experiences afford a particularly enlightened perspective on the conflict, and that one thereby sees the relevant issues more clearly than anyone else, can lead individuals to reject proposed solutions not only when offered by members of the opposing side

147. *See supra* note 72.

148. SULLIVAN, *supra* note 72, at 6.

149. *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) (“Deviation from [the applicable rate] is not permitted upon any pretext . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.”)

150. In a way I was right, because Conrail eventually agreed to dismiss the case when it could not find the records.

151. CHARLES F. WALDEN, *FREIGHT TRAFFIC GUIDE* (1921), <http://archive.org/stream/freighttrafficu00waldoft#page/n9/mode/2up>. Ruling 214, adopted in 1907, acknowledged that “[t]he lawful charge on any shipment is the tariff rate via the route over, which the shipment moves. No carrier can lawfully refund any part of the lawful charge except under authority so to do from the Commission or from a court of competent jurisdiction.” Nevertheless, there was an exception to the rule if the traffic moved on a higher cost route not specified by the shipper, as long as there no attempt to evade the correct tariff. *Id.* at 216-17.

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but also when suggested by neutral third parties.”¹⁵²

I recently had a dialogue with a close friend about data he had discovered regarding the comparative ability of adults and children to collaborate in finding solutions to difficult problems. His view was that collaboration could be taught. I thought not. The source of difference between the adults and the children was that the children *learned* naturally. It was because they were already learners (an epistemic orientation) that they collaborated. Again, the infinite regress surfaced. Can you teach an adult non-learner (one who resists learning) to learn? It seems obvious that someone who resists learning will also resist learning how to learn. Teaching is an activity from the outside in; learning is an activity from the inside out. Teaching is equivalent to disclosure or information; learning is equivalent to judgment or decision. My accession to wisdom in the Conrail case, it seems to me, was less cognitive than affective. I simply reached the point where I was prepared to listen to someone I did not think knew as much as I did about the systems of the law.¹⁵³

Even the most dyed-in-the-wool evidence-based management gurus have no reductive silver bullet for wise decision-making. Stanford management professors Pfeffer and Sutton wrote a book called *Hard Facts, Dangerous Half-Truths & Total Nonsense: Profiting from Evidence-Based Management*. In a section entitled “Wisdom: The Most Important Thing,” they still fall back on attitude and state of mind rather than intellectual horsepower. The most important characteristic of managers and advisers is the *attitude* they have toward knowledge. “The idea that wisdom is reflected in the attitude people have toward what they know, not in how *much* or how *little* they know, goes back at least to Plato’s writings.” Wisdom, however, precedes the conceptual framework used to organize the data. Wisdom is the mental act of “striking a balance between arrogance (assuming you know more than you do) and insecurity (believing that you know too little to act). This attitude enables people to act on their present knowledge while doubting what they know.”¹⁵⁴

I have come to think of wisdom as a combination of epistemic humility and

152. Ehrlinger, et al., *supra* note 24, at 11.

153. Gary Blasi’s 1995 article is exhaustive on the subject of the application of cognitive theory to what we perceive as lawyerly wisdom. The central question in his article deserves to be central: why do clients seek out experienced and “wise” counsel as opposed to the doctrinal analyses of the brightest recent law school graduates? Blasi, *supra* note 137, at 314-15. Blasi was aware of and praised Donald Schön’s work in *The Reflective Practitioner* as “acutely perceptive.” Nevertheless, it was faint praise. He characterized Schön’s proposed reflection as better than “unstructured narrative of miscellaneous things done right and wrong,” but still sort of the kind of insight to be provided by the developing cognitive science. *Id.* at 389-90. I am less disdainful of narrative to the extent it tries to focus on the subjective and affective experience of being wise, as opposed to the objective and technical assessment of wisdom.

154. PFEFFER & SUTTON, *supra* note 6, at 52-53.

epistemic courage (the latter of which I discuss in Part IIIC). Both of these attributes are affective or emotional or a priori, rather than capable of rational reduction.¹⁵⁵ In other words, a state of mind embracing simultaneously epistemic humility and epistemic courage precedes one's ability to accept or reject authoritative statements or commands.¹⁵⁶ Epistemic humility deals with the knowledge side of things—to be wise I need, like Socrates, to be aware there are so many things I do not know, and to be skeptical of any assertion of a foundational truth. It is not to reject candidates for foundational truth out of hand, but it is likely to leave them for all time as candidates without ever allowing them to be elected. The first step in the translation of knowledge to action, then, is an understanding of the subjectivity inherent in knowledge and humility about *any* analysis in the face of the need to act.

B. Rationality and Self-Deception

The next matter in the translation of thinking to action is dealing with the power of our own lawyerly ability to convince ourselves of just about anything.¹⁵⁷ Posed most famously by Sartre, the question of self-deception—of lying to oneself—has been inextricably tied to modern questions about consciousness and philosophy of mind.¹⁵⁸ The question returns to how we not only somehow manage to act in ways that seem objectively to be irrational, but also that we have experienced the phenomenon so regularly in our own lives, and in such fundamental ways. There is never a problem in coming up with examples in which there is a conflict between desiring that something be true and believing that it is not, yet acting on the desire rather than the belief. We believe that we cannot beat the market (or so all the evidence seems to show us), but we desire to beat it nevertheless, and we act on the desire and not the belief. Nevertheless, I sit here at the computer, thinking about System 1 and System 2 thinking, and when I try to apply it to myself, I do not seem to make much progress in finding the end of the regress.

155. Some have attempted empirical studies of wisdom. Recognizing that the game in such studies lies in the definition of wisdom, nevertheless one conclusion is that intelligence alone is not the most powerful predictor. "Instead, high predictive value comes from a combination of psychosocial characteristics and life history factors, including openness to experience, generativity, cognitive style, contact with excellent mentors, and some exposure to structured and critical life experiences." BALTES & SMITH, *supra* note 32, at 60.

156. See POPPER, *supra* note 8, at 246-47: "[W]henver we are faced with a command by an authority, it is our responsibility to judge whether this command is moral or immoral. The authority may have the power to enforce its commands, and we may be powerless to resist. But unless we are physically prevented from choosing the responsibility remains ours. It is our decision whether to obey a command, whether to accept authority."

157. I have previously discussed the difficulty in distinguishing lawyerly argument from rationalization when a lawyer as counselor is advising a business client. See Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959 (2006).

158. See JEAN-PAUL SARTRE, BEING AND NOTHINGNESS (Hazel E. Barnes trans., Wash. Sq. Press, 1984) (1943).

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So I propose considering this phenomenon of lying to myself (or oneself) philosophically rather than scientifically.

The literature of self-deception is so rich in part because there is no universal consensus about what self-deception is or if it is even possible.¹⁵⁹ Behavioral science itself acknowledges what otherwise seems to be self-deception as various forms of illusion, not the least of which are the illusion of understanding and validity. As Daniel Kahneman observes, “The core of the illusion [of understanding] is that we believe we understand the past, which implies that the future should also be knowable, but in fact we understand the past less than we believe we do.”¹⁶⁰ Nevertheless, the benefit of tapping the philosophical work on self-deception is that, unlike behavioral science, it starts from the inside of the subject and works its way out. It does not merely seek to describe behavior that appears to be at odds with objectively rational conclusions, but to understand how the subjective mind could be both believing and not believing the evident objective truth at the same time. It is about the very illusion of validity itself, which arises from “our tendency to construct and believe coherent narratives of the past.”¹⁶¹

If our System 2 thinking is the source of our ability for rational self-reflection, how does self-deception fit into the picture? On one hand, Donald Davidson, reflective of the skeptical approach to self-deception, asserts that the attribution to another of belief in a straightforward contradiction is simply unintelligible *because* it is irrational.¹⁶² For one simultaneously to believe a proposition *p* and to believe its contradictory proposition, *not-p*, one would need to be performing the act of intending a misrepresentation, and recognizing it as such, while at the same time not recognizing its falsity, since such recognition would defeat the purpose of the misrepresentation.¹⁶³ Davidson’s objection to the utility of self-deception as a concept is that it entails the assumption that someone can think one’s way to irrationality by the acceptance of contradictions or inconsistencies that rational

159. See Sissela Bok, *The Self-Deceived*, 19 SOC. SCI. INFO. 923 (1980) (acknowledging that the phenomenon of a person’s failure to acknowledge what to others is too obvious to miss is worthy of exploration and inquiry, but contending that the rubric “self-deception” is unhelpful in the effort). Kent Bach observes, “As philosophical topics go, self-deception has something for everyone. It raises questions about the nature of belief, intention, reasoning, motivation, attention, self-knowledge, the unity of the self, self-esteem, psychic defenses, the unconscious, personal character, and interpersonal relations.” Bach, *supra* note 75, at 164.

160. KAHNEMAN, *supra* note 14, at 201.

161. *Id.* at 218. One of the leading thinkers on self-deception, Alfred R. Mele, illustrates the construction of such a narrative. Sid, who is fond of and regularly lunches with Roz, theorizes that Roz’s refusal to go out with him, and her insistence that she loves her steady boyfriend, is instead “playing hard to get.” *Two Paradoxes of Self-Deception*, in DUPUY, SELF-DECEPTION AND PARADOXES, *supra* note 75 at 37, 44.

162. Donald Davidson, *Who is Fooled?* in DUPUY, SELF-DECEPTION AND PARADOXES, *supra* note 75, at 1, 5 (1998).

163. *Id.* at 3.

thinking itself should reject. Says Davidson, “I do not want to call someone irrational because he has beliefs or desires that in themselves seem mad as long as the person has not arrived at these attitudes through faulty thinking, failing to take into account evidence he acknowledges, or willful disregard of contrary considerations.”¹⁶⁴

Davidson’s resistance is understandable. To make sense of anything in a rigorous or principled way, we need to start with a thinking process that is based on rationality (characterized by deductive, inductive and other forms of logic). Hence, “[o]ne must think in order to be inconsistent. It is only by showing ourselves largely rational and consistent that we show ourselves capable of irrationality and inconsistency.”¹⁶⁵ Davidson posits two explanations of the phenomenon of what appears to be self-deception. Take, as an example, Ronald Reagan’s apparent knowledge that he had endorsed the Iran-Contra “arms for hostages” deal at the same time he appeared to believe he had not. First, there may be mental states, like wishful thinking, that are the cause of a deceived belief, but the wishful thinking is not itself a reason for the wishful thinker to believe what he wishes were true. Second, Davidson posits a theory of a “partitioned” mind, not wholly integrated, as capable of holding two contradictory beliefs in the face of what would otherwise be inconceivable: that a single rational mind both believes and does not believe something at the same time.¹⁶⁶

Other philosophers and psychologists are less willing than Davidson merely to assume away the possibility of self-deception as a thinking phenomenon merely because it shakes the foundations of rationality.¹⁶⁷ For those who believe self-deception—the simultaneous belief in the truth of p and its contradiction $not-p$ —is possible, one move is to suggest that self-deception does not involve an intentional deception as though it were the equivalent of the intentional deception of another. Ariela Lazar, for example, criticizes Davidson’s account because it depends on the assumption of intentionality within the subject.¹⁶⁸ She posits a

164. *Id.* at 6.

165. *Id.* at 7.

166. *Id.* at 7-9.

167. Davidson shrugs off the question “who is to be the judge of rationality and consistency?” in a pragmatic way.

The annoying answer is that this is a bad question, a question without an answer. There is no eternal, absolute standard. At the same time, we are not thrown back on your standards or mine; relativism is not the only alternative to standards independent of all thought and judgment. It is clear that in evading the question when a set of attitudes can be recognized as inconsistent, we are quickly driven back to basic logic; there comes a point at which intelligibility is so diminished by perceived inconsistency that an accusation of inconsistency loses application for lack of identifiable contents about which to be inconsistent.

Id. at 6-7.

168. Ariela Lazar, *Division and Deception: Davidson on Being Self-Deceived*, IN DUPUY, SELF-DECEPTION AND PARADOXES, *supra* note 75, at 19.

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Ph.D. student with a strong desire to pass her doctoral defense. Passing the defense is highly desirable, but she is poorly prepared because she is insufficiently advanced in her research and thinking so as to be able to present a coherent thesis. Because of the desirability of the outcome of passing, she nevertheless proceeds with the defense against the advice of one of her committee members. The evidence is that she will fail, but she believes she will pass. Davidson would argue that her motivation provides an explanation for her behavior—a form of wishful thinking—but it does not provide support for the concept that she irrationally believed the contradiction itself—she would both fail and pass.¹⁶⁹

I am persuaded (from my own life experience) that we are indeed capable of self-deception and that it is not necessarily irrational, particularly if rationality is the application of principled and coherent thinking to the objective facts of the world. Self-deception is no more than the formation of a creative hypothesis for the purpose, as Kent Bach describes it, “of giving up or replacing the unpleasant belief, at least as far as one’s ongoing thinking is concerned.”¹⁷⁰ Indeed, Kahneman’s anecdotes about his observations of cognitive illusion strike me as much of self-deception as of heuristics and biases. He discovered cognitive illusion for the first time when psychologists in the Israeli Army (of which Kahneman was one) continued to believe in the efficacy of their leadership tests for officer candidates despite evidence that the tests were unreliable.¹⁷¹

Why not simply rest on behavioral observations of self-deception (as does Kahneman) and forego the possible excursion into metaphysics? I want to take up what Kahneman does not, namely, what it means to be an individual subjective consciousness in an objective world. We can do all the analysis we want from the outside in of our objective perceptions of the decision-making process, but that is not the same thing as the internal experience of making a decision. The appropriate analogy is the difference between explaining the reasons why a 2005 Chateaufeuf de Pape tastes so wonderful, and actually experiencing what the wine tastes like when it is rolling around the tongue and palate. My claim here is that the fact we are subjective minds making sense of an objective world that includes our own decision-making processes, locked into an infinite regress of self-reference, leads to the result that we always carry the seeds of our own self-deception.

169. Davidson, *supra* note 162, at 4.

170. Bach, *supra* note 159, at 167. In my more ethereal moments, I am inclined to believe a purposeful life is itself a Newcomb problem in which we know nothing in very long run makes a difference, but we impel ourselves nevertheless to making a difference. Sartre’s answer is to live consciously with the awareness that purposiveness in an absurd world is another example of the world’s absurdity. Or, as in this characterization of self-deception, we simply put aside all of the unpleasant beliefs, such as in death, illness, entropy, and the Big Crunch, that conflict with our present goals.

171. Kahneman, *supra* note 27; *see also* KAHNEMAN, *supra* note 14, at 209-16.

We can never be sure of our own objectivity (and I doubt Kahneman would disagree with me about that).

My own System 2 thinking leads me to the conclusion that we cannot simply, *pace* Davidson, assume away the phenomenon of self-deception. Instead, it is something with which we must grapple whenever we think about the process of making rational judgments. I do not intend to get bogged down in the debates about nomenclature or whether self-deception must necessarily be intentional to be deceptive; instead I accept that there is a phenomenon we have all experienced in which we manage to keep ourselves from thinking about something we believe is true, but do not want to face.¹⁷²

The point is that self-deception is another way of approaching the subjective and motivated processing of objective data. Deceiving oneself is at the heart of the problem-setting process that Schön describes. When we encounter a problem to be solved, we need to come up with an explanatory hypothesis and then test it. Something other than reason (perhaps imagination) is the source of our ability to develop the hypotheses we use as the bases of alternative explanations. As Nozick concedes, “There is no mechanical (algorithmic) procedure for generating the most promising alternative—none that we know of anyway.”¹⁷³ If our desires, rather than rationality, affect the processing of information and the justification of a course of action that we tell ourselves are our reasons for acting, it is not surprising that we might have a reason to question our own rational conclusions.¹⁷⁴

172. *Id.* Bach notes the difference between his view and that of Georges Rey, who contends that the self-deceiver holds contradictory beliefs, but that they are different kinds of belief, one central and unstated, and one avowed but contrary to the central belief. Bach objects to the notion of different types of belief, contending instead “the self-deceiver avoids the sustained and recurrent thought that *p*,” a thought that would provide evidence that the person actually believes *p*. “One effect of self-deception, then, is to suppress the subjective evidence that one believes that *p*, hence to make it seem to one that not-*p*.” *Id.* at 168.

There are debates in the literature about whether self-deception is conscious or unconscious, or a matter of suppression rather than repression. *Id.* I am reasonably persuaded from my own life experience that self-deception that might arise from psychological repression. Peter Gay, one of Freud’s biographers, observed:

Self-deception and hypocrisy, which substitute good reasons for real reasons, are the conscious companions of repression, denying passionate needs for the sake of family concord, social harmony, or sheer respectability. They deny these needs, but they cannot destroy them. Freud liked the passage from Nietzsche that one of his favorite patients, the “Rat Man,” quoted to him: “‘I did this,’ says my Memory. ‘I cannot have done this,’ says my Pride and remains inexorable. In the end—Memory yields.”

PETER GAY, *FREUD: A LIFE FOR OUR TIME* 129 (Norton, 1988). My concern here is with the limit of conscious rationality in the decision-making process, and I do not believe that tapping into theories of the unconscious is necessary to this discussion. For those interested in that subject, see, e.g., the essays collected in BRIAN P. MCLAUGHLIN & AMÉLIE OKSENBERG RORTY, EDs., *PERSPECTIVES ON SELF-DECEPTION* (1988); MIKE W. MARTIN, ED., *SELF-DECEPTION AND SELF-UNDERSTANDING: NEW ESSAYS IN PHILOSOPHY AND PSYCHOLOGY* (1985).

173. NOZICK, *supra* note 76, at 172-73.

174. ALFRED MELE, *SELF-DECEPTION UNMASKED* 25-46 (2001).

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The only antidote to rationalizing and justifying self-deception seems to me to be that aspect of wisdom we call self-awareness.¹⁷⁵ The confrontation with self-deception is beyond the limits of rationality; it means coming to terms with our apparent capability rationally to believe p and not- p at the same time. We cannot reason our way out of self-deception precisely because it is an epistemic struggle to assess whether we are being rational in the assessment of our rationality. Self-awareness then is, as some writers have suggested, a matter of epistemic courage, the willingness to face the truth about ourselves or the world, a state of mind or emotional resilience that precedes the application of rationality.¹⁷⁶

C. Decisions, Responsibility, and Time

As I thought about my thesis in terms of entrepreneurs (say, versus other professionals like bankers or lawyers), my visceral reaction was that perhaps entrepreneurs were the most self-deceived, and ought to be. After all, entrepreneurs are supposed to be affected by those “irrational” behavioral characteristics of over-confidence, and over-optimism. Indeed there is something to the idea that creativity or innovation itself requires taking leave of what really is in favor of what could be.¹⁷⁷ The opposite side of the self-deception coin is the heart of creative endeavor capsuled by the idea of the willing suspension of disbelief.¹⁷⁸ But I have come to think, consistently with my intuitions expressed here, that lawyers and business people (particularly entrepreneurs), to the extent they are thinkers rather than doers, are each self-deceived in their own way, and none will be able to think their way out of the problem.

Coming to a one-handed conclusion in the least self-deceived manner, and

175. For a discussion of the role of self-awareness in mediating difficult issues of ethics in the corporate setting, see Barry Castro, *Knowing Ourselves*, 4 BUS. ETHICS Q., 181 (1994).

176. Annette Barnes asks and answers: “Why do we so frequently lack the epistemic courage required to obtain self-knowledge? I think the answer is simple and stark: truth is abundant and often ugly.” ANNETTE BARNES, *SEEING THROUGH SELF-DECEPTION* 173 (1997).

177. On the morning I originally typed this paragraph, the *Wall Street Journal* had run an interview with Paul Simon about his new album. The interviewer asked, “What’s your success rate with songwriting? How often do you hit a dead end?” It seemed to me that Simon’s response evoked a certain self-deception underlying creativity: you proceed believing what you know is not good in the belief that it also good:

[O]ccasionally, I’ll be in the middle of a song and drop it if it doesn’t feel true. It’s not a fun thing to do. You tend to fool yourself as you go along, because you’re working hard at it. In a sense it’s good, or competent, but it doesn’t pass the test.

John Jurgensen, *A New Tour and a New Audience at 70*, WALL ST. J. (Oct. 14, 2011).

178. SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA*, Chapter XIV (1817) (“[I]t was agreed, that my endeavors should be directed to persons and characters supernatural, or at least romantic, yet so as to transfer from our inward nature a human interest and a semblance of truth sufficient to procure for these shadows of imagination that willing suspension of disbelief for the moment, which constitutes poetic faith.”); see also Alan Singer, *The Self-Deceiving Muse: Fiction and the Rationalistic Dictates of the Present*, 12 SYMPLOKE 77 (2004).

then taking a business risk, it seems to me, requires the opposite side of the coin from epistemic humility. Epistemic courage, as it were, is necessarily a matter of action rather than mere reflection. That is, one needs a certain amount of epistemic courage either to face the world as it is, or to insist that the world can be changed by way of action in accord with one's beliefs, and then to act on the belief. Hence the last step in the move from mere information to analysis to decision and then to action is about consequence and responsibility.

The "sunk cost" problem is a demonstration of the need to face reality, to accept consequences, and not to engage in a reconstruction of the past. The rule of action in investment decisions ought to be a hallmark of rational choice—the past does not matter. As an example, in 2005, my wife and I invested in a small rental property in the Michigan town where we spend our summers. Our plan was to rent it out at the prime summer weekly rates. The financial crisis and the ensuing depression hit Michigan and that market dried up. By 2011, the suggested listing price if we were to sell was about sixty percent of our equity in the house. Rational choice would tell us that as long as the house were merely an investment, the lost equity was a sunk cost, and there was no rational reason to prefer recouping the loss with the house or an alternative investment. But in fact we resisted selling. The behavioral psychologists tell us this is a "behavioral trap," one form of which is the investment trap: "prior expenditures of time, money, or resources lead people to make choices they would not otherwise make."¹⁷⁹ Once we have ridden this horse (or house or share of stock) down to the bottom, why should it matter whether we ride this or another horse back up to the top? The past simply should not matter.

Nozick argues that a principled (and therefore rational) decision may nevertheless take account of the past.¹⁸⁰ We might find a reason for not selling the house or not changing investment horses or not giving up on an entrepreneurial enterprise, for example, in commitments that we have made to others (or, I suppose, to ourselves). But is the reason mere justification or self-deception? What is the principle for deciding when our decision to take account of the past is not an instance of commitment or endowment bias, but is in objective truth a rational decision? We are back to the infinite regress. Is there a principle for deciding when to be unprincipled? It seems to me that we cannot think our way out of the sunk cost conundrum because there is no "thinking" solution.

Observe how the philosopher Jean-Pierre Dupuy, a committed rationalist,

179. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION-MAKING* 241-44 (McGraw-Hill, 1993), citing H.R. Arkes & C. Blumer, *The Psychology of Sunk Cost*, 35 *ORG. BEHAV. & HUMAN DECISION PROC.* 124 (in experiments, 85% of respondents choose to complete the last ten percent of a multi-million research investment, even though the product of the research had already been made obsolete by a competitor's product).

180. NOZICK, *supra* note 76, at 22-26. These commitments factor into the symbolic utility variable in Nozick's decision value function. *See supra* notes 110-111 and accompanying text.

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tries to reason his way to a resolution of the Newcomb problem. Recall that a principle of rational theory is that the past does not matter. Nevertheless, in the Newcomb problem, one's inclination is to decide and act in accordance with evidentially expected value even though, causally speaking, the die has already been cast and the present action should not make any difference. According to Dupuy, there *can* be a rational solution to the Newcomb problem, but that it requires, ironically, a bit of self-deception.¹⁸¹ His thought experiment involves a familiar issue for contract law theorists, namely, the rationality of cooperation over time. If only the future matters in rational choice, then there is a real problem with non-simultaneous performance of contract obligations. Dupuy argues that rational choice about non-simultaneous performance of an exchange of promises is a Newcomb problem. Where B's action to fulfill his end of the bargain (at some cost to B) is to follow A's performance, B's rational choice, once A has performed, is not to perform because anything done in the past is a sunk cost and does not matter. Since A, also being rational, knows this is what B will rationally conclude, A will never perform her end of the bargain.¹⁸² Hence, under rational theory, there can never be cooperation. In short, because there is no fixed and necessary relationship between A's and B's performance—B is free to choose to act or not—B acts irrationally because the past does not matter. Dupuy's answer is that it *is* rational for B to fulfill the promise, but it requires a bit of Kantian legerdemain. By an act of will, B legislates for himself as a matter of duty the fixed relationship that is otherwise lacking. Because B has promised, he creates a counterfactual past in which the promise *causes* his performance. My feeling is that Dupuy finds himself trapped in this box because he is stuck on the positivist side of the knowledge-decision dichotomy. He cannot think his way to a solution, and so he resorts to metaphysics.

What is the sensible response to this clever nonsense? Kent Bach's is that Dupuy is thinking too much.¹⁸³ In real life, there will be five arguments pro and five arguments con, and none of them will be a knockdown answer. The only solution will be to act or not act, and in either case, the state of mind of the *actor* ought to be that she is obliged to take responsibility for the consequence of the action. Do we buy or not? Do we invest or not? Do we file a lawsuit or not? Do we settle or not? As I described this to a fellow law professor with extensive transactional experience, the hardest thing about thinking like a lawyer is overcoming the very desire to be rational in the face of uncertainty. It is only a slight

181. DUPUY, *supra* note 75, at 126-47.

182. I have no doubt Nozick would resolve this by attributing symbolic value to the upholding of a commitment, and thus factoring it into the value of a particular decision. That, of course, creates the same conundrum of subjective rationalization versus objective value.

183. *See* Bach, *supra* note 75, at 184-87

hyperbole to generalize that when we would have a really tough call on something in my professional life, there really were five good arguments either way. And I (the lawyer!) would say, “now it’s time to hold hands, take a breath, and all jump together.”

Responsibility is about the relationship of knowledge and decision to time. The objective reality of the past is fixed, but how we conceive of it is not. One aspect of epistemic courage is not reconstructing the past in an effort to rationalize or avoid responsibility for decision. Did we make a commitment in the past or not? That is tricky territory for lawyers, since after-the-fact rationalizing or justifying is at the core of what lawyers do.¹⁸⁴ There is always room for after-the-fact opportunity depending on how we hypothesize the problem. “Well, we did have a contract. There is no doubt about that. And we did make commitments. But the question now is whether the commitment really means what the other side is now saying it means.”

It may well be that my professional responsibility as lawyer-advocate is to use the tools of the law to recreate the past the best I can on behalf of the clients who are paying me. I accept that. But a fully formed lawyer-counselor, it seems to me, needs to keep some Sartre in mind. Getting things done is a “no-whine” zone. Rationality and knowledge hit their limit, and we simply have to decide. As counselor, I can hardly claim this to be an absurd world—it is not completely indeterminate and indeed there is a place for reason, principles, and theory. But putting myself in the shoes of my client-actor, those processes of thought hit a limit. At that point the actor takes whatever information the world provides and makes a decision, and the actor is responsible. And the actor’s commitment must be now not to lie to himself, i.e., not to deceive himself that the past was anything other than what it really was. That is taking responsibility.

V. CONCLUSION

My life as a lawyer has been too rewarding, intellectually and otherwise, to denigrate the orderliness of lawyerly thinking, even if it is two-handed. My goal instead has been to consider the respective orientation of thinkers (prototypically lawyers) and doers (prototypically business people, investors, and entrepreneurs) to knowledge and decision. The essence of the lawyer’s contribution to a business decision is the processing of knowledge under some coherent theory. The lawyer can create a theory of success, a theory of risk, a theory of liability, a theory of failure. But our legal analysis is but another rational path through the Newcomb problem. Rationality has its limits. In contrast, creating and innovating in the real world turn out not to be something we can model in any form of decision theory,

184. See Lipshaw, *supra* note 157.

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simplified or complex. Those problems invoke decision, and are problems of action, of what to do next. They are not solely problems of knowledge.

Law professors I respect immensely for their deep theoretical understanding of transactional work, as well as their ability to teach practical skills, have expressed the concern that I am advocating a dangerous usurpation of business decisions. They fear I might be suggesting that young and inexperienced lawyers, rather than seasoned veterans (like myself), actually *make* the business decision.¹⁸⁵ I have three preliminary responses. First, all I am really advocating here is that all lawyers have a sense (not just the “book learning”) of the difference between throwing advice over the transom to the decider and making the decision, whether or not the lawyer makes the decision. The way I expressed this when I was an outside lawyer was “your alternatives are A and B, and it’s up to you, but if it were my company, I would chose B for the following reasons.”¹⁸⁶ Second, for reasons I have addressed elsewhere, I do not think there is a clear delineation between legal and business decisions. It is instead an overlap, and somebody needs to step into it. I think lawyers are often more capable of doing this than the non-lawyers.¹⁸⁷ Third, I am not persuaded that only seasoned business lawyers find themselves in the position of strongly influencing the non-legal decision. I teach many students who graduate and promptly either hang a shingle or become lawyer-managers in startup companies, and I find myself giving them informal counseling on how to face precisely these kinds of mixed law and business questions.

I have a reasoned skepticism about our ability to navigate through life on a wholly reasoned and rational basis, concluding instead that sometimes being wise means understanding we just have to conclude, to decide, to act, to pay our money and take our chances. I recognize fully the abstraction of much of what I have said here.¹⁸⁸ But I have wanted to counter the underlying rational, objective, and scientific underpinnings of much of the professional mindset: we can figure it all out and control it if we just think hard enough. More practically, as some have

185. Thanks to Joan Heminway and Usha Rodrigues for these comments.

186. For an extensive and nuanced discussion of decision-making as between lawyers and clients generally, see BINDER, ET AL., *supra* note 13. The authors endorse my particular approach (on the assumption the clients solicited my view, and sometimes even if not). *Id.* at 335-38, 417-28.

187. Jeffrey M. Lipshaw, *The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity*, 41 SETON HALL L. REV. 1 (2011). Nothing about my position suggests that a lawyer usurp the decision, fail to consult with the client or businessperson, or impose a result that may be contrary to the desired outcome of the client or businessperson. Indeed, I believe that the epistemic humility and intense level of reflection I ask of lawyers is consistent with what Binder, et al., call the “client-centered approach. BINDER, ET AL., *supra* note 13, at 4-8.

188. My commitment to thinking about it at all is itself a Newcomb problem, one in which I simultaneously believe in and seek ways to make life subjectively meaningful, while at the same time believing that meaning itself is a chimera, a puff of fantasy in the physical universe.

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suggested, there is a real question whether any of this state of mind can be taught in school. I think we can rigorously and ethically help young lawyers develop one-handedness, but that must be the subject of another article.