

# Western New England Law Review

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Volume 31 31 (2009)

Issue 3 SYMPOSIUM: *ENTREPRENEURSHIP IN  
A GLOBAL ECONOMY*

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Article 7

1-1-2009

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### Recommended Citation

Jeffrey M. Lipshaw, *WHY THE LAW OF ENTREPRENEURSHIP BARELY MATTERS*, 31 W. New Eng. L. Rev. 701 (2009), <http://digitalcommons.law.wne.edu/lawreview/vol31/iss3/7>

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# WHY THE LAW OF ENTREPRENEURSHIP BARELY MATTERS

JEFFREY M. LIPSHAW\*

Why do we not see a rich literature in the law of entrepreneurship? There is extensive economic and finance literature on entrepreneurship, but hardly writing of the same quantity as to the legal aspects.<sup>1</sup> I taught a seminar in technology startups and venture cap-

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\* Associate Professor, Suffolk University Law School; AB, University of Michigan; JD, Stanford University. This Article is based on a presentation given by Professor Lipshaw at the Third Annual Conference on Entrepreneurship and Community Economic Development on October 17, 2008. This conference is hosted by Western New England College Law and Business Center for Advancing Entrepreneurship. The theme for the 2008 conference was "Entrepreneurship in a Global Economy."

1. I originally made this observation in 2006 based on a search of the SSRN abstract database. On September 9, 2008, I updated the search. Using the search terms "entrepreneur, entrepreneurship" in the SSRN abstract database (title, content, or keywords), I pulled up one thousand papers. By reviewing those titles, as well as by searching combinations of the words "legal" and "law," on the one hand, and "entrepreneur" and "entrepreneurship," on the other, I was able to come up with the following set of twenty-seven articles (not including a previous draft of this one) that, in my subjective view, address the intersection of law and entrepreneurship. As the following list indicates, there has been additional work in the two intervening years. However, while I am sure that this is neither a complete list nor a precise measurement, I stand by the observation as a fair description in order of magnitude as between financial/economic and legal scholarship about entrepreneurship.

In addition to other pieces noted throughout this essay, the articles are: Kenneth Ayotte, *Bankruptcy and Entrepreneurship: The Value of a Fresh Start*, 23 J.L. ECON. & ORG. 161 (2007); Jochen Bigus, *Staging of Venture Financing, Investor Opportunism, and Patent Law*, 33 J. BUS. FIN. & ACCOUNTING 939 (2006); Peter David Blanck et al., *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583 (2000); Linda Christine Fentiman, *A Distance Education Primer: Lessons from My Life as a Dot.Edu Entrepreneur*, 6 N.C. J.L. & TECH. 41 (2004); Catherine L. Fisk, *The Story of Ingersoll-Rand v. Ciavatta: Employee Inventors in Corporate Research & Development—Reconciling Innovation with Entrepreneurship*, in EMPLOYMENT LAW STORIES 143 (Samuel Estreicher & Gillian Lester eds., 2006); Brett M. Frischmann, *Commercializing University Research Systems in Economic Perspective: A View from the Demand Side*, in 16 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION AND ECONOMIC GROWTH 155 (Gary D. Libecap ed., 2005); Ronald J. Gilson & David M. Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 HARV. L. REV. 874 (2003); Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008); Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71

ital in the spring of 2005, and still the best we could do for a broad-based legal text was a practice manual.<sup>2</sup> There are certainly aspects

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(2008); Leandra Lederman, *The Entrepreneurship Effect: An Accidental Externality in the Federal Income Tax*, 65 OHIO ST. L.J. 1401 (2004); Seung-Hyun Lee, Yasuhiro Yamakawa, & Mike W. Peng, *An Empirical Examination of 'Barrier to Exit': How Does an Entrepreneur-Friendly Bankruptcy Law Affect Entrepreneurship Development at a Societal Level?*, in FRONTIERS OF ENTREPRENEURSHIP RESEARCH 2007: PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL ENTREPRENEURSHIP RESEARCH CONFERENCE (Andrew Zacharakis et al. eds., 2007); Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do About It*, 28 COMP. LAB. L. & POL'Y J. 817 (2007); Amir N. Licht & Jordan I. Siegel, *The Social Dimensions of Entrepreneurship*, in OXFORD HANDBOOK OF ENTREPRENEURSHIP 511 (Mark Casson et al. eds., 2006); Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297 (2008); Sean M. O'Connor, *Teaching IP from an Entrepreneurial Counseling and Transactional Perspective*, 52 ST. LOUIS U. L.J. 877 (2008); Simon C. Parker, *Law and the Economics of Entrepreneurship*, 28 COMP. LAB. L. & POL'Y J. 695 (2007); D. Gordon Smith & Masako Ueda, *Law & Entrepreneurship: Do Courts Matter?*, 2 ENTREPRENEURIAL BUS. L.J. 353 (2006); John Armour & Douglas Cumming, *Bankruptcy Law and Entrepreneurship* (Eur. Corp. Governance Inst., Working Paper No. 105/2008, 2008), available at <http://ssrn.com/abstract=762144>; Matthieu Chemin, *The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan's Access to Justice Programme* (Centre Interuniversitaire sur le Risque, les Politiques Économiques et l'Emploi [Inter-Univ. Ctr. on Risk, Econ. Policies & Employment], Working Paper No. 07-27, 2007), available at <http://ssrn.com/abstract=1018901>; Catherine Fisk, "An Ingenious Man Enabled by Contract": *Entrepreneurship and the Rise of Contract* (Duke Sci., Tech., & Innovation Working Paper No. 16, 2007), available at <http://ssrn.com/abstract=983739>; Viktor Mayer-Schoenberger, *Entrepreneurial Law* (Kennedy Sch. of Gov't Working Paper No. RWP07-023, 2007), available at <http://ssrn.com/abstract=984311> (2007); Brian J. Broughman, *The Role of Independent Directors in VC-Backed Firms* (Oct. 13, 2008) (unpublished paper on file with the University of California, Berkeley School of Law), available at <http://ssrn.com/abstract=1162372> (2008); Anthony J. Luppino, *Can Do: Training Lawyers to Be Effective Counselors to Entrepreneurs—Report to the Ewing Marion Kauffman Foundation* (Jan. 30, 2008) (unpublished report on file with the University of Missouri at Kansas City School of Law), available at <http://ssrn.com/abstract=1157065>; Michael J. Whincop, *Entrepreneurial Governance* (Aug. 2000) (unpublished paper on file with the Griffith Law School), available at <http://ssrn.com/abstract=254169>. The SSRN search did not turn up other pieces of which I am aware, such as Anthony J. Luppino, *Minding More than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151 (2007); D. Gordon Smith, *Independent Legal Significance, Good Faith, and the Interpretation of Venture Capital Contracts*, 40 WILLAMETTE L. REV. 825 (2004) [hereinafter Smith, *Independent Legal Significance*]; Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 L. & SOC. INQUIRY 679 (1996).

2. On the advice of Joseph Grundfest, who offered a similar course at Stanford, I assigned CONSTANCE E. BAGLEY & CRAIG E. DAUCHY, *THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW*, (2007), and ALEX WILMERDING, *TERM SHEETS & VALUATIONS* (2004), in addition to a course package with assorted readings on various subjects. I considered using JACK S. LEVIN, *STRUCTURING VENTURE CAPITAL, PRIVATE EQUITY, AND ENTREPRENEURIAL TRANSACTIONS* (Martin D. Ginsburg & Donald E. Rocap eds., 2007), but it is heavily oriented to tax planning (although it is the benchmark on that subject). Another candidate was JOSEPH W. BARTLETT, *FUNDAMENTALS OF VENTURE*

of the entrepreneurship process that have imported significant aspects of contract, tax planning, corporate, and intellectual property law. Yet, the only unique jurisprudence of entrepreneurial law I have yet been able to identify is the law applying anti-dilution clauses in what is known as the “down round”—where the startup company has a lower value in later rounds of financing, and either the founders or the investors have to bear the brunt of the loss.<sup>3</sup> Two of the most accomplished “law and entrepreneurship” scholars have attempted to do away with the elephant in the room—namely, that the same criticism Frank Easterbrook levied about the law of cyberspace nearly fifteen years ago might well be transferred to the law of entrepreneurship today: “there was no more a ‘law of cyberspace’ than there was a ‘Law of the Horse.’”<sup>4</sup> Instead, “law and entrepreneurship” thrives not in doctrine, or even in current interdisciplinary law and social science, but on the ground in clinical programs.<sup>5</sup>

Neither the profession nor the academy has yet figured out how the legal profession should best assist this unusual creature, the entrepreneur.<sup>6</sup> Entrepreneurs face all sorts of contingencies: cash flow problems, partner breakups, natural disasters, loss of a major customer, new competition, industry change, loss of key personnel,

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CAPITAL (1999), which I described in the syllabus as “a handy little volume that describes issues. It does not contain forms or voluminous details on structuring.” In practice, I had admired *START-UP & EMERGING COMPANIES: PLANNING, FINANCING AND OPERATING THE SUCCESSFUL BUSINESS* (Gregory C. Smith ed., 1997), but it was simply too expensive and, in some areas, too outdated to assign to students.

3. See Smith, *Independent Legal Significance*, *supra* note 1.

4. Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501-02 (1999) (recounting a speech by Judge Easterbrook); see also Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207-09; see also Ibrahim & Smith, *supra* note 1, at 71-72.

5. See Luppino, *Can Do: Training Lawyers to Be Effective Counselors to Entrepreneurs*, *supra* note 1, at 17-19. There are dozens of small business and startup clinics in law schools across the country, one of which is run at the host school for this symposium, Western New England College School of Law. See Western New England College School of Law, Small Business Clinic, <http://www1.law.wnec.edu/current/index.cfm?selection=doc.5689> (last visited May 15, 2009). Thomas H. Morsch, Director and Clinical Professor of Law in the Small Business Opportunity Center at the Northwestern University School of Law, advised me on September 11, 2008, that the business clinic listserv he administers has 149 participants.

6. See Manuel A. 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,” “overconfident” (indeed to the point of “blind[ness] . . . to the need for more information”), better at innovating than running a company, having “poor management skills,” lacking “business savvy,” and having “bounded rationality” (unable to plan well for contingencies). *Id.* at 92-93, 100-04, 114 n.228.

theft and embezzlement, and family problems.<sup>7</sup> Who is better equipped than a well-trained lawyer to assist a client in planning ahead? But how many of these contingencies are addressable in advance by the tools we teach lawyers? The primary means by which business lawyers attempt to impose order on the contingency of the heteronomous world is the institution of contract which, notwithstanding rational actor and behavioral economic theory to the contrary, is limited at best.<sup>8</sup> Only a few of the remedies to this set of problems suggested by one popular pundit were expressly legal: draw up a partnership agreement with a buy-sell mechanism; have adequate insurance policies against natural disaster, fraud, and theft; and develop an estate plan for the owner-operator.<sup>9</sup>

Despite valiant (if nascent) efforts to show that law, or at least courts and doctrine, matter in the broader study of entrepreneurship,<sup>10</sup> I am skeptical that it really does, for reasons that underlie my broader view about the relationship of law to business and everyday life. To put it bluntly, my observation after a long career in the business world, which included the representation of startup entrepreneurs as well as would-be entrepreneurs in the corporate setting, is that “law” makes a lot more difference to lawyers than to anybody else.<sup>11</sup> I do not think it is simply because law is what we

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7. Rhonda Abrams, *9 Problems to Avoid by Planning Ahead*, USA TODAY, Nov. 20, 2006, at 5E.

8. Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DEPAUL L. REV. 1077, 1080 (2005) [hereinafter Lipshaw, *Contingency and Contracts*].

9. Abrams, *supra* note 7. This is not to suggest that there are no legal issues that are core to the venture capital business. But like the “law of the horse,” it is an amalgam of tax, choice of entity, and other business-planning issues. The one area that is unique is the so-called down round issue.

10. *See supra* note 1.

11. Abrams, *supra* note 7. *See generally* Smith & Ueda, *supra* note 1, at 366-68. When sophisticated business people think about agreements and send their lawyers off to scribble, are the lawyers writing the agreements for courts or for each other? Whether or not contracts are interpreted textually or contextually, it is probably fair to say that the lawyers, if you asked them, were doing their best to make the entire agreement textual, and not contextual. And the reason for textuality is that the writing will be read and interpreted by others. Or will it? Have you ever set aside a draft and re-read it a year later? Or re-read an old article that you wrote five or six years ago? Who wrote it? So I think there is something far more nuanced going on than the rational model that we write contracts because we are addressing the hypothetical judge who will resolve our disputes, and in doing so, apply *ex ante* the rules that have been laid down legally or linguistically, as a way now of controlling the future. Hence, I have asked whether there is any real linkage between what the court ends up saying in a close case of interpretation and what the parties may have intended. Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99 (2005) [hereinafter Lipshaw, *The Bewitchment of Intelligence*].

do. The fundamental reason has something to do instead with different ways the legal mind and the entrepreneurial mind make sense of the world, and then decide what to do about it. I contend that “[p]racticing lawyers are reductivists in comparison to their clients—reducing the complex world through the [doctrinal] science of law to a model; [and law] professors are reductivists in comparison to their students,” aspiring to reduce the law to social science.<sup>12</sup> Models are reductions of complexity whose power lies in explanation and prediction.<sup>13</sup> Lawyers apply linguistic models and doctrinal rules that impose a kind of order on the chaos of life; social scientists discover and verify theories showing the order in human existence (what is science if not the discovery of nature’s regularities, i.e., its laws?).

In contrast, entrepreneurship is about judgment—either the leap from the inductive inferences from what we observe to what we generalize, or the leap from what we generalize to what we do next. This judgment is not teachable and, instead, is learnable only through practice. Judgment—how we infer regularities in the data of the world or decide how to subsume the next encounter with data under an existing rule—is still the great mystery of cognitive science and moral philosophy. In philosophy and jurisprudence this falls under the topic of “rule-following,” and I contend here that there are inherent philosophical (and perhaps psychological) problems with the interaction of the lawyer and the entrepreneur.

In this essay, I will explore three rationales to explain why lawyers and entrepreneurs are like ships passing in the night: first, there is no rule about how to apply rules; second, lawyers struggle with the kind of judgment that comes naturally to the entrepreneur; and third, the nature of a legal solution is essentially cognitive and does not address the non-cognitive aspects of entrepreneurship.

First, as philosophers have shown, there is no rule for the application of a rule, and what we perceive as a given result is a matter of social congruence rather than a result inherent in the rule itself.<sup>14</sup>

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12. Jeffrey M. Lipshaw, *Law’s Illusion: Scientific Jurisprudence and the Struggle with Judgment* (Suffolk Univ. Law Sch., Research Paper No. 08-20, 2008), available at <http://ssrn.com/abstract=1163256> [hereinafter Lipshaw, *Law’s Illusion*].

13. See generally Jeffrey M. Lipshaw, *Models and Games: The Difference Between Explanation and Understanding for Lawyers and Ethicists*, 56 CLEV. ST. L. REV. 613 (2008) [hereinafter Lipshaw, *Models and Games*].

14. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 268 (Paul Guyer & Allen W. Wood trans., Cambridge Univ. Press 1998) (1781); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §201, at 69<sup>e</sup> (G.E.M. Anscombe trans., 3d ed. 2001); Linda Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CIN. L. REV. 727,

The social and psychological orientation of those who create law, and those who create innovation, are at odds. As an illustration, a lawyer's lawyer sees the world in relatively simple models by which contracts are supposed to inhibit opportunism—e.g., the futures contract for the purchase and sale of wheat that gives the buyer a remedy against the seller's opportunism when the contract price was \$100 and the market price on the date of sale is \$120. Indeed, the law is an element of the heteronomous world; it controls, restricts, and limits the choices of the free agent.

The entrepreneur, on the other hand, sees the world as a moveable feast of phenomena, posing danger but presenting opportunities to be seized and exploited, with choices to be made over and over again. One entrepreneurship scholar sees the entrepreneur's mode of reasoning as effectual rather than causal: while causal reasoning posits a goal and seeks means to achieve the goal, "effectual reasoning . . . begins with a given set of means and allows goals to emerge contingently over time from the varied imagination and diverse aspirations of the founders and the people they interact with."<sup>15</sup> Philosophers teach that "[t]here is no rule for the application of a rule," and it might be the entrepreneurs' creed, because what the philosophers are really telling us is that what we think are rules for the application of a rule are not inherent in the rule, but in our social constructs around it. Most of us have a common and unremarkable understanding that the rule of 2-4-6-8 means that the answer is 10; the entrepreneur may see it as 12 or 19 or 1-5-6.<sup>16</sup> The law calls for consistency and coherence in the application of rules.<sup>17</sup> I suggest that entrepreneurs are far more at home with inconsistency and indeterminacy.

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734-45 (1999); Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 948-49 (1990).

15. Saras D. Sarasvathy, *What Makes Entrepreneurs Entrepreneurial?* (Univ. of Va., Working Paper No. UVA-ENT-0065, 2008), available at <http://ssrn.com/abstract=909038>; see also Saras D. Sarasvathy, *Causation and Effectuation: Toward a Theoretical Shift from Economic Inevitability to Entrepreneurial Contingency*, 26 ACAD. MGMT. REV. 243 (2001); D.K. Sarasvathy, H.A. Simon & L.B. Lave, *Perceiving and Managing Business Risks: Differences Between Entrepreneurs and Bankers*, 33 J. ECON. BEHAVIOR & ORG. 207 (1998).

16. WITTGENSTEIN, *supra* note 14, at 74<sup>c</sup>-75<sup>c</sup>.

17. See generally RONALD DWORKIN, *LAW'S EMPIRE* (Belknap Press 1986) (1977) (discussing fit and justification as the basis for integrity in law); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* (Tony Honoré & Joseph Raz eds., Clarendon Press 2002) (1991); William A. Edmundson, *The Antinomy of Coherence and Determinacy*, 82 IOWA L. REV. 1 (1996).

At the risk of losing my readers (if they are not already lost) in abstraction, my intuition is that this is traceable to the different ways entrepreneurs and lawyers might explain *why* things happen, which invokes the question of causation. Hart and Honoré produced the most thorough discussion to date of the legal concept of causation.<sup>18</sup> They sought to distinguish the “historian’s and the lawyer’s and the plain man’s use of causal notions” from those of the scientist.<sup>19</sup> The goal of the former is to distinguish the singular cause of a particular event from the set of all conditions that were necessary for the event to occur. The goal of the latter, and the great breakthrough of David Hume and the empiricists, was to do away with singular causes (at least in the sense of divine or mystical ones) in favor of causation that “lies *wholly* in the fact that the particular events with which they are concerned exemplify some generalization asserting that kinds or classes of events are invariably connected.”<sup>20</sup> We can call this latter scientific causal statement “nomological-deductive” and the former common sense causal statement “attributive.”<sup>21</sup>

I think the “law and entrepreneurship” issue invokes causation in two ways. First, different external observers might make either nomological-deductive or attributive causal statements about transactions to which they are not parties. The irony in the Hart and Honoré treatment of Hume, I think, is that a law, as a closed system, aspires to scientific notions of causation within the system, and regularly ignores or discounts nonlegal attributive causes. A good example is in Ibrahim and Smith’s defense of law’s relevance to entrepreneurship.<sup>22</sup> In responding to AnnaLee Saxenian’s nomological-deductive causal explanation for Silicon Valley’s advantage over Boston’s Route 128 as cultural norms,<sup>23</sup> Ibrahim and Smith seem to give more credit to Ronald Gilson’s competing nomological-deduc-

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18. H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (1959). I have just pre-ordered a copy of MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY* (2008), which Oxford University Press describes as “the first comprehensive attempt since Hart and Honoré to clarify the philosophical background to the legal and moral debates” about causation. Oxford University Press, *Causation and Responsibility: Michael S. Moore*, <http://www.oup.com/us/catalog/general/subject/Law/JurisprudenceandLegalPhilosophy/?view=usa&ci=9780199256860> (last visited May 15, 2009).

19. HART & HONORÉ, *supra* note 18, at 10.

20. *Id.* at 9.

21. THOMAS L. HASKELL, *OBJECTIVITY IS NOT NEUTRALITY: EXPLANATORY SCHEMES IN HISTORY* 16 (1998).

22. *See generally* Ibrahim & Smith, *supra* note 1.

23. *See generally* ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* (1994).



tive explanation: California law governing non-compete agreements.<sup>24</sup> Both are scientific statements: if we could reproduce the particular events, like cultural norms or certain laws, we could generalize that entrepreneurs would flourish as a consequence. I do not know who is right; I am suspicious, however, that lawyers' hypotheses about the importance of law are more likely to be wishful thinking than borne out empirically.

Further, these nomological-deductive statements still do not get at the mystery of judgment. My Suffolk colleague, Eric Blumenson, puts the distinction nicely in his article about the limits of skepticism.<sup>25</sup> Trying to inform decision-making practice from an outside perspective is

a category mistake that conflates two alternative views of human action—the views from “inside” (*doing* it) and “outside” (*observing* it). . . . From the external standpoint, one sees predictable patterns of behavior, not autonomous subjects capable of transcending history through reason. But this view has no “cash value” for the agent *making* the decision.<sup>26</sup>

The philosopher Christine Korsgaard similarly criticized a dispassionate and reductive scientism—“a description of the world which serves the purposes of explanation and prediction”—as incapable of guiding the agent “when we must make our decisions and choices ‘under the idea of freedom.’”<sup>27</sup> In short, all the science in the world may *inform* our judgment or *explain* the circumstances of judgment, but it is not the same as *making* the judgment.

My position is not that law does not matter; it is that, in the sense of what lawyers do to reduce transactional complexity to linguistic precision as a matter of “rule-following” and prediction, it barely matters. What matters is *not* a particular doctrine that might be created in the law of entrepreneurship. My intuition is, instead, that the rule of law as a social phenomenon, which has “cash-value” to the decision-maker (in Eric Blumenson’s terms), is what is fundamentally important about law and entrepreneurship. Entrepreneurship flourishes in a society that builds the rule of law from Lockean assumptions about the primacy of property and the free-

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24. Ibrahim & Smith, *supra* note 1, at 82.

25. Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996).

26. *Id.* at 559-60 (emphases added) (footnote omitted).

27. CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 94-97 (1996).

dom to own it and trade it.<sup>28</sup> There is a strong libertarian theme here—entrepreneurial communities are the Wild West,<sup>29</sup> wherein the notions of personal autonomy and freedom run deep, not just politically, but epistemologically and morally as well.<sup>30</sup> For all that lawyers support the entrepreneurial process, like accountants, insurance agents, business plan writers, consultants, and other transaction cost consumers, they are merely passengers on the train to somewhere the law cannot chart. And to the extent that theorists have attempted to ascribe value to the lawyering process or to advance a theory of the law of entrepreneurship, in most cases entre-

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28. See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1943); Howard E. Aldrich & C. Marlene Fiol, *Fools Rush In? The Institutional Context of Industry Creation*, 19 *ACAD. MGMT. REV.* 645 (1994). For more modern empirical work on this, see Chemin, *supra* note 1; Roman Frydman, Marek P. Hessell & Andrzej Rapaczynski, *Why Ownership Matters: Entrepreneurship and the Restructuring of Enterprises in Central Europe* (Columbia Law Sch. Ctr. for Law & Econ. Studies, Working Paper No. 172, 1998), available at <http://ssrn.com/abstract=194574>; Simon Johnson, John McMillan & Christopher Woodruff, *Property Rights, Finance and Entrepreneurship* (CESifo Group Munich, Working Paper No. 212, 1999), available at <http://ssrn.com/abstract=198409>. I am very interested in, yet remain to be convinced of, the Smith-Ueda working thesis that courts, as common law developers of a more flexible, adaptable law—as compared with the civil law—have a material effect on the facilitation or hindrance of entrepreneurial activity. See Smith & Ueda, *supra* note 1, at 354. I would suggest that the way common law judges process data and apply rules in adjudication bears little resemblance to the way a Schumpeterian entrepreneur would process data and apply rules, including the rules, where she is aware of them, laid down by the common law judges. And if the response is, “Yes, but they have lawyers to make them aware of the rules,” I ask, “Really? How do you know? And if they do have lawyers, do they listen to them?” Without giving it nearly the due consideration it deserves, let’s just play with the title of Frederick Schauer’s *Playing by the Rules*. See SCHAUER, *supra* note 17. What does “playing by the rules” mean to a court? What does “playing by the rules” mean to an entrepreneur? And what does “playing by the rules” mean to the entrepreneur’s lawyer? See generally MARCUS BUCKINGHAM & CURT COFFMAN, *First, Break All the Rules* (2005) (1999); BARRY J. NALEBUFF & IAN AYRES, *Why Not? How to Use Everyday Ingenuity to Solve Problems Big and Small* (2003).

29. Joseph Bankman & Ronald J. Gilson, *Why Start-ups?* 51 *STAN. L. REV.* 289, 290 (1999) (“[A]s a matter of culture, high-tech entrepreneurs are the cowboys of our age. In the United States, as Willie Nelson has told us, our heroes have always been cowboys.” (citing WILLIE NELSON, *My Heroes Have Always Been Cowboys*, on *THE ELECTRIC HORSEMAN ORIGINAL SOUNDTRACK* (Columbia Records 1979))).

30. See *id.* at 306. To follow the Smith-Ueda thesis, is there a relationship between that underlying libertarianism and the presence of a common, rather than civil, law? See Smith & Ueda, *supra* note 1, at 353-54. I am not enough of a political theorist to know. Judges could put a crimp on the economic incentives to creative destruction, but so could legislatures and executives. But to me, that’s like holding the tiller of a small boat on the crest of a tsunami and thinking that because you can impede or enhance the progress of the boat, you control the tsunami. Do tiller-people matter? Yes, but not nearly as much as the tiller-people think. In this analogy, the entrepreneurs are the seismic causes of the tsunami.

preneurship is about something other than jurisprudence.<sup>31</sup> Put another way, lawyers do not precede the rule of law; rather, a social consensus that we will abide by the rule of law permits lawyers to flourish.

The second theme is that lawyers (or the law) struggle with the kind of judgment that comes naturally to the entrepreneur.<sup>32</sup> The creation of law is *ex post*; the presumption—whether in Langdellian legal science, Holmesian legal realism,<sup>33</sup> the currently dominant approach of rational actor, or behavioral economics—must be that actors may determine, to a greater or lesser extent, legal outcomes by a rational *ex ante* prediction of those judgments, and to control the outcomes with a reductive rule-based model, be it contract or other regulation.<sup>34</sup> None of these models accounts for the inherent paradox (or antinomy) of judgment. As elucidated by Kant, the issue with judgment is that we understand that the conclusion is ours alone (and people can differ), but at the same time we ascribe universality to the conclusion. This is one of the themes of the *Cri-*

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31. The thrust of this work is essentially Coaseian. The best thing lawyers can do is to reduce transaction costs—in essence, get the law out of the way of the entrepreneurial engine. See generally Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239, 242-45 (1995); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 242-43 (1984). Suchman and Cahill argue that Silicon Valley lawyers act as a kind of social grease in the system of getting deals done, but that there is still nothing particularly legal about their work. Suchman & Cahill, *supra* note 1, at 680-83. Professor Steven L. Schwarcz has taken issue with the proposition that this is the primary value, but his work still does not show that there is anything of jurisprudential import that adds value to the entrepreneurial or transactional process. Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487-88 (2007). Professor Steven Hobbs attempted to put the legal aspects of entrepreneurship toward a general theory, but the result is really just a small-business lawyer's tool kit, combined with finance and public policy impacts on the field. See generally Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241 (1997).

32. See Lipshaw, *Bewitchment of Intelligence*, *supra* note 11, at 5-6. See generally Lipshaw, *Law's Illusion*, *supra* note 12.

33. Oliver Wendell Holmes, Jr., Justice of the Supreme Judicial Court of Massachusetts, *The Path of the Law*, Address at the Boston University School of Law dedication (Jan. 8, 1897), in 10 HARV. L. REV. 457, 465-66 (1897).

34. A lawyer acting as lawyer looks from the outside in, seeking to explain and predict. See *id.* But the entrepreneur is the agent who must operate under the idea of freedom. Both Blumenson and Korsgaard follow Kant in seeing the desire of pure reason to explain the world as if from no perspective, and in antinomial relation to the agent, who must necessarily have a perspective. Compare KORSGAARD, *supra* note 27, and Blumenson, *supra* note 25, with KANT, *supra* note 14. Kant's view is that pure reason is incapable of establishing empirical truth (the "is"), but can be employed practically to determine the "ought." See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Mary Gregor ed., Cambridge Univ. Press 1997) (1788).

*tique of Judgment*.<sup>35</sup> When we look at a painting, we simultaneously (a) know it is just a matter of taste, but (b) ascribe some objective standard of bad, good, better, worse, and best to the art.<sup>36</sup> If there were an algorithm for judgment, we would not prize it in individuals the way we do, and we would be letting our computers, rather than our lawyers, negotiate our deals. The entrepreneur's lawyer has to balance these two dynamics: (1) the lawyerly sense that such-and-such a provision really should go into the agreement "to cover you just in case this-and-that happens," and (2) the business sense that the same provision could stop the deal in its tracks. That is the antimony of deal lawyering, because from the center of any such problem, you can always argue your way to either antithetical conclusion.<sup>37</sup>

The third theme is that the very nature of a legal or regulatory solution, by and large, is cognitive, and fails to address the noncognitive aspects of entrepreneurship. I contend it is the lawyer's place to assume the primacy of the lawyer's particular world view: if I process sensory data in a cognitive way, so must everybody else. What do I mean by a cognitive solution? Take the issue of disclosure as a cure; that is, "sunlight is the best disinfectant."<sup>38</sup> There was recently a proposal that public company proxy statements should include a detailed description of the heuristics by which the board determines CEO pay, and that this would somehow cause the perceived excessive CEO pay problem to be cured.<sup>39</sup> I am skeptical. If the cognitive approach really worked, then we ought to be able to reduce housing prices in California by making every house buyer read a prospectus on the likelihood that the house is overpriced in relation to equivalent homes in Milwaukee or Des Moines, and in danger of destruction by tsunami, earthquake, or high force Santa Ana winds.

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35. See generally IMMANUEL KANT, *CRITIQUE OF JUDGMENT* (J.H. Bernard trans., Macmillan 2d ed. 1931) (1790).

36. *Id.* at 50-54.

37. When I am asked "how do you know which way to go?" my response is the same as that of the Geoffrey Rush character in the movie *Shakespeare in Love*, who explained why everything in the hectic production of a play always works out despite that "the natural condition [of the theater business] is one of insurmountable obstacles on the road to imminent disaster": "I don't know; it's a mystery." *SHAKESPEARE IN LOVE* (Universal Pictures 1998).

38. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1913).

39. Gretchen Morgenson, *Gilded Paychecks: Group Think; Peer Pressure: Inflating Executive Pay*, N.Y. TIMES, Nov. 26, 2006, § 3 (Business), at 1.

So what we find is that lawyers (or people who “think like lawyers”) tend either to pose noncognitive issues as cognitive, or propose cognitive solutions to noncognitive problems.<sup>40</sup> The question here is not whether the entrepreneur or the lawyer is right or wrong in his or her application of the rules to circumstances, but whether they are even speaking the same language.<sup>41</sup> I suggest that we can

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40. In Manuel Utset’s article, he proposed that venture capitalists be required to provide something like an S-1 prospectus to the entrepreneur, designed to remedy the perceived inequalities between entrepreneurs and the supposedly more sophisticated venture capitalist. Utset, *supra* note 6, at 161-63. I have observed that there is something of an infinite regress inherent in a solution that is merely more information—particularly one that smacks of the typical disclaimers that go, for example, into an SEC registration statement for an initial public offering. I commented on this: “In sum, the starry-eyed, cocky, sheltered engineer or scientist lacking people skills and a crystal ball is probably already overwhelmed with information. The regress is in trying to find that conclusive piece of information or disclosure that gets through to this kind of personality.” Lipshaw, *Contingency and Contracts*, *supra* note 8, at 1093 n.69.

In Germany, even today, if you sell a piece of real estate, or if you sell a multibillion dollar company that involves the transfer of real estate, the civil code requires that the transaction be undertaken in a notarial deed. This is hardly the notarial act of a U.S. common law jurisdiction. The notary undertakes (for a significant fee) to serve the function that legality, enforceability representations, and lawyers’ opinions serve here. The notary is putting the imprimatur of legality on the agreement. And if you have ever been party to one of these events, you know that the notary (or someone delegated by the notary) is required to read the entire document out loud (*even if it’s a 400-page document including exhibits that are essentially Wall Street firm-generated doorstops*). This is an anachronism dating back to the Middle Ages, when the law prevented big city sharpies from cheating the peasants (who generally couldn’t read) out of their land. This, I assume, was the legal equivalent of taking the about-to-be-victim, shaking him (probably not her back then) physically about the head and shoulders, and saying “do you understand what a stupid thing you are about to do?”

41. Compare the cognitive and non-cognitive approaches in a scene from Robert Penn Warren’s *All the King’s Men*. Willie Stark, the Huey Long equivalent, begins his political career as an honest idealist, duped into running in the Democratic primary as a way of splitting the vote. Willie has been giving a boring stump speech, and this is the exchange he has with the cynical reporter covering his campaign on the subject of the cognitive approach:

“You tell ’em too much. Just tell ’em you’re gonna soak the fat boys, and forget the rest of the tax stuff.”

“What we need is a balanced tax program. Right now the ratio between income tax and total income for the state gives an index that—”

“Yeah,” I said, “I heard the speech. But they don’t give a damn about that. Hell, make ’em cry, or make ’em laugh, make ’em think you’re their weak and erring pal, or make ’em think you’re God-Almighty. Or make ’em mad. Even mad at you. Just stir ’em up, it doesn’t matter how or why, and they’ll love you and come back for more. Pinch ’em in the soft place. They aren’t alive, most of ’em, and haven’t been alive in twenty years. . . . [I]t’s up to you to give ’em something to stir ’em up and make ’em feel alive again. Just for half an hour. That’s what they come for. Tell ’em anything. But for Sweet Jesus’ sake don’t try to improve their minds.”

ROBERT PENN WARREN, *ALL THE KING’S MEN* 77 (1946).

see the problem most clearly in the one place the law deals with the inherent antinomy of setting rules by which it determines whether the next case accords with preexisting rules: the patent system.<sup>42</sup> What constitutes creativity in lawyering is the occasional flash of inspiration that is more akin to the inventor's work and language than to that of the lawyer.<sup>43</sup>

To summarize, there is a jurisprudential point to be made here about the limits of the law, or law's place in relation to other social institutions. There is, additionally, an implication for the training of lawyers, and the relationship of the academy to the practice. If there is as little doctrinally as I claim that is important about the law of entrepreneurship, what, if anything, of value (beyond the usual transaction cost reduction)<sup>44</sup> does an entrepreneurial lawyer qua lawyer bring to the table? Here I want to suggest a fundamental distinction between the definition of one's presently ascertainable rights in property, and private ordering to deal with future contingency. To quote one professor quoting an unidentified Stanford professor, what distinguishes the law of property is the "thingness of it."<sup>45</sup> In the former, the law comes as close as it ever does to being constitutive; in the latter, what we say now is merely ammuni-

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42. *Autogiro Co. of Am. v. United States*, 384 F.2d 391, 397 (Ct. Cl. 1967) ("Often the invention is novel and words do not exist to describe it. The dictionary does not always keep abreast of the inventor. It cannot. Things are not made for the sake of words, but words for things."); Craig Allen Nard, *Legitimacy and the Useful Arts*, 10 HARV. J.L. & TECH. 515 (1997). See generally Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?*, 66 TENN. L. REV. 1167 (1999).

43. I am thinking here of a real invention, like Martin Lipton's creation of the shareholder rights plan, otherwise known as the "poison pill." See e.g., Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW 101 (1979); Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAW 59 (1992). This was a real product, with real perceived value, and it bore the very aspects of surprise to those of average skill in the art of corporate lawyering that a patentable invention otherwise bears to the prior art.

44. Gilson, *supra* note 31; Schwarcz, *supra* note 31.

45. June Carbone, *Back to the Future: Intellectual Property and the Rediscovery of Property Rights—and Wrongs*, 46 ST. LOUIS U. L.J. 629, 630 (2002). This particular conception of property having thingness and substance strikes an epistemological or, perhaps, an economic chord. Property is sharp and distinct compared to the inchoate statement of future rights and liabilities in a contract. Or perhaps the thingness of property is an aspect of the availability of the heuristic or prospect theory in behavioral economics. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY 3, 11 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); see also Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1998).

tion for instrumental use later.<sup>46</sup> The import of this distinction is that the only thing truly interesting about the law of entrepreneurship is more akin to the relationship of the law to property and liberty. The entrepreneur is significantly interested in those portions of the term sheet that define property rights in the event of success. As to the rest of the lawyers' work—dealing with the resolution of claims if the venture fails—it may bear the same stigma of the law of commercial contract boilerplate: it is of significant interest to the lawyers, but has no real present interest to the business negotiators.<sup>47</sup>

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46. I recently purchased a home in Massachusetts. The residential real estate practices were unfamiliar to me, as was the specific property, which happens to be a condominium, although our particular unit is simply one of two buildings, the other of which is a duplex. I realized when I was scanning the condominium master deed and the condominium trust deed (effectively the organizing document of the condominium association), the only thing I really cared about were those provisions that define my present rights. So while I ignored most of the boilerplate, I read carefully the description of my unit, my rights to common areas, my rights to exclude others from certain areas, and my ability to control the decisions of the condominium trustees, at least as they affected me.

In light of this recent experience, I am pondering Professor Madison's proposal to wholly eliminate the deed as a means of conveyance, and to embody all of the rights, expectations, and liabilities in real estate ownership and transfer in the contract itself. See Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 406 (2002). To twist this to my point, I think Professor Madison is suggesting that the entire game involves those aspects of the transaction documents that deal with future contingency, and that there is barely a dispute around the mundane aspects otherwise encapsulated in the deed, like the description of the property presently owned. See *id.* at 407-08.

47. I do not want to minimize the subject of contract boilerplate as between advantaged and disadvantaged parties. But I subscribe to the empirical view, at least on the subject of Article 2 of the Uniform Commercial Code, "that there seem to be two only slightly overlapping worlds out there: the world of business practice and the world of law. In the world of business practice, law is much less significant than reputation and leverage as forces that govern the day-to-day behavior of the actors." DANIEL KEATING, *SALES: A SYSTEMS APPROACH* 3 (3d ed. 2006). This is, of course, a restatement of Professor Macaulay's "non-contract" view. See Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465.

In fact, there were two presentations in a recent symposium on boilerplate provisions in contracts that were not consumer contracts. Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1036 (2006) (proposing a theory by which sophisticated parties might use boilerplate as an efficient coordinating mechanism by which the goal of reaching an agreement rather than "winning" might be achieved); Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 953-54 (2006) (studying the boilerplate provisions in the contracts by which automobile manufacturers obtain parts from suppliers). Both articles are based upon a presumption that the contracts are constitutive of the business relationship and are not entirely clear, when talking about the impacts and strategies of boilerplate, precisely who the sophisticated parties are. Moreover, they presume, because economic theory says the terms ought to have a pricing impact, that the terms *do*

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have a pricing impact. As Professors Ben-Shahar and White found, there are several deal points beyond price about which business people in the auto industry care—termination rights, warranty obligations, ownership of intellectual property, for example—but they are correct in observing that “[t]he legal terms in the forms are the tail that is wagged by the business dog, not vice versa.” Ben-Shahar & White, *supra*, at 964. I suggest that the contracts qua contracts, as opposed to mere reflections or shadows of the deal points, are equally as much the tail of the dog, or less.