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WHAT NOBODY KNOWS

John C.P. Goldberg*


INTRODUCTION

By meditating on displays of cunning in literature, history, and current events, Don Herzog1 in his new book isolates and probes difficult puzzles concerning how to understand and evaluate human conduct. The point of the exercise is not to offer a system or framework for resolving these puzzles. Quite the opposite, Cunning aims to discomfit its academic audience in two ways. First, it sets out to show that some of the central dichotomies of modern thought—those between means and ends, reason and desire, self-interest and morality, fact and value, virtue and vice, knowledge and politics, authenticity and artifice, and appearance and reality—tend not to function as useful analytic constructs, but instead operate as blinders that prevent us from accurately grasping the wellsprings, stratagems, and character of human action. Second,

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1. Edson R. Sunderland Professor of Law, University of Michigan Law School.
it asks us to confront related and daunting questions of what and whom one can justifiably believe, and how one ought to behave in a world that, at every turn, seems to invite and reward artifice and deception.

In addressing these topics, Herzog eschews road maps and linear exposition for casuistry and jazzy riffs. The result might profitably be described as Wonka for professors—a fantastic, vertiginous, somewhat menacing tour of a rogue's gallery, led by a guide with rogish sensibilities of his own.\(^2\) Painstakingly crafted, darkly witty, honestly observed, and hyper-literate,\(^3\) the book delivers on its promise to unsettle. It also demonstrates the edifying power of a style of analysis that is historical, philosophical, humane, and resolutely anti-reductionist but not ethereal, arcane, grandiose, or soft-minded. In short, Cunning's mind-bending inquiry teaches us as much about the possibilities for humanism as it does about humans.

I

A. Tales from the Gallows Pole

The body of Cunning's argument is elegantly packaged between an introduction and an afterword recounting parallel tales of murder most foul. The introduction describes events portrayed in the gallows confession of John Kello, a sixteenth century Scotsman (pp. 3–7). Kello, we learn, murdered his wife. Why? Because he had an offer of a better job that she didn't want him to take. We also learn that he went about his grim task conscientiously. After an unsuccessful poisoning, Kello strangled her and then hung her corpse so as to suggest a suicide.

So what sort of monster was this Kello? And how was his crime exposed? Here's a twist. Kello was a minister. And he seems to have tended to his flock faithfully even as he went about this sinful business. Yet, even before he reached the gallows, he confessed. Why? Here's another twist. Some time after committing the murder, Kello asked a fellow minister to interpret a dream of his, and the interpretation so staggered him that he persuaded himself that God had ordered him to confess (p. 4).


\(^3\) Here are some of the characters, works, and events stuffed into the pages of this relatively short book. Parentheses that follow reveal something about the state of the reviewer's pre-Cunning knowledge. Pamela Anderson; Arabella (hopelessly romantic heroine of a 1752 novel); Tammy Faye Bakker; Mary Bateman (famous witch); Beowulf; Tawana Brawley; Cicero; Michael Cleary (murderous Irishman); the Constantine Donation; Coyote and Skunk (characters from a Navajo tale); Cuthbert Cunny-catcher (spokesperson for petty thieves); Duck Soup; W.E.B. DuBois; George Eliot; Morton Feldman (avant-garde composer); Gerald of Wales (medieval scholar, reformer and diplomat); Lucienne Goldberg; Dashiell Hammett; Väclav Havel; Mme. Thérèse Humbert (possibly self-deluded scam artist); Dr. Johnson; John Kello (murderous minister); Victor Klemperer (diarist of Nazism); Charles Kuralt; William Lilly (famous astrologer); Master Lowe (another murderous minister); Martin Luther; Machiavelli; mahabis (amazing Iraqi face-reading contest); Melanthus (clever general); Hans Van Meegeren (Vermeer forger); Odysseus; Plutarch; assorted pontiffs; assorted salesmen—Amway, automobile, and snake-oil; Satan; Tupperware; Bertie Wooster; and Xanthus (victim of clever general).
Now leap ahead to Cunning’s concluding vignette (pp. 187–92). Master James, an elderly minister, hired Master Lowe as an assistant, welcoming him into his home. Lowe soon took up with James’s wife, a fact that James somehow missed or ignored. Not content, Lowe resolved to murder James. After several failed attempts, Lowe one night entered James’s bedroom and, over the victim’s incredulous protestations, suffocated him in plain view of his young daughter, and in earshot of a servant.

When the corpse was discovered by the servant the next morning, James’s widow dismissed his attestations (and those of her daughter) that Lowe was the murderer, and she later had the body bound up so as to cover its wounds. Lowe, meanwhile, sent the accusing servant on an out-of-town errand with the idea of using the servant’s “flight” as grounds for incriminating him. Fortuitously, the servant was intercepted by a neighbor of unusual acumen who arranged for the servant to tell his story to a justice of the peace.

Lowe later appeared before the justice and tried to make his charge against the servant stick. Wise to the situation, the justice asked Lowe to stay around while the matter was cleared up. There, the resourceful neighbor ingratiated himself with Lowe, letting on that he was sufficiently well-connected that, if Lowe confessed, he could arrange for a royal pardon. (Of course he’d need the confession in writing, accompanied by a payment.) Lowe expressed misgivings, but the neighbor won him over. Lowe confessed and indicated that James’s widow was good for the money. (Did this mean, asked the neighbor, that she was in on the crime? No, insisted Lowe.)

The neighbor later brought Lowe’s confession to the justice. Stunned, Lowe bitterly denounced his betrayal. The relentless neighbor also interrogated the widow, but she insisted that, should Lowe prove to be a murderer, she would gladly see him hanged. Yet Lowe continued to insist on her innocence. He was hanged, she burnt alive. Before her execution, she confessed to helping conceal the killing, but continued to claim that she played no role in planning or performing it. On the gallows, Lowe confessed not only to this crime but to another—that of killing a daughter conceived out of wedlock. Our pamphleteer reports that Lowe asked those convened to pray for him and that he embraced his death.

Why does Cunning start with Kello’s tale and end with that of Lowe’s? In part, because of their darkness. Explorations of cunning perhaps need not take on sinister tones. Think of How to Win Friends and Influence People, that oddly ethical ode to manipulation in the service of can-do capitalism.4 Herzog is himself an admirer of human ingenuity and even on occasion an advocate for cunning tactics. But he is also alive to, and at times near despair over, the “sheer nasty cleverness” of human cunning (p. 9).

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4. Dale Carnegie, How to Win Friends and Influence People (rev. ed., reissue ed. 1990). I say “oddly ethical” because Carnegie’s book teaches that the best way to get another to do what one wants is to appreciate what he or she wants. While this sort of exercise can serve as a prelude to crass manipulation, it might also induce those who would otherwise be shamefully self-centered to have greater concern and respect for others.
More to the point, these tales contain characters that are complicated. True, Kello is easily denounced. In any relevant sense of the word, we know that it is wrong to kill your spouse just because she doesn’t want you to take a more attractive job. (So much for the notion that the world is divided into knowable facts and unknowable values.) But he was also a minister, and apparently a conscientious one.\(^5\) Similarly, Kello was rational and irrational. If you want a better job, isn’t it instrumentally rational to remove an obstacle to getting it in a manner that permits you to obtain it? (p. 6). Kello was rational in just this way. He staged the suicide, quietly spread rumors that his wife was depressed, arranged for discovery of the body, and expressed bereavement, perhaps even sincerely. And yet this methodical murderer suddenly heeded the call of the divine teachings he had flouted, and convinced himself to confess, thereby laying waste to his careful efforts—hardly the stuff of hardheaded instrumentalism. That is, unless one supposes that Kello came to doubt that wealth and professional status were the only ends that he ought rationally to be pursuing, or that rationality is fully captured by the unconstrained pursuit of such ends.

Would it be accurate to describe Kello as cunning? Maybe not. He did manage to get himself hanged. On the other hand, he almost got away with murder. And, again, who says that the idea of cunning has to be tied to material success? Perhaps part of what it means to be cunning is to be cleverer than one should be; to be willing to navigate obstacles that, if one’s life is to go well, one never should have sought to avoid in the first place.\(^6\)

Now consider the characters in Lowe’s story. One might offer three cheers for Master James, the righteous minister. Yet this was also a man too innocent, complacent, or self-deluding to notice that his lodger was sleeping with his wife and trying to murder him. Do guileless or willfully blind victims deserve praise? If not, does that complicate our views on whether cunning is a virtue or a vice? This same line of inquiry leads us directly to the crafty neighbor, who is in some ways the mirror image of the naïf James. An excellent detective, it would seem. But who put him in charge? And should we have any qualms about his willingness to deploy manipulative tactics? Did he ever worry that his own scheming might send an undeserving person to her death?

\(^5\) Cf. Liberty Lobby v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (Scalia, J.) ("It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot. . ."), vacated, 477 U.S. 242 (1986).

\(^6\) Herzog informs us that, according to Ambrose Bierce, cunning is "[t]he faculty that distinguishes a weak animal or person from a strong one. It brings its possessor much mental satisfaction and great material adversity. An Italian proverb says: "'The furrier gets the skins of more foxes than asses.'" P. 8 (quoting AMBROSE BIERCE, THE DEVIL'S DICTIONARY 60 (1911) (definition of "Cunning")).

To avoid possible reader disappointment, and to make clearer the breadth of Cunning’s aspirations, I should point out up front that Herzog is not interested in providing a definition of cunning. P. 7. And, although the book uses the concept of cunning as a focal point, it is ultimately concerned with a broad array of related (good and bad) capacities including astuteness, opportunism, selfishness, slyness, and so on.
Master Lowe, like Kello, is a perplexing figure. It's hard to find anything redeeming about a double-murderer, but Lowe does earn a bit of respect, if not for his display of honor-among-thieves sentiments in his dealings with the squirrelly neighbor, then for remaining loyal to his lover even after there was nothing material to be gained by doing so. The widow, meanwhile, remains enigmatic. Was she burned alive for murder, acting as an accessory after-the-fact, committing adultery, or being a victim?

Implicit in the foregoing description of the characters in Lowe's tale is a third dimension—the complexity of their interactions with one another. For example, Lowe is in some ways a darkly effective character in James's household. Yet he soon meets his match in dealing with the neighbor. And he remains a steadfast lover to James's wife. The suggestion is—as it was in the case of Kello—that the multiplicity of contexts in which one acts provides occasions for a multiplicity of one's characteristics to come to the fore.

A fourth dimension to each of these tales that is relevant to the larger aspirations of Cunning can be identified by asking how we know of these sordid events from long ago. I said above that Kello's story comes to us by way of his confession. But confessions of this sort, Herzog tells us, were usually written by men of the cloth (p. 164). Here's yet another twist: Kello's and Lowe's upright colleagues are probably speaking for them. But to what end? Do these good scribes lack cunning of their own? Consider the title of Kello's confession: The Confession of Maister Iohn Kello Minister of Spot, Togidder with His Ernst Repentance Maid upon the Scaffold Befoir His Suffering, the Foutd Day of October. 1570 (p. 3 n.1). Can we be confident that, with the gallows looming, Kello really did offer "His Ernst Repentance"? That the details of his confession were accurate? In particular, that his dream-revelation is what got him hanged? Or is the confession itself a "pious fraud" (p. 164)—a bit of third-person sermonizing dressed up as first-person attestation for pedagogic purposes?

B. No One Is Nobody, but Some People Sure Act Like Him: Does Everybody Know?

The body of Cunning takes up and develops the foregoing themes by considering two familiar figures from the Western great books tradition: Odysseus, offered by Homer as the embodiment of cunning, and Machiavelli, the infamous advocate of ruthlessly cunning tactics.

Herzog teases out several paradoxical dimensions of Homer's equation of Odysseus's status as a "nobody" with his character's unmatched capacity for cunning. In what sense is a cunning person a nobody? The initial answer

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7. Herzog notes that the connection in ancient Greek was not just conceptual but linguistic. Pp. 16-17. Odysseus famously identifies himself to the Cyclops Polyphemus as "nobody." After Odysseus escapes, Polyphemus wails to his fellow giants that "nobody" has blinded him. They respond with puzzlement, wondering why he is so upset "if Nobody has hurt you." In this usage, the Greek for "nobody"—mē tis—puns on the Greek for cunning—mētis. Homer, The Odyssey 509–10 (Robert Fagles trans., Penguin Books 1996).
comes from the mouth of Odysseus. To be cunning is to be “whatever the occasion demands” (p. 27)—a man so detached, so in control, and so clear-eyed that, at any given moment, he can be whomever he needs to be and do whatever he needs to do to get what he wants out of a situation. But, Herzog observes, if the perfect embodiment of cunning is this sort of shapeshifter, then the linkage takes on another, more literal meaning. This ideal of cunning turns out to be an unattainable abstraction (p. 29). No one can be a nobody. To be nobody is to be not human. Indeed, he claims that Homer was wise to this point and meant to teach it to his audience. Although usually keen to portray Odysseus as the master of death-defying improvisation, Homer also offers up some moments when the hero is not on his game. For example, Odysseus can’t resist boasting of his true identity as his crew sails away from the blinded Polyphemus, thereby earning the wrath of Neptune (the cyclops’s dad) at a dear cost to Odysseus’s efforts to reach home, not to mention his crew’s lives (p. 17). And when he finally does return home, Odysseus’s gift for strategic action is overwhelmed by his thirst for vengeance, leading him to launch an atrocious massacre that quite unwisely provokes a potentially disastrous showdown with the victims’ survivors (p. 16).

More boldly, Herzog argues that Homer meant for the audience to realize that his master of cunning is doubly fictional—a creation not just of Homer but of Odysseus himself (p. 19). Who attests to Odysseus’s most famous exploits? Odysseus. Might he be making them up? Slyly activating the real-world sensibilities that we suspend when lost in an exotic tale, Herzog points out that a man in the position of Odysseus would have some explaining to do. How it is that it took this supremely gifted man ten years to make the less-than-400-mile journey from Troy to Ithaca? (p. 21). And why were eight of them spent in the company of two beauties, Calypso and Circe? (p. 21). And how did he alone manage to survive—was it dumb luck, or were some choices made, or was it some of each? Surely it would be useful in this situation for Odysseus to have at hand an account of the unimaginable obstacles that he faced, and the wits and courage that permitted him alone to survive, and barely. Remember, this is the character who tells us up front that he does what he needs to do when he needs to do it. If so, the nobody really is a nobody: a figment of a cunning imagination pressed into service by the need of a clever man to justify his actions.

The general lesson Herzog takes from The Odyssey is that the aspiration to be nobody is silly. Partly the problem is one of resources. Only a fictional character has the time, energy, skill, and luck constantly to deliver whatever the occasion demands. There’s also the problem of reputation. If one gains notoriety as a cunning fellow, those aware of it may simply refuse to deal

8. Obviously this creature is very different from Woody Allen’s Leonard Zelig, the chameleon who blends in out of hyper-conformism. See Zelig (MGM Pictures 1983).

9. In other instances, Odysseus seems to behave cunningly not for any immediate purpose, but just for the sport of it. See p. 18 (describing Odysseus sparring with Athena).
with you. In this situation, cunning runs counter to instrumental rationality by preventing you from getting what you want from others. But the problem runs deeper. To be capable of anything is to be incapable of not being capable of anything. A shapeshifter might play the role of faithful friend or devoted spouse when the occasion demands. But he can't be a faithful friend or devoted spouse (pp. 27–28). Those roles require one not to be detached and inconstant. In other words, there is a dimension of being to human existence that stands apart from the dimension of doing. To aspire to be Odyssean is to aspire, insanely, to a life of doing without being.

So what have we learned by considering the case of the nobody? One lesson, says Herzog, is that real people are more than the sum of their actions—that they have qualities such as character, integrity, and consistency. In turn, these qualities give us reasons for action that are not captured by models of human action that analyze it entirely as a forward-looking pursuit of goods or goals. To say the same thing, there are lots of reasons to regard as impoverished a conception of rational action that is confined to the instrumental pursuit of goods. One can rationally act because of who one is, or what one has done, or what one's duty is, regardless of where it stands to get you. Asks Herzog: suppose you encounter a former high-school friend with whom you've lost touch. She is down on her luck. Don't you have a reason to help her that a complete stranger does not, regardless of what's in it for you? (pp. 35–36).

Odysseus also reminds us that our evaluations of cunning action will vary depending on our relation to the actor and the context in which he acts. Admiration comes naturally when we witness Odysseus engineer Polyphemus's blinding to avoid the prospect of him and his men being eaten. We might even deem tolerable (at least as among soldiers in the midst of battle) his decision to sneak about at night, slitting the throats of sleeping Trojan soldiers. But Odysseus is worrisome because he draws no lines—he is unwilling to describe for us the situations in which he would forbear from cunning tactics and be himself, rather than the man he needs to be.

Can we get a handle on those situations? Enter Machiavelli. Herzog's Machiavelli is first and foremost the great—and justifiably caustic—debunker of the political pieties of classical and medieval thought. The Prince tears apart the mirror-of-princes literature, founded on a naive faith that prudence, wisdom, efficacy, and fairness will naturally align with one another in the good leader (pp. 43–47). Likewise, it refuses to dissolve the problem of wicked rulers by relying on the crutch of divine judgment (p. 41). In doing so, Machiavelli clears the way for his infamous advice: if

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10. Achilles at one point shuns Odysseus for just this reason. Pp. 28–29.

11. Of course one can trick out this framework by distinguishing between short-term and long-term goals, and by adding side-constraints through devices such as reputational effects, or by redefining goals to include the means by which they are achieved. But to do so, says Herzog, is to turn the model of instrumental rationality into "Silly Putty" (p. 33).

12. Being brutally tortured for one's political affiliations (p. 38) is presumably an adequate ground for adopting a somewhat cynical attitude toward politics.
one’s goal as prince is to maintain order and promote prosperity, then cunning and cruelty are virtues, and fairness and mercy vices. And just so we’re clear, when Machiavelli advocates the use of cunning, he is not talking about running attack ads. His praise is reserved for the prince who arranges for the public dismembering of a trusted advisor, now conveniently made into a scapegoat.  

What are we to make of this message? The traditional account views Machiavelli as a satanic courtier who teaches princes to embrace without qualms the savagery and duplicity that is going to get them what they want. More charitable readings treat The Prince as a manual for the grim-but-selfless gunslinger seen in certain Westerns: the detached, amoral man of action who wipes the streets clean to permit ordinary folk to live virtuously in a peaceful republic thereafter (p. 48). The latter attempt to cabin Machiavelli’s Machiavellianism doesn’t work, says Herzog, because he himself rejected it. Here he turns to Mandragola, Machiavelli’s comic play about lusty Callimaco’s cunning “conquest” of Donna Lucrezia, the pious wife of the simpleton Nicia (pp. 53–54). Prince-ly tactics, the play demonstrates, are always available, always useful, not just tools for founding fathers. The natural and social world supplies endless opportunities for cunning. It is at home everywhere.

So does this mean that Herzog wishes to revert to the traditional condemnation of Machiavelli as a ruthless amoralist? Quite the opposite. In his own cunning twist on Straussian interpretation, Herzog hints that Machiavelli’s critics, as well as those who defend him by the cabining strategy described above, have failed to appreciate the extent to which he was a genuine humanist. That failure stems from misunderstanding the audience for whom he was writing. The standard supposition is that The Prince was written for princes. But why do they need to read Machiavelli? After all, everything that’s in the book he learned from them. So perhaps Machiavelli had a different audience and a different agenda in mind. Maybe The Prince and his other writings are aimed not at the prince but at the principality (p. 50). And maybe their point is not to preach cunning to the cunning, but to give others a sense of the unspeakable things that occur in the corridors of power and the minds of ambitious men. Doing so might enable some, at least, to avoid being the dupes of all those around them who profess piety and virtue, but are steeped in the ways of cunning. Simultaneously, it offers them a picture of how a person ought to live in a world rife with cunning—courageously, actively, cunningly. The real advice of The Prince, on Herzog’s reading, is not “Do whatever it takes,” but “‘Tis better to do than to be done onto.”

13. P. 40. This example suggests a somewhat different spin on the phrase “no guts, no glory.”

14. Specifically, Herzog fuses the Straussian idea that the great texts of political philosophy carry esoteric or hidden agendas with the profoundly anti-Straussian thought that Machiavelli’s hidden agenda was to let ordinary folk in on the hard truths about politics and human nature that, according to Straussianism, they should for their own sake not learn.
Herzog’s engagement with Machiavelli prompts a shift in Cunning’s orientation; not a clean break, but a change of emphasis. Whereas the focus up to this point has been on the poverty of certain ways in which academics understand human action, the question that comes to the fore in the latter portions of the book are questions of practical reason: of how one should act. Closely related to this question, in Herzog’s view, is the epistemological question of rationality or warranted belief—on what basis does one know? In tackling both of these questions, the book retains its underlying thematic emphasis on the unreliability of people and their words.

Machiavelli’s efforts at consciousness-raising, Herzog suggests, operate within a familiar way of looking at the social world, one that divides it into two kinds of people—knaves and fools. Here he breezes through a cast of knaves ranging from false prophets of ancient Rome to today’s marvelously inarticulate Internet scam artists (pp. 57–67). Some of these knaves have been ingenious, but most could proceed simply by casting a wide net and waiting for the gullible to get caught. So isn’t Machiavelli’s point well-taken? Given a dyadic choice, is it not better—more manly, more virtuous, more existentially assertive—to be a knave? Alternatively, if the world could be neatly divided into knaves pursuing their knavish plots and innocent fools endangered by them, might there be a promising strategy by which to save the gentle fools? For example, if we could figure out how to unmask the knaves—how to get past appearances to what’s really going on—the fools could know what’s up, where they stand, what to do.

If only it were so easy. If the world were just knaves and fools, we might agree that the better course is to be the knave. Or we might come up with a reliable scheme of knave-detection. But those who advocate knavery in the belief that it is appropriately hard-boiled (think film noir) are guilty of a kind of romanticism (think film noir again). The idea that one can become some sort of ruthlessly effective amoralist supposes that mere mortals can attain Odyssean heights. Knaves prey on fools and other knaves, and knaves prey on themselves. Knaves are knavish with respect to one facet of their lives and fools with respect to others. (Recall the murderous, foolish Lowe.) The fool’s aspiration for transparency is similarly unworldly—an expression of a vain desire to become the omniscient audience to one’s own life. “Stop this ride, I want to get off!” is an understandable sentiment. It is escapist nonetheless.

Part of the problem with both of these simplistic views is that the ideas of deception and masking are themselves complicated, as the following examples provided by Herzog suggest (pp. 72–79). Some masks are duplicitious. Others call attention to themselves. (Cue Tammy Faye Bakker.) A mask can work its effects even when people can see through it. For example, even if everyone involved in a vote knows that it is ratifying a done deal, the exercise can function as a moral comb-over. (p. 76). A mask can operate as a mask in some respects but not others. Aesthetically, one presumably ought to be delighted to own a perfect forgery of a famous painting.
even though its inauthenticity might render it a disastrous investment. Some masks are villainous. Others are empowering in more playful and benign ways. A mask might even permit one to be one's "real" self. Masks can be masked: Smith can pretend to be Jones pretending to be Smith. Masks can be chosen or imposed. So W.E.B. DuBois argued that African Americans had no choice but to adopt a get-along, go-along mask if they were to advance. Masks can serve social values. Ethical rules forbid lawyers from revealing to juries what they really think about their clients, in part because we don't want their beliefs (or the jury's assessment of their beliefs) to be part of jury deliberations. And masking isn't always or even typically about conscious deception. Many of the set pieces in our lives have role-playing built into their fabric. Herzog reports (or purports to report) in uncomfortable detail his recent experience buying a car (pp. 94–97). He goes into the event nervous and suspicious, as he should. Not because car salesmen are evil. Nor are they in a position to be dark lords of deception, at least with respect to those who know where to find relatively reliable pricing guides. It's just that the situation calls for a dance. The point of the dance, of course, is to see if the dealer can wear you down and get you to pay a little more, not because you lack knowledge, but because you're timid, tired, confused, or embarrassed, or because you're good at rationalizing spending more than you should. (Why not redistribute a bit of wealth to the fellow with the hideous jacket? Is that why he's wearing it?)

Also, detection isn't merely a problem of decoding the evidence before one's eyes. For the investigation often will have to take place in circumstances that hinder one's ability to get to the bottom of things. How much effort are you willing to put in? How much embarrassment will you risk? How much annoyance or violence are you willing to provoke? Here's another item from Herzog's reservoir of examples (p. 87). You're in a line to buy a frothy coffee drink. It costs five dollars and you pay with a ten-dollar bill. The counter-person completes the transaction. You apologetically ask for your change. He looks at you—was that a sly smile?—and reminds you that you paid with a five. You insist it was a ten. Now what? Other customers are getting impatient with you. You are beginning to wonder if you are mistaken. Is it worth calling in his supervisor? How will you prove that you're right? What if you're wrong and the counter-person is fired because of your mistake? What if he isn't fired, and you are a regular? Will you be too embarrassed to go back?\(^4\)

So masking is complicated. Sometimes good, sometimes bad. Sometimes nefariously deceptive, sometimes innocently or admiringly deceptive. Sometimes chosen, sometimes not. Sometimes detectable, other times not. However earnest, a plea for full disclosure, constant genuineness, is mis-

\(^{15}\) Thus, Herzog relates a story from the Nazi-era diary of Victor Klemperer, a German Jew, in which Klemperer tells of subtly inducing a Catholic family to assume that he, too, is Catholic. In doing so, he induces them to treat him as the decent person that he actually is. Pp. 77–78.

\(^{16}\) And might a part of you want to suffer an injustice? By providing an opportunity for a healthy bout of indignation, doesn't the occasional minor outrage provide you with a net gain in welfare? Consider, in this regard, the utility function of the average affluent American teenager.
guided, probably incoherent. Perhaps instead, though, we can develop a technique for sniffing out the bad masks—the ones worn by quacks who knowingly sell ordinary laxatives to desperate souls as a cure for cancer? This effort has been underway forever. Aristotle advised that we trust the fellow who speaks with a deep voice and walks slowly (p. 81). Today it is the man who looks you in the eye and offers a firm handshake. All cant and gibberish, says Herzog (p. 84). We know from Odysseus that the cunning are shapeshifters. So if they are any good at all, they will blend in. Maybe you can get really good at detecting them, like some idealized television cop. But even then, you can only make headway if you have the chance for close observation. What about the strangers upon whom you regularly rely, but whom you never see? One might instead aspire to live by the rationalist’s motto: take nothing on authority. But that hope is no less fanciful than the hope for a guileless world. What’s rational to believe in any given instance is connected to what one already knows and believes (p. 102). And what one already knows and believes is largely the product of information that one has received from external sources and from other persons. One has to figure out whom and what to trust, and that judgment will be informed by one’s existing beliefs.

To make this observation is not to fall prey to radical skepticism. We can still be more or less confident about our beliefs. It would be hard for one of us to verify by first-person observation that the USSR no longer exists as a nation-state, but we know that it doesn’t, just as we know that it was wrong for Kello to murder his wife to advance his career. Moreover, we can exercise some judgment about the business of forming beliefs in better and worse ways. For example, we can appreciate how a given situation might be conducive or not conducive to the formation of sound beliefs. But we are also always vulnerable to error and to misinformation. That belief formation necessarily involves reliance on others creates occasions for others to deceive us. That belief formation is fundamentally a matter of trying to reconcile new information and thoughts with our existing beliefs creates occasions for us to mislead ourselves. In both respects, the process creates opportunities for cunning, which is no less at home in the realm of knowledge than in the spheres of politics and sex (pp. 109–10).

This last point has been with us since the beginning of the book—recall the questionable authenticity of Kello’s confession. Herzog also uses the example of prominent seventeenth-century English astrologer William Lilly to point out our epistemic dependence and vulnerability (pp. 110–18). Lilly specialized in spewing forth the stream of vague prophecies characteristic of astrology. In his time, he was quite a success, earning the ear of princes and national fame. Was it rational for anyone to believe in astrology in England circa 1650? Herzog notes that Lilly seemed to foretell the death of Charles I

17. Although there is no reason to suppose that this exercise will identify a unique set of conditions that can be counted on to generate truth. The marketplace of ideas might be good at combating complacent beliefs, but may also foster hyperbolic and polarized discourse that hampers our ability to articulate and defend subtle or moderate positions. The academic conference may be an occasion for the productive exchange of ideas, but also for professorial preening and posturing.
and the elimination (temporary, as it turned out) of the monarchy. He also
notes that Lilly’s methods were publicly defended, or at least credited, by
others, including possibly Charles I himself.\(^{18}\) Also on Lilly’s side is the fact
that the great Newton saw no conflict between Newtonian physics and a
belief in the literal truth of the Bible, as well as the validity of alchemy.
These bits of authority would seem to have entitled a contemporary of
Lilly’s rationally to maintain a belief in the validity of astrology. Pointing
in the other direction were contemporary critics who trashed Lilly as a knave, a
lunatic, a Papist, and a disciple of the devil. That Lilly was an advisor to
radical Puritan zealots might also provide grounds for doubting his claims.
We are entitled, at least sometimes, to draw inferences about the reliability
of one’s claims from the company one keeps.\(^{19}\) On balance, Herzog con­
cludes, it could have been rational to believe or not to believe Lilly’s claim
to be able to prophesize on the basis of the study of the stars.\(^{20}\)

In further support of his claim that the simple framework of knaves and
fools is inadequate, Herzog notes that, in Lilly’s time, a belief in astro­
logy—or, in the case of another horrendous instance of spousal murder,\(^{21}\) a
belief in changelings—was not crazy. For the knave-fool dichotomy presup­
poses an insupportably sharp distinction between appearance and rationality
and between fiction and truth. All we have is a set of beliefs that hang to­
gether, more or less. Knaves cannot be consistently detected because they
infect knowledge and belief formation. What one is warranted in believing
today is surely different from what one was entitled to believe in 1650, and I
don’t take Herzog to be denying that one can meaningfully talk about the
progress of knowledge. That progress notwithstanding, humans are still left
to make sense of the natural and social world by attempting to spin coherent
webs of belief out of an endless supply of often ambiguous and inconclusive
information, which may or may not be reliable, and which will inevitably be
interpreted in light of their priors and their interests.

In fact, for two reasons, the problem of knavery is even more pervasive
and intractable than the foregoing treatment suggests. First, it is not always

18. Of course, says Herzog, we’d want to know who offered these testimonials, and who
reported the King’s endorsement, and under what circumstances. Might they be Lilly himself, or
paid associates? P. 114.

19. For example, if you’re currently a Democrat, you’re likely not going to be inclined to
credit political claims made by persons affiliated with the Swift Boat Veterans for Truth.

20. Herzog also wants us to notice that Lilly’s own view of what he was doing are not dispo­
sitive of the question of whether it was rational to believe him. Pp. 118–19. Suppose Lilly was a
shameless cynic who didn’t believe a word of what he was saying. He could have been mistaken.
Suppose Lilly fervently clung to his belief in the veracity of astrology even as torturers urged him to
confess otherwise? Do we have reason now to trust his judgment? Not necessarily. Perhaps the best
thing a cynical, manipulative rogue can do is to convince himself of the truth of something false so
that he can carry out his rogueish plans. Suppose Lilly’s predictions caused people to act so as to
render them true. (E.g., by advising Puritan leaders of the imminent death of Charles, he induced
them to execute him.) Would it then be rational to believe him?

21. Namely that of late nineteenth-century Irishman Michael Cleary, who, upon reaching the
conclusion that his young wife had been replaced by a changeling, forced upon her a dreadful herbal
“remedy” and then, unsatisfied with the result, burnt her alive. P. 119; see ANGELA BOURKE, THE
or typically the case that cunning operates at the level of ratiocination. Citing examples of unconscious musical composition and improvisation, statements that carry coherent meanings never imagined by their speakers, and lower animals that deploy brilliant survival tactics, Herzog argues that the exercise of cunning can be detached from notions of intent or even consciousness (pp. 125–31). Humans are masters at masking their motivations from themselves. Some of history’s most celebrated frauds were likely not callow manipulators but self-deceiving deceivers. Mme. Humbert, a farmer’s daughter from the turn of the twentieth century, was at the center of an elaborate scam in which she claimed to be an heiress (pp. 133–38). (Alas, her fortune was tied up in litigation, so she required loans from kind strangers, many of whom were glad to oblige.) For all we know, Humbert may have come to believe that the lie was the truth, in part because those around her were falling for it, which made it easier for her to believe. How does one unmask a mask that’s no longer a mask?

Like Kello and Lowe, Humbert is offered as an extreme, exotic version of more familiar human traits and actions. Have you embellished a favorite story over time? Are you sure which part of it really happened and which part is retouched?22 Have you deluded yourself in less elaborate ways than Mme. Humbert? You’re consistently amazed at the degree to which your coworkers act out of crass self-interest, yet you are prone to believe that your own actions are on the up and up. Is it possible that you are not examining your motives as clearly as you might? (pp. 138–40). The most prevalent mode of cunning, Herzog maintains, is not heroically Odyssean or Machiavellian, but a sporadic, messy mixture of knavery and foolishness. Convincing yourself of things that you know at some level aren’t so, suppressing nagging worries or doubts, failing to correct an insinuation that you never intended to make, spinning or embellishing—this is the stuff of everyday life. All of it is sly, some of it is nasty, and yet little of it is self-conscious or strategic (pp. 138–39).

Second, even when we can detect instances of conscious deceit, we’re not necessarily going to agree with one another that we are looking at an instance of knavery. As our differing reactions to Odysseus’s various exploits suggest, views on whether an act of cunning is cause for condemnation will depend on what counts as a worthwhile objective, as well as an evaluation of the context in which the act takes place (pp. 143–46). Seagoing pirates may be thieves and worse, but can we condemn them if the governments outside of which they operate are brutally oppressive? What’s so terrible about the small-time crook, as compared to the grocery store that uses special lighting to make its produce look better than it actually is? What if the world is just a thief stealing from a pirate stealing from a charlatan?

22. Ronald Reagan apparently was prone to mistake events that happened to his film characters for events that happened to him. See Frances FitzGerald, Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War 22 (2000).
D. If You Outsmart Yourself, Who Are You?

As *Cunning* nears its conclusion, Herzog has us in a deep hole. The cunning are everywhere, even inside our heads. Ruthlessly or lazily, others are misleading us, as we are misleading them, as we and they are playing games with ourselves. To be sure, there’s a certain amount of comfort in all this. We’ve relegated the cunning über-villain to the margins. Few of us will be so committed to and so accomplished at being sneaky. But for those activities and occasions when one is not just muddling through, what can possibly counsel against emulating the example of Odysseus or following the advice of Machiavelli? Is not the appropriate response to the human condition to “learn how to dirty your hands, how not to be good?” (p. 143).

Herzog surveys some classic responses to this quandary and finds them wanting. One suggests that we take refuge in social roles and the obligations that they generate (pp. 143–45). There is something to the recognition of our embeddedness. The existentialist notion of the purely detached, entirely authentic, fully autonomous agent is at least as much adolescent-male fantasy as noble philosophical ideal. In any event, it is a nonstarter. We tend to be encumbered not only by attributes such as race and gender, but by who we are—family members, friends, colleagues, subordinates, superiors, customers, etc. These aspects of our lives are governed by norms and come with powers and responsibilities. Perhaps, then, it might be supposed that an adequate response to the question of how one should live in the face of the omnipresence of cunning is that one should play one’s role and do one’s duty.

Unfortunately, says Herzog, there is no way to resolve the perennial tension between immersion and distance (pp. 144–58). Professors are surely obligated to prepare adequately for classes, run them with a certain degree of attention, grade students’ exams conscientiously, etc. But what if you’re a professor who is convinced that he has been badly mistreated by successive department chairs or deans? Would you not be entitled to shirk? True, the students are innocent victims here. But if union members can engage in work stoppages and slowdowns at the expense of a business’s customers, why can’t you follow suit? There’s also the problem of how to prioritize the demands of conflicting roles. I’m determined to live out the worthy role of breadwinner for my family. But the local economy is in the toilet and I don’t have the training or connections to get a decent job. Does attending to my familial duties entitle me to become a petty thief? Some role identification is dehumanizing; certain roles simply shouldn’t carry as much importance as they sometimes do. And one doesn’t have to subscribe to existentialism to accept that there’s something enduringly attractive about role detachment—the idea of taking a well-earned holiday from one’s responsibilities. And

23. Louis Menand, *Stand By Your Man: The Strange Liaison of Sartre and Beauvoir*, NEW YORKER, Sept. 19, 2005, at 140 (describing Sartre’s awful behavior toward women, especially Beauvoir, and his and her rationalizations of that behavior). Indeed, the existentialist ideal of authenticity seems no less divorced from notions of accountability and responsibility than the Homeric vision of the man who is whatever the occasion demands.
such detachment is not only attractive but in some cases admirable. Didn’t Jesus disown his mortal family and counsel the same act of renunciation for others? (p. 153).

An alternative response to Machiavelli turns on an appeal to self-interest. Hobbes, Hume, and Benjamin Franklin all proclaimed that honesty is the best policy (pp. 159–62). By this, Herzog explains, they meant that honest behavior is the prudent course of action, at least in the medium-to-long term. The risk of being detected or outsmarted is sufficiently high that it is better to play things straight.

Alas, the soundness of this advice depends on an empirical assessment of the odds of detection and punishment, and an unjustified embrace of a risk-averse conception of prudence. To this way of looking at things (as to Rawls’s argument from the original position), one can respond, simply, “I’ll take my chances” (p. 162). Anyway, who is to say that judgment will be forthcoming? A society is a collection of sub-units with different identities, different interests, and different assessments of the worth of and appropriate response to different forms of action. If the cunning can rely on their compatriots, why should we suppose that their conduct is imprudent? Athenian general Melanthus, in a war-settling duel to the death with his opposite number from the Boeotian camp, uses trickery to win (pp. 174–75). Has he flouted some sort of honor code? Presumably his troops would not think so. He did what needed to be done. And it is not as if these actions would somehow tag Melanthus with a reputation for being shiftless, because others can credibly conclude that he behaved sneakily only as that occasion demanded. If anything, Athenians might trust him all the more.

Finally, Herzog notes with a certain weariness that some will suppose that the question of whether one should be Machiavellian can only be answered negatively within a worldview that includes a judgmental deity (pp. 163–77). What about the good old days, when sinners repented and embraced the true and the right, trembling before the prospect of Hell? We already have seen some reason to doubt this picture. Again, this is a book that begins and ends with two murderous ministers. It is also one that suggests that acts of repentance may have been fabricated by men of the cloth. More generally, isn’t faith the domain of cunning on earth? Melville thought so when he wrote The Confidence Man, a book that treats piety as the ultimate weapon of Satan, here cast as the ultimate con-man (pp. 178–79). How many medieval churchmen who spoke of angels patrolling the earth and divine retribution were true believers, and how many saw a useful means of keeping ordinary folk on the straight and narrow at a time in which the state lacked means of law enforcement? How many times has religious belief been preyed upon by the cunning for personal or political ends? In comparison to mere acquisitiveness, religious zealotry is arguably a vastly more fertile source of cunning behavior. To repeat a lesson learned earlier in the book, cunning need not be tied up with the attainment of material goods or worldly power. If only the youth who respond to calls for suicide bombers were merely avaricious or venal (p. 171).
So, again, even after we've granted that Odyssean opportunism marks an unattainable anti-ideal, and even after we've granted that the social world and each of its members is a collection of masks that won't admit of some sort of ultimate unmasking, what's to counsel against the adoption, where possible, of the Machiavellian creed of "stick it to them before they stick it to you"? On the brink of despair, Herzog offers the following response, already alluded to in his initial discussion of Odysseus. A life doesn't go well simply insofar as one gets what one wants, even though attaining what one wants is part of the story. A good life involves being a certain kind of person. And even insofar as it involves attaining ends, it concerns the attainment of ends worth attaining, where worth is not defined simply as what is wanted, or what is obligatory given one's roles or stations in life.

Why not, Herzog asks (p. 157), steal twenty dollars from your friend's dresser if you're highly confident that she won't catch you (she's driven off in her very noisy car on an errand) and won't notice it's gone (she's famously careless with her money)? Because, he says, friendship is incompatible with being willing to do such a thing. One definition of a cunning person, noted above in connection with Kello's tale, is a person who is too clever by half. In the end, Herzog suggests, the cunning rogue runs the risk of being his own chump. If he is not careful, he may cheat himself out of a worthwhile life, a life with goods such as friendship that are attainable only if one declines to heed the example of Odysseus (pp. 83–84).

Returning to ancient myth, Herzog concludes the body of the book with the tale of Metis, the Titan whose name provides the Greek word for cunning. Bowled over by Metis's beauty and savvy, Zeus relentlessly pursues her. Although Metis uses her bag of shapeshifting tricks to avoid him, she eventually succumbs, and they are married. (In some tellings of the myth she is seduced, in others she is raped.) When an oracle prophesizes that Metis will someday bear a son destined to overthrow him, Zeus attempts to ward off his fate by swallowing his pregnant wife. This act prompts the mother of all headaches, followed by the emergence from Zeus's head of Athena, goddess of wisdom. Athena, it turns out, will later play the role of cunning Odysseus's protector (p. 16).

Of what relevance are these bizarre ideations from a civilization long dead? I take Herzog's answer to be this. The mythmakers were wise enough to see that our appetite and aptitude for cunning can, by virtue of its own covetousness, beget wisdom, which in turn can protect us from our cunning selves. The problem of cunning is, quite literally, the problem of humans being too clever for their own good. The solution is the realization that there's more to life than being adept at getting what one wants.

24. P. 184. It was Metis who devised the potion that caused Zeus's father, Kronos, to regurgitate Zeus's siblings, thereby enabling them to join him in a successful coup that led to the installation of the gods on Olympus. P. 184.
II

Like a commercial outline for a first-year law course, the foregoing synopsis runs the risk of sucking the life out of its subject. Dazzling, disorienting, and at times frustrating, *Cunning* is to be valued as much for the experience of reading it as for any of its take-away lessons. With each turn of the page, the reader is met anew with a shrewd observation or confounding example. It would be entirely appropriate, then, for me to end this review simply by encouraging you to read the book. Alas, reviewers have their duties, so I will say a bit more than that. Like Herzog, I will begin by looking backward to pre-modern England, in this case to draw a comparison of *Cunning* to Thomas Hobbes’s great work, *Leviathan*. By appreciating important similarities between these otherwise very different books, I aim to shed light on why *Cunning* argues the way it does, and what sort of problem motivates its argument. I then explain why this book, although not on its face about law, has a number of important lessons for law professors.

A. Hobbes’s Gambit

Would you spare a kind thought for Hobbes? He was an unapologetic authoritarian, of course. But imagine yourself as a seventeenth-century scholar in the following situation. You have witnessed your country consumed by civil war, an event that you link to the death of classical and medieval conceptions of the world as hierarchically ordered, and the corresponding collapse of every standard theory of political legitimacy, including natural law theory, divine right theory, feudal order theory, and ancient constitutionalism. You are also convinced that you have devised a new and compelling justification for political authority appropriate to the modern world. Indeed, you have already taken the trouble to write out the proofs for all to see. Yet no one who matters has shown any interest. How could this be? The explanation dawns on you. The problem is appetitious humans and their fickle language. When harnessed by disinterested philosophers working in the cool sanctuary of the study, language permits the demonstration of truths, whether of politics or mathematics. When used by ordinary persons—or worse, ambitious elites—in the heated world of action, it invites deception, ideological distortion, and interminable strife.

So here is your desperate situation. You believe all of the foregoing to be true, but you also know yourself to be a timid soul with no taste or aptitude for political battle or intrigue. Does this mean you have no choice but to abandon your aspiration to rationalize politics and bring order to a chaotic world? Or is there a way to proceed with your project notwithstanding the...

25. The proof of the aptness of this comparison will have to be in the pudding. I should note preliminarily, however, that Herzog is no stranger to Hobbes’s great work. See DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 72–109 (1989).

inhospitality of politics to reason? The genius of *Leviathan*, I would argue, resides in its identification of a path forward.\(^{27}\)

A casual reader could be forgiven for mistaking *Leviathan* as yet another rendition of Hobbes's earlier efforts to write out a proof of the propriety of authoritarian rule. After all, the argument does seem to proceed through a series of deductions starting with Chapter One's account of sensory perception and ending with Chapter Eighteen's claim that sovereignty is absolute.\(^{28}\) But appearances are misleading. These Chapters are not only or even primarily concerned to lay out the steps of a logical argument. Rather, they are at least as concerned to unsettle the reader by showing just how untrustworthy words and the people who use them really are. In doing so, they implicitly embrace a particular account of how to make arguments—and how to govern—in a world of knavish fools. (Sound familiar?)

The theme of distrust starts immediately with Hobbes's account of sensation. We learn that sense perceptions caused by the motion of external objects are "fancy, the same waking, that dreaming."\(^{29}\) Imagination and memory are even less trustworthy, being nothing but "decaying sense."\(^{30}\) (This tells us that, if we are to know anything, we will need constant reminders. Hence Hobbes's prescription that the sovereign arrange for instruction in the doctrines of *Leviathan* from every pulpit and in every school.) Then there is language, the very medium of reason. In *Leviathan*, Hobbes almost never discusses language without noting its twin ability to generate insight and permit deception.\(^{31}\) True definitions permit right reasoning to true conclusions. Loose or metaphoric definitions—the ones that are out and about in the world—lead men to reason absurdly.

Continuing his gloomy portrait of the human condition, Hobbes observes that most of us rarely get beyond seat-of-the-pants prudential reasoning that is unselfconscious and often erroneous.\(^{32}\) When it comes to more abstract or theoretical reasoning, we don't think for ourselves, but instead take things on authority. And "whatsoever we believe, upon no other reason, than what is drawn from authority of men only, and their writings; whether they be sent from God or not, is faith in men only."\(^{33}\) Unfortunately, there are no creatures less worthy of faith than the men of *Leviathan*. In whom should one trust? The lunatic scholastics and natural lawyers?\(^{34}\) The clergy who use the word of God as cover for their pursuit of worldly inter-

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27. THOMAS HOBBES, *LEVIATHAN* (Michael Oakeshott ed., Collier Books 1962) (1651). Of course Hobbes's solution didn't at the time pan out, in part because his concerns over modern societies' susceptibility to perpetual strife turned out to be overblown. This is merely to note that events tend to show up even the geniuses among us (including, fortunately, the evil geniuses).

28. *Id.* at 509.

29. *Id.* at 22.

30. *Id.* at 23.

31. See *id.* at 34, 43, 45–46, 56–57.

32. *Id.* at 45.

33. *Id.* at 58.

34. *Id.* at 34, 44–46.
The nobility, who pay lip-service to obsolete notions of honor and virtue?35 (No civilization was more obsessed with virtue and honor than Ancient Greece, Hobbes points out, yet its gods were routinely celebrated for acts of rape, theft, and deceit.36) Last and least, there are the shifty lawyers, accomplished in twisting precedent and logic to befuddle others for their own benefit.38

And the problem is not just that there are scheming knaves ready to prey on the fools. The problem is that whenever one uses words to discuss a subject pertaining to worldly interests they are unreliable. Geometry may permit undistorted rational thought, but that is only "because men care not, in that subject, what be truth, as a thing that crosses no man's ambition, profit or lust."39 Any speech connected with worldly matters is inherently unreliable, colored as it is by interest.40 Thus, of any claim by any man pertaining to worldly affairs, one must always ask cui bona—who stands to benefit if the claim is believed?41

It is tempting to see in these skeptical musings an effort by Hobbes to induce his reader to embrace the sort of clear-eyed, disinterested rationalist thinking about politics that his earlier works had provided. But this can't be his message. For his claim is that any writing on matters of politics is inherently suspect, which means that his own writing cannot be trusted. Recall Hobbes's claim that metaphoric rather than literal usages of names and other words are at the root of all misunderstanding and error. Now recall that this piece of skepticism is coming from the author of a book that carries the title Leviathan, and that commences with the classical analogy of the polity to the human body.42 From his title page forward, Hobbes announces to his reader that he has left the study to speak the deceitful language of politics just like all the other cunning folks who operate in the political realm.43

35. Id. at 86–87.
36. Id. at 79, 82.
37. Id. at 76–77.
38. Id. at 84.
39. Id.
40. "I doubt not," Hobbes continues:

[I]f it had been a thing contrary to any man's right of dominion, or to the interest of men that have dominion, that the three angles of a triangle, should be equal to two angles of a square; that doctrine should have been, if not disputed, yet by the burning of all books of geometry, suppressed, as far as he whom it concerned was able.

Id.
41. Id. at 494.
42. Id. at 19; see HERZOG, supra note 25, at 99–102 (noting Hobbes's reliance on this metaphor and his simultaneous criticism of argument by metaphor).
43. See, e.g., HOBBES, supra note 27, at 510–11 (warning the reader that "[t]here is nothing I distrust more than my elocution," and announcing that he will leave the turmoil of the political world for the dispassionate analysis of natural rather than "artificial" bodies). Others, including Herzog and Quentin Skinner, have emphasized Leviathan's heavy reliance on rhetoric as distinguishing it from Hobbes's earlier political writings, and have argued that this change reflects Hobbes's increasing appreciation of the need to match the rhetoric of his opponents. HERZOG, supra
Why would Hobbes set out to undermine his own credibility? Perhaps he hoped that he would earn some points with his reader for candor. More importantly, by taking himself out of contention along with everybody else, *Leviathan* cunningly creates a theoretical vacuum. The reader is advised to trust no one, which in turn invites the reader to decide for himself. Why is this a good outcome for Hobbes? Everything hinges on the identity of Hobbes's immediate intended audience—which I take to be a would-be absolute ruler. If you're writing to the future monarch or Lord Protector, and if your message is, roughly, "distrust the ambitious men hovering around you, take charge without hesitation or apology, organize a top-down state that is fully responsive to your will, and implement a scheme of relentless indoctrination that will induce the populace to support your regime," then you probably do not need to convince him by rational argument what the right form of government is. To be sure, there's an element of chance in this strategy. But it is hardly crazy to suppose that, if you can convince your intended reader to treat everyone around him—churchmen, scholars, lawyers, nobility—with a jaundiced eye, and if you can show him how to rule effectively once in power, and if he is lucky enough to prevail, then you'll prevail. This is why, in his introduction, Hobbes asks his reader to heed a second Latin maxim: *nosce teipsum*—read thyself. The message is essentially this: "Apply to my work the same cynical acid that I am applying to everyone else's, then ask yourself whether what I am saying gibes with your instincts. If so, run with them." When it comes to the cunning world of politics, Hobbes ruefully observes, this is all an author can ask, "[f]or this kind of doctrine adrnitteth no other demonstration." Pretty clever stuff for a bookish philosopher faced with the puzzle of how to impose reason and order on an unreasoning and unreasonable world.

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note 25, at 95–99; QUENTIN SKINNER, REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBES 432–33 (1996). My point is different. It is not just that *Leviathan* relies heavily on rhetoric, but that it relies on rhetoric to convey a nearly self-defeating claim about political argument.

44. It would not have been absurd for Hobbes to suppose that he could gain the ear of a future ruler—he tutored the future Charles II in mathematics. RICHARD PETERS, HOBBES 18 (1967). Others have argued that Hobbes wrote *Leviathan* for a broad readership. See DAVID JOHNSTON, THE RHETORIC OF LEVIATHAN (1986). This strikes me as an odd supposition given the monstrous length and complexity of the text, Hobbes's dim view of the reasoning powers of the ordinary person, and his (accurate) sense that educated elites would reject his doctrine because it sought to deprive them of their political power. It is much more plausible to suppose that he had in mind that the absolute ruler, once in power, would arrange for the churches and universities to preach and teach the gospel of *Leviathan* to the general population.

45. At one point, Hobbes is near despair, supposing, with Plato, that chaos will never give way to order "till sovereigns be philosophers"—a most unlikely turn of events given his account of the human condition. HOBBES, supra note 27, at 270.

46. It is also why, at the end of the book, Hobbes admonishes his reader not to be squeamish or feel guilty about what it will take to seize control and establish order. Any sincere effort to legitimate one's power, he argues, is counterproductive because it sets grounds for critique. Moreover, it does so needlessly, because the founding of states is an inherently nasty business, for which no defense or apology is necessary. In fact, he says, there has never been a polity "whose beginnings can in conscience be justified." *Id.* at 506.

47. *Id.* at 20.
B. Be Careful What You Think.

I have invoked *Leviathan* as a point of comparison for several reasons. First, I mean to suggest that *Cunning*, like *Leviathan*, is a virtuoso performance. Second, I offer my reading of Hobbes as a kind of tribute, for it is an effort at the sort of strong interpretation that Herzog delivers when dealing with texts such as *The Odyssey* and *The Prince*. Approaching interpretation this way carries a lesson in and of itself. Great works are not instructional manuals. To read them for some take-away point ("Hobbes? Oh, yes; he's the guy who said that people are selfish and that, if they are left to their own devices, their lives will be nasty, brutish, and short") is to fail to read them.48

Third, although their authors' politics bear no resemblance to one another, in many other respects *Leviathan* and *Cunning* are birds of a feather. Indeed, in both content and tone, Herzog's book bears an astonishing resemblance to the opening chapters of Hobbes's. Both authors are profoundly troubled about how we know, how we think, how we communicate, and how we should come to terms with the subtle and not-so-subtle ways in which illusion and delusion creep into thought and action.

Finally, I believe that Herzog faces in his own work a variant of Hobbes's choice. Obviously, he is not writing in response to the breakdown of the political and social order, nor looking to persuade a would-be tyrant. And he is not—as he supposes was Machiavelli—seeking to illuminate for the educated citizen the dark recesses of political and social life. (A topsyturvy, academic-press book would be a poor vehicle for that mission.) *Cunning* is instead written for academics. But what is it trying to get us to see? And why does it make its points indirectly, through a disorienting array of examples and anecdotes? The answer may start to emerge if we consider the current state of academics, for which we can use the law school as a convenient focal point. My speculation is that *Cunning* is in part about (or at least a reaction to) the current state of scholarship, perhaps even legal scholarship in particular.

In law schools, of course, interdisciplinary study is the rage. And there is no reason to believe that Herzog—who came to law via political theory, and who in his own writing brings to bear the methods of a historian, literary critic, and philosopher—is hostile to this trend. What may be of concern to him are some of the prevalent ways in which disciplines tend to interact. For example, what might be termed the fashionista model has law professors indulging in facile applications of the latest in literary theory or cosmology. More common, and more depressingly mundane, is the touriste model, by which a law professor dabbles with a foreign way of thinking in the knowledge that others regard it as important, even though he is largely ignorant of what it stands for, or the context in which it was developed. Creepiest is the dominatrix model. Here the doughy jurist confesses his worthlessness and

48. John Hart Ely's famous gibe about the uselessness of political theory for constitutional interpretation trades on this impoverished understanding of what it means to theorize about politics. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 58 (1980) ("We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.").
abjectly pleads for discipline. Maybe he enjoys it; or maybe it's just good for his career. Still, there is something humiliating about his embrace of domination at the hands of a method-clad master. After all, what is interdisciplinary about law becoming the bondage slave of economics, philosophy, psychology, sociology, or biology?

Cunning, I am suggesting, is animated at least in part by a worry that professors, and perhaps law professors especially, are sometimes prone to embrace these and other unhealthy versions of interdisciplinary. Of particular concern may be a perceived tendency among academics to forget that the models and frameworks we invoke as ways of helping us to think are useful only if they actually help us to think. It is a mistake to treat the mere wielding of a model for actual thinking—to confuse method for reasoning. It is likewise a mistake to privilege as epistemically favored one or another method of analysis, or families of methods with some favored characteristic, such as hardheadedness. Theoretical inquiry, Cunning seems to suppose, is in danger of devolving into method-fetishism, which in turn raises the possibility that important dimensions of human experience, including law, will be mishandled or ignored.

If something like the foregoing supposition is fueling Cunning, its point is, I think, well taken. Consider, for example, the attitudinal model of Supreme Court decisionmaking, which today carries increasing currency among law professors who write in public law. It is premised on the idea that a justice's vote in a given case is best predicted by his or her political attitudes. Of course there's nothing odd (or particularly novel) in suggesting that justices' views on law interact with their views on, say, who would make a better president or what monetary policy the Federal Reserve Board ought to pursue. Nor is there anything new in supposing the justices are (or become) predictable in their decisionmaking. What is odd and unsatisfactory about attitudinalism is that its central concept of judicial "attitude" is poorly articulated and defended, and unjustifiably dismissive and corrosive of law.

One problem with attitudinalism is that it is arbitrary about what can count as an attitude. For example, what's to stop us from attributing to a justice an attitude that favors making decisions on the basis of her best judgment about what the Constitution requires, as opposed to deciding in a way that seems most likely to advance some near-term partisan agenda? There doesn't seem to be anything within attitudinalism itself that rules out the possibility of justices maintaining the former attitudes. Perhaps attitudinalists believe that these sorts of attitudes simply can't exist. One basis for such a belief would be a philosophical claim that law—or at least law as it figures in the work of the Supreme Court—is so radically indeterminate that it can't actually do any work in accounting for a justice's vote. If so, attitudinalists haven't done nearly enough work to defend these claims. (It

49. See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002).

50. I owe this point to Larry Sager.
doesn’t suffice merely to point out that precedents can generate plausible support for different outcomes in a given case. Why should we suppose that, for law to exist, there must be a system of rules that for any given case generates a unique result that all fair-minded observers would accept as correct?) In any event, aren’t we free to write off this sort of radically skeptical jurisprudence as but an expression of the professional self-interest of attitudinalists, or of their attitude of dislike for lawyers, law professors, or law schools?51

Alternatively, the claimed nonexistence of law might be offered as an empirical proposition about how justices have decided cases or about the psychological impossibility of acting for reasons other than the achievement of some political or personal agenda. But then it seems very implausible. History is rife with examples of justices biting bullets in the name of following the law.52 It’s possible that they were all deluding themselves, or that they were play-acting in order to pander to the laity’s naïve belief that judges don’t relentlessly pursue specific political goals. But why should we be keen to seize on this possibility when it’s commonplace for one to act other than the way one would want to act because of a not-particularly-precise rule or norm? Suppose an office adopts a new policy permitting business-casual dress on Fridays. The category of business casual surely admits of conflicting interpretations about what counts as appropriate garb. Now suppose an employee says to you: “I’ve got to spend all day tomorrow sitting in front of a computer, and I’d be much more comfortable wearing my old jeans. But that’s probably not allowed under the policy, so I guess I’ll wear khakis instead.” What reason is there to doubt the sincerity or accuracy of the employee’s claim that there is a disjunction between the outcome he would most prefer and what he believes that he ought to do in light of the (ambiguous) standards governing this aspect of his conduct?53 If none, why—apart from the philosophical commitment to law-skepticism discussed above—should we be inclined to treat differently a justice’s claims that she decides cases in accordance with her best judgment of what the law requires, as opposed to merely implementing her political preferences?

51. If attitudinalists are entitled to be dismissive of what justices claim to be doing when they are deciding cases, why can’t we be equally dismissive of what attitudinalists claim to be doing when they advance or rely on theoretical arguments? Surely we are not to suppose that explanations of behavior by reference to preferences and interests have no place in assessing the behavior of the professoriat.

52. Chief Justice Taft thought Prohibition was foolish, but nonetheless consistently upheld measures enforcing it. Robert Post, Federalism in the Taft Court Era: Can It Be “Revived”? , 51 DUKE L.J. 1513, 1540–41 (2002). Then-judge Cardozo didn’t like the doctrine of charitable immunity but voted to apply it. ANDREW L. KAUFMAN, CARDozo 252 (1998). Justice Stevens has recently identified several decisions that he signed onto as legally correct even though he disapproved of their results. Justice John Paul Stevens, Judicial Predilections, Address to the Clark County Bar Association (Aug. 18, 2005).

53. The example does not hinge on the employee being in fear of material sanction. Imagine these words are coming from the mouth of a partner in a law firm who has no reason to suppose that he’d be subject to an adverse employment action because of his decision to dress down.
There is a deeper problem still with attitudinalism, which resides in its efforts to divide judicial attitudes and law into hermetically sealed compartments so that attitude, rather than law, can be seen as the best predictor of judicial decisions. Suppose we see a justice who was appointed by a Republican president voting to grant states broad immunity from suit in federal court. That outcome might be described as deriving from an attitude that favors granting power to the states at the expense of the federal government. But why is this an attitude, rather than a substantive view about the proper place of the state and federal governments in our constitutional scheme of government? Yes, the Republican Party platform includes (probably selective) endorsements of states’ rights. But to point this out is just to note that it takes positions on issues of constitutional law.

Matters only get worse when the model has to account for the inevitable instances in which the same justice reads limits into Eleventh Amendment immunity, or upholds federal power over state power in a different context, such as a case involving Congress’s Commerce Clause power to enact federal criminal law, even when doing so interferes with state law. Now what sort of attitude are we looking at? One answer might be: the attitude of a Republican who generally favors broad powers for states except if doing so interferes with a particularly important goal such as crime control. Even if we can stretch the concept of attitude to capture something this complex, we can again ask why it is best described as an extralegal or prelegal disposition, as opposed to an on-the-merits claim about the way in which the Constitution allocates state and federal power. And if it turns out that, all along, attitudinalists have been predicting justices’ votes on the basis of positions in constitutional law, then what (apart from the cynical, “it’s all politics” spin) does the attitudinal model deliver?

Suppose I am right that worries over the prevalence of clumsy or arid invocations of method are a motivating force behind Cunning. Why doesn’t Herzog just say so, instead of making the reader work to appreciate his point? Occasionally he does. But obviously the book is not a treatise on meta-theory. Instead, it makes its case through examples and puzzles that


56. See Gonzales v. Raich, 125 S.Ct. 2195 (2005) (upholding federal power to regulate local marijuana farming).

57. The foregoing is not offered as a condemnation of political science analysis of the courts, nor do I mean to suggest that political science methods are uniquely prone to fetishism. (We’ve all encountered empirical papers that drearily mine data simply because it’s been compiled, just-so stories about human behavior from economists and game theorists, and clumsy efforts by philosophers to cram some topic or problem into the contours of Rawlsian, Kantian, or Hayekian theory.) Rather, I mean only to offer an example of an instance in which method seems to be getting in the way—creating obstacles to understanding rather than generating insight. I also do not mean to detract from the value of gathering and coding information on judicial decisionmaking, which can be very useful in helping to identify justices’ understandings of the law.
expose the limits of standard models, or demonstrate that they can be rendered pliable to the point of vacuity. In some respects, this approach makes things easier on the reader. It’s vastly more enjoyable to read *Cunning* than a philosophical tome on epistemology or practical reason. Yet this choice of approach also makes things harder on the reader, simply because the argument bounces around among a diversity of source materials, topics, temporal frames, and modes of analysis. So why write this way?

The answer probably has many facets. There are the author’s feelings to consider. It must have been fun to write this book and Herzog clearly takes pleasure in playing with his material. But it would be an error to write off *Cunning* as mere performance art. It is structured the way it is for reasons having to do with the substance of Herzog’s claims. And this brings us back to Hobbes. *Cunning* proceeds as it does because doing so provides Herzog with a highly effective means of staking out his position.

Look at it this way. Insofar as Herzog aims to drive home the idea that theories and models of human action are prone to be misused in a manner that leaves academics failing to engage life in all its complexity, there would be something odd, if not self-defeating, about making that point in the form of a highly abstract, theoretical argument. At a minimum, it wouldn’t be especially helpful to his cause to write out a fancy theory of why casuistry and mid-level theory are useful antidotes to reductionist theory. Better instead to provide an actual demonstration of what they can deliver. Given the claims that he is making, Herzog is better off proceeding by *doing*, rather than arguing about how to do. And that he does.

Relatedly, the book is built on the conviction that thinking, and therefore academic reading, ought to be a brow-furrowing, temple-rubbing, hall-pacing experience. To say this is not to sanction or celebrate obscurantism. Rather, by writing and reasoning well, an author can invite the reader to *think*—to identify connections, distinctions, and ideas, including ideas not specifically intended by the author. This mode of analysis and inquiry stands in stark opposition to the impoverished models of interdisciplinary scholarship I mentioned above. They attempt to resolve problems by the imposition of prefabricated frameworks. Knowledge, Herzog suggests, is not captured in the indiscriminate application of a given method, nor in the idea of an end-state in which the repository of one’s brain is filled with information. It is an activity.

The third aspect of *Cunning*’s approach concerns an often overlooked normative or ethical dimension of social theory, one that stands apart from familiar ethical injunctions against illicit scholarly acts such as fabrication and plagiarism. The issue arises because our theories of human action affect how we conceive of ourselves, which affects how we behave, which in turn affects how we theorize ourselves, and so on. To grasp the nature of this feedback effect, think of the stereotypical psychologist who can’t turn her professional self off—the one who inappropriately psychoanalyzes and second-guesses her family members, friends, and colleagues, much to their understandable annoyance. Here, the psychologist’s theory of human behavior profoundly influences, often for the worse, the way in which she interacts with others.
Or suppose that you and your colleagues are deeply enamored of a rabid version of public choice theory. As a result, each of you refuses to take each other’s words at face value, and instead assumes that every time another faculty member speaks to the merits of an issue he or she is actually making a move that is designed to advance his or her narrow self-interest. And he or she thinks that about you. In this conceptual space, a discussion on the merits of, say, a hiring decision becomes somewhere between difficult and impossible because of how you and your colleagues have come to understand human behavior (in this setting, at least).

Here’s a third example. Suppose you are a lawyer who is convinced that judicial decisions are driven by raw political preference, and that law is a fiction. If you are elevated to the bench, this understanding of law might well affect how you go about your job. Although strategic or reputational considerations might cause you to behave as if you believed in some meaningful notion of law and adjudication, they could just as easily lead you to treat the job of judging as equivalent to that of being a party apparatchik, and to take as your professional role model not Learned Hand but Katherine Harris (or at least the persona with which she is now associated). 58

The foregoing are perhaps extreme cases, but the point is generalizable beyond them. How we conceive of human action affects our self-understandings, and how we interact with one another. To an important extent, we are the persons whom we conceive ourselves (and others) to be. 59 This in turn adds an ethical layer to the rarified and seemingly innocent activity of academic theorizing. In addition to plotting one’s career while refraining from lying or plagiarizing, one also should worry about what will happen if others start to take seriously one’s account of human action. To ask this question is to appreciate further why Herzog insists on linking in Cunning a discussion of the methods of modern social theory with questions of practical reason. His message is that thin or shallow models of human behavior run the risk of begetting thin or shallow human behavior, while richer conceptions permit richer forms of interaction. Richer doesn’t necessarily mean better. (Recall again that this is a book that begins and ends with murderous ministers.) Still, Herzog seems worried that the way in which the modern academic enterprise is undertaken might be helping to render various goods scarce or unavailable to us, including goods such as meaningful discussions of subjects such as ethics, law, and politics. Here one detects in Herzog’s thought a deweyan concern that the narrow terms of elite intellectual inquiry are closing off possibilities for constructive political discourse.

58. Representative Harris perhaps might have benefited from reading Machiavelli. See Brian Montopoli, The Bush Brothers Kick Katherine Harris to the Curb, SLATE, June 30, 2005, http://slate.msn.com/id/2121746 (last visited Oct. 10, 2005) (reporting that George and Jeb Bush have reneged on promises to support Ms. Harris in her upcoming senatorial campaign as a reward for her efforts to deliver Florida’s electoral votes to President Bush in the 2000 election).

59. Within limits, of course: no amount of reconceptualization will convert us into creatures capable of unassisted flight.
C. What’s In It for Us?

Up to now I’ve been content in this review to wrestle with Cunning on its own terms. However, I want to conclude by canvassing briefly some of the reasons why law professors and law students should take the time and trouble to read it. To begin with, it is worth pointing out that Cunning is filled with tasty intellectual nuggets. Herzog’s nuanced and instantly recognizable account of the ritual of the automobile purchase would, I suspect, support a fine discussion in a negotiations class (pp. 94–97). Likewise, his treatment of the subtle ways in which one can delude oneself helpfully poses questions of responsibility and blame of the sort tackled in criminal and tort law (p. 138). Cunning’s vivid demonstration of the divorce between intended meaning and received meaning, and the ability of readers and listeners to impute meaning to texts and spoken words, could easily be used to shed light in areas ranging from contracts to statutory and constitutional interpretation (pp. 127–30).

There is another level entirely at which Cunning speaks to law professors. Indeed, I find myself surprised to have been supposing (even though I have been supposing) that the book stands to benefit from something like a reader’s companion for law professors. For one can argue that it expresses and defends a very lawyerly conception of reason. Rather than engaging questions at a high level of abstraction, Cunning works at the level of case studies. These studies, taken separately and together, present problems that invite careful analysis of texts, events, and actions. This process of analysis in turn leads us to push back on the examples themselves—to gain a richer sense of what they involve, in part by empathetically imagining the situations and mindsets of the actors whose actions we are studying and evaluating. By means of this to-and-fro, the reader is led at times to resolution, but at other times to a deeper appreciation of the nature and the dimensions of the puzzles she is facing.

Although terse and abstract, this description is I hope recognizable to the reader familiar with traditional legal analysis and legal pedagogy. To further flesh out its content, I will launch into a somewhat belabored discussion of a simple tort case. (Sorry, it’s what I know.) While hardly a match for the parables of Kello and Lowe, it will help convey some of the lessons that I think Herzog is trying to impart, and why those lessons have salience for law professors.

In Appelhans v. McFall, five-year-old William McFall rode his bike into Maxine Appelhans, aged sixty-six.60 As a result, she suffered a broken hip. Appelhans sued William for negligence and sued his parents for negligence in supervising William. The trial court granted a motion to dismiss on both claims and Appelhans appealed. The intermediate Illinois Appellate Court invoked two grounds for affirming. As to the claim against

William, it applied the deliciously named "tender years doctrine," which states that a child under the age of seven cannot be found to have acted unreasonably.61 As to the negligent supervision claim, the court ruled that it foundered on the plaintiff's failure to allege facts demonstrating that the McFalls were on notice of particular instances of prior dangerous conduct by William.62

How much is there to say about a simple tort case like this? Start with a very basic question: Why are we even encountering a lawsuit here? The adversarial posture of litigation might lead one to imagine that this running-down incident was the last straw in William's reign of terror over his elderly neighbors, or that there was bad blood between Appelhans and the McFalls. Yet neither fact by itself seems sufficient to explain why Appelhans would go to the trouble of pursuing a legal claim against young William. More likely, the immediate impetus for the suit was that Appelhans was facing significant medical expenses, only some of which were covered by insurance. It will also help to introduce at this point an off-stage actor in this unfolding drama—Appelhans's attorney. Lawyers do not tend to make their livings by leading vendettas or crusades against careless children or irresponsible neighbors. The upshot of these observations is that, however upset Appelhans was with the McFalls (and she may not have been particularly upset, as we will see), it would be a mistake to conceptualize her tort suit as merely an expression of anger. Rather, it was brought on the assumption that it would permit her (and her lawyer) to tap into a potential source of monetary compensation.

What source? One possibility is the adult McFalls. But did Appelhans really desire to drain thousands of dollars from her neighbors' bank account? What sort of person pushes that hard on this sort of claim? Even if she did, why did she bother asserting a claim against William? For this answer, we must again look offstage, this time to the insurance company that must have issued a homeowner's or umbrella policy to the McFalls covering certain liabilities, possibly including liabilities arising out of William's bicycle riding.

Now a new question arises: How did Appelhans come to know of the existence of this insurance policy and its potential application to a claim that she might bring? Perhaps a friend or relative suggested to her that she look into the possibility. Just as likely, the McFalls volunteered the information. Why would they do that? Perhaps the McFalls felt remorseful about the whole episode, particularly if they learned that Appelhans was facing uncovered medical expenses. If this were the situation, they might well have sought to make amends, and the prospect of insurance coverage would have made it easier for them to do so. We can even imagine them saying to her: "Don't worry, we took out an insurance policy for this sort of thing." Presumably, the insurance adjuster in this instance refused to offer Appelhans a meaningful settlement, in part on the ground that she did not have a valid

61. Appelhans, 757 N.E.2d at 993.
62. Id. at 993–94.
tort claim against the McFalls. At this point Appelhans's decision to retain a lawyer and to bring a claim against William (and her lawyer's willingness to take her case against William) becomes much easier to fathom. Just as the presence of insurance probably made it easier for the McFalls to offer amends, so too it may have made the decision to sue not just economically feasible, but psychologically palatable. Here, we can imagine Appelhans thinking to herself: "After all, it isn't really their money. . . ."

Notice how far we have come merely by considering how an elderly woman came to sue a young boy. Perhaps the most general lesson—one that I take Herzog to be anxious to demonstrate in his own parsings of language, texts, stories, events, and situations—is that assessments of seemingly simple human interactions often demand that the assessor take pains to think through the social dynamics of the scenario. In this instance, the analyst can't simply infer from the "v." in the case caption that we are dealing with a hostile confrontation. Achieving this realization in turn requires uncovering background information that is crucial to making sense of the more immediately visible features of the situation, including that: health insurance plans often leave insureds to pay a significant portion of their medical bills; tort law only swings into motion at the insistence of a victim who must overcome informational, financial, and psychological obstacles to suing; tort typically promises redress only in the form of monetary compensation, as opposed to corporal punishment or public shaming; tort suits are brought by lawyers who must treat litigation decisions as business decisions; those with a certain amount of wealth and foresight can at least partially protect themselves against liabilities associated with their conduct by purchasing insurance; and liability insurers aren't tortfeasors—they don't have to pay unless there's a viable tort claim against the insured.63

A professor with a "law and society" bent might at this point be ready to move on, content in the knowledge that she has uncovered its cash value by pointing out the centrality to modern tort law of contingent-fee contracts and liability insurance. But to stop on these grounds would be to ignore another of Cunning's central lessons: We should not think of thinking on the model of paint stripping, whereby the job of the thinker is to get past a layer of mere appearances to the "reality" underneath it. While there is obvious

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63. Armed with information of this sort, one can also begin to identify subtle issues of responsibility that often reside even in simple lawsuits. I hypothesized above that the McFalls might have been interested in making amends to Appelhans, whereas their insurer was not. One might cast this difference as a diametric opposition, and perhaps see in it an occasion to celebrate the kind-heartedness of humans while condemning the heartlessness of companies (or at least insurance companies). Perhaps more profitably, one could see in this example a distinction between the McFalls' recognition of a moral responsibility to make some sort of amends to a person who suffered serious injuries in part because of acts of theirs and their child, and the insurer's insistence that its obligation to indemnify does not kick in until Appelhans can establish that the McFalls had committed a legally cognizable wrong against her. Likewise, one could cast the McFalls' potential ability to cover their liability with insurance as a cheesy effort to slough off personal responsibility (a view apparently taken by early-to-mid-nineteenth-century Anglo-American law, which seems to have prohibited liability insurance in part on these grounds), or instead see liability insurance as an institution that advances the cause of justice by preventing tort law from ruining actors for relatively minor delicts.
value in attending to the sort of extrinsic information I have just considered (and while some of us, not necessarily to our credit, have delighted in tormenting 1Ls by hiding these sorts of balls), there is no reason to treat this sort of revelation as getting past mere formalities to the essence of the situation. Other aspects of a litigation such as this, including the questions of substantive tort law it raises, are equally important. (At a minimum, the issue of liability insurance is parasitic on the underlying issue of tort liability.)

The gist of the tender-years doctrine is that children under seven will not be asked to live up to a standard of reasonable care. Why not? One explanation focuses on the lesser capacity of young children to appreciate the risks of physical harm they pose to others, or to control their conduct even when they are aware of such risks. Another explanation posits that little kids (as opposed to teenagers or adults) come with a built-in "warning label": in the average run of cases, adults will have the opportunity to see the little terrors coming, and thus can be expected to know and adjust for the fact that they aren't good at being cautious.

Both of these hypotheses seem to offer facially plausible accounts of the content and justification of the tender-years doctrine as applied to the facts of Appelhans. But before we can sign on to either, we need to examine if they can be squared with other applications of the same doctrine, as well as related tort doctrines. The warning-label rationale has trouble explaining why the doctrine is not on its face limited to instances in which the victim is an adult, as opposed to another young child. And the incapacity argument seems to run headlong into the rule stating that adults with diminished mental capacity do not get the benefit of a tender-minds doctrine, but instead are held to the standard of reasonable care. If the issue is capacity to comply with norms of conduct, why should negligence law treat a five-year-old differently than an adult with the mental age of a five-year-old?

It has long been the bread and butter of law professors to probe doctrine in this manner, by considering whether a given rule, principle, or rationale extends to new cases, or whether it can be reconciled with others.64 Depending on one's views of how to go about this sort of exercise, and what it stands to accomplish, the arguments of Cunning will provide either reassur-

64. Another line of reasoning one could pursue in this situation concerns the responsibilities of parents for harms caused most immediately by their children. It may seem natural to look to the parents of a young child to supervise him so as to reduce the risk of injuries to neighbors, perhaps as natural as holding employers responsible for the careless acts of employees who are acting within the scope of employment. Yet, as every lawyer knows, employers face the "strict" rule of respondeat superior, which runs precisely counter to the doctrine of negligent supervision. (As its name suggests, the latter doctrine demands proof of faulty conduct on the part of the parents as a condition of their being held liable.) Is this because a young child's relationship to the "managers" of his family is so different from an adult employee's relationship to the managers of his firm? At least with respect to young children living at home with their parents, don't parents have at least as much ability to control their children's conduct as managers have over the conduct of employees? Aren't parents the "cheapest cost avoiders" here? Does it tell us something about the justification for respondeat superior that it can apply to family businesses but not to families per se? And why, more generally, does negligent supervision law seem to err on the side of lenience toward parents in respect of their children's acts? The law often will impose strict liability on dog owners for dog bites. Why not on parents for their young children's injurious acts?
ance for, or a challenge to, the undertaking of such efforts. The book's position on epistemology—that the process of knowing *just is* the process of reconciling new beliefs with the beliefs one already holds, and of revising existing beliefs in light of new beliefs—ought to give some comfort to a certain kind of legal traditionalist. For, under it, lawyers can claim to know law as well as anyone can claim to know anything. Indeed, a certain kind of sophisticated academic lawyer—one who has a keen and subtle appreciation of how the nooks and crannies of a body of law do or don't hang together across a wide range of applications—can legitimately hold himself out as a kind of expert.

Today however, many law professors claim kinds of sophistication and expertise that don't mesh quite as neatly with the coherentist approach to knowledge articulated in *Cunning*. For example, some equate sophistication with an adult tolerance for messiness and incoherence. In this view, perhaps the major objective of legal education is to get students to overcome their prior assumption that law is an instruction manual so that they might come to see it is a vast repository of contrary principles that will enable them to argue as the occasion demands. (Here, for example, the idea would be that negligence law's inconsistent treatment of diminished capacity enables a lawyer to argue for or against the imposition of liability, depending on the interests of her client.) To this brand of legal sophisticate, *Cunning* is not as congenial as one might suppose from its title. To be sure, the book provides an account of our ability and willingness to know that is in some ways quite bleak. But it does not do so in aid of facile skepticism or deconstruction. Quite the opposite, it invites us to take up a struggle—to throw ourselves into the difficult task of continually reconstructing our beliefs in light of the complexity of experience, and notwithstanding our proneness to confusion and error.

Another sort of sophisticate, one that we have already encountered, takes a very different tack, supposing that legal knowledge is to be found in the act of explaining law in terms of some extralegal essence. An example of this approach with immediate relevance to the present discussion is the (admirably) comprehensive effort of Landes and Posner to prove that a notion of efficiency is the Rosetta Stone that permits us to unlock the secrets of tort doctrine. Unlike the facile skeptic, they contemplate a defense for tort law's differing treatment of diminished capacity in young children and adults. It proceeds roughly as follows:

1. Efficiency analysis suggests that courts will adopt strict liability rather than fault-based liability when loss-prevention is better served by discouraging an actor from engaging in a given activity altogether, as opposed to encouraging him to take reasonable care while engaging in it.

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65. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 127–29 (1987). To be accurate, they do not defend the tender-years doctrine per se, but the application to young children of a more subjective and forgiving standard of reasonable care than the ordinary reasonable person standard. The same rationales apply, however.
The imposition of the reasonable care standard on persons with diminished capacity is de facto strict liability, because this class of actors lacks the capacity to comply with the standard.

That tort law applies the reasonable person standard to adults with diminished mental capacity makes sense because it is on average efficient to suppress the (public) activities of adults who are so incapacitated as to be unable to regulate the dangerousness of their conduct. (True, mentally incapacitated persons won’t suppress their own activity in response to the threat of liability, but their custodians and guardians will do it for them.)

When it comes to young children, there’s nothing comparable to be gained by suppressing their activities: restraining children from engaging in one set of activities (e.g., bicycle riding) to prevent harms to others means only that they will instead engage in a different set of activities (e.g., tag) that pose roughly the same risks of physical harm to others.

Hence the law does not apply de facto strict liability to young children.66

Here, I think, we have another nice illustration of the type of analysis that leads Herzog to worry about the dictates of a model overtaking and distorting the critical thinking that the model is supposed to be aiding. One dodge involves collapsing the distinction between de jure and de facto strict liability. If Landes and Posner were correct, why wouldn’t the formal doctrinal standard that applied to mentally incapacitated persons be stated as a standard of strict rather than fault-based liability? Another is that they simply posit the general availability of able and willing guardians who stand ready to respond to the threat of liability by controlling the behavior of adults with diminished capacity. A still bigger cheat is the postulate that parental restraint of young children won’t promote safety, for here Landes and Posner implicitly assume the existence of side constraints on how parents and other guardians are entitled to go about restraining their children’s activities. In particular, they suppose that kids must remain at liberty to undertake one or another activity that will pose risks of physical harm to others. But how does the economic model generate this constraint? Why isn’t the efficient thing to do to keep kids away from physical activities, whether in the yard, the park, or the playground, until they’re at least seven years old? To be sure, this proposal is ridiculous. But its immodesty does not derive from its inefficiency. Instead it flouts norms about what sort of liberty a child of a certain age ought to enjoy.

Picking up on this last point, it seems entirely plausible to suppose that the tender-years doctrine relies heavily on a normative judgment that very young children ought not to be burdened by the obligation of having to be careful as to the physical well-being of others even if the social costs of permitting them to do so exceed their benefits. Here freedom from obligation is

66. *Id.* at 128-29.
treated as a privilege of early childhood. Compared to adults, children under seven have relatively fewer rights and less control over where they go and what they do. So, one might suppose, they deserve a corresponding break on the duty side. The law may also want to give young kids a greater amount of leeway to be careless, in part to give them opportunities to learn how to be responsible, and to avoid giving parents incentives to steer them away from activities like bicycle riding that, among other things, teach them how to be careful for their own well-being and the well-being of others. Finally, the doctrine may be motivated in part by the sense that there is something crazy or unseemly about a legal system that gives adults incentives to bring lawsuits against very young children, even careless children, as opposed to responding in other ways.67

The linkage of the tender-years doctrine to reasons such as these can explain why adults with diminished mental capacity are treated differently from young children, thus warding off the skeptic. Moreover, they offer an explanation that does not require us to join the reductionist enterprise of explaining all of negligence law, or all of tort law, by reference to some freestanding concept of efficiency or justice. True, the doctrinal reconstruction that I am pushing rests on a claim about the privileges enjoyed by young children. But, as Herzog repeatedly emphasizes, such a claim need not be reductionist or foundationalist. It can instead be historical and interpretive. That young childhood ought in important respects to be a duty-free zone is bound up with other beliefs that we tend to hold and other practices in which we tend to engage concerning family and its role in our social order. Members of differently situated cultures, including the cultures of our ancestors, likely operate or operated under a rather different conception of childhood within a rather different conception of family. This legal rule, in other words, like many legal rules pertaining to conduct, to some extent tracks and to some extent shapes historically contingent social norms that connect up to other laws and norms.

This last point leads us to appreciate two additional aspects of legal analysis that Cunning suggests will be important, namely, its historical and sociological dimensions. In Appelhans, plaintiff’s counsel displayed a certain sensitivity to the historically contingent, practice-based grounds for the tender-years doctrine. Indeed, he assailed it as antiquated and arbitrary, although in ways that were perhaps a bit off. Here’s the appellate court’s rendering of one part of that argument:

Plaintiff [argues] that profound societal changes since the adoption of the rule [warrant its elimination]. Specifically, plaintiff asserts that the judiciary that crafted the rule did not envision “cable television, video games, the internet, pre-teen gangs, and violent crime.” She argues that, in response to these modern-day challenges, children are instructed at an early age that they must exercise good judgment for themselves and others and

67. This reconstruction of the tender-years doctrine is not without some difficulties. For example, the rationales I’ve just discussed would seem to suggest that it should be conceptualized as a no-duty doctrine, rather than a doctrine of no breach as a matter of law.
therefore we may hold them to a reasonable standard of care based upon on their age.\textsuperscript{68}

In other words, as compared to the modern seven-year-old who strays from the TV or video-game console only to engage in gang activity, the pampered late-nineteenth-century farm kid simply didn't know from responsibility.

One lesson we can draw from this aspect of \textit{Appelhans} is that lawyers (including judges and law professors) need at least as much training in history as in the Coase Theorem. Others concern the art of advocacy. It is a truisim that litigators need to think hard about the argumentative strategy that the occasion demands. In this instance, plaintiff’s counsel did just that, and with a significant measure of success. Indeed, the intermediate appellate court \textit{agreed} with his argument that the tender-years doctrine is outdated and unjustified.\textsuperscript{69} Unfortunately for counsel (and client), the court nonetheless felt itself obligated to apply the doctrine until such time as the state high court decides to change it.\textsuperscript{70}

Notwithstanding the headway that Appelhans’s counsel made at the appellate level, and controlling as much as possible for hindsight bias, can one still conclude that it would have been more effective to harness the tender-years doctrine in a different way, by using its grant of blanket immunity to the child as leverage for pressing harder on the trial court’s rejection of the negligent supervision claim against the parents? As it turns out, the trial court had taken a pretty hard line in throwing out Appelhans’s complaint for failing to allege certain facts about what William’s parents knew or should have known about his propensity to engage in dangerous activity. The main precedent supporting the intermediate appellate court’s affirmance of the dismissal of Appelhans’s negligent supervision claim was a case that refused to impose liability on the parents of a teenager who was old enough to drive.\textsuperscript{71} (This entails, first, that the child in that case was himself capable of being adjudged negligent under Illinois law, and second, that his parents’ ability to control his conduct was likely quite modest.) Thus, instead of arguing for a flat-out overruling of the tender-years doctrine on the basis of questionable sociological and historical claims about the enhanced capacity for responsible behavior among modern children as compared to those of earlier generations, might counsel have improved his odds of winning by arguing differently? Might he have argued that Illinois law should in some cases hold parents responsible for failing to take reasonable steps to control the potentially dangerous acts of their young children precisely because the law deems the children themselves as not responsible for taking care? Would this allocation of responsibility have struck a set of appellate judges as more palatable? As I’ve already noted, in areas like tort law, legal norms tend to correspond at least loosely to social norms. (This is one reason why


\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.} at 993–94 (discussing Lott \textit{v.} Strang, 727 N.E.2d 407 (Ill. App. Ct. 2000)).
tort law is part of a body of law called "common" law.) So, unless one is dealing with a bench populated by judges strongly inclined to push a top-down theoretical take on tort law, one can suppose that attempts to attribute legal responsibility will tend to be more successful if they work with social norms than if they depend on questionable history, soaring rhetoric, or a counterintuitive theory of how the world ought to work.

The final link that I will draw between Cunning and the present discussion is to reemphasize its focus on the desirability of adopting a relatively capacious understanding of human action. Appelhans probably was not a cranky old lady on a vendetta, a heartless witch willing to send the McFalls into bankruptcy, or a gold digger looking to bleed the coffers of an insurance company. By the same token, it is probably equally misguided to suppose that she and the McFalls were engaged in some sort of sordid conspiracy. The potential presence of insurance coverage perhaps did affect Appelhans's inclination to sue and the McFalls' inclination to make amends and thereby altered the alignment of interests as between Appelhans, the McFalls, and the insurer. But this is not necessarily to say that the plaintiff and defendant colluded to engineer an unwarranted transfer of wealth from the insurance company to Appelhans. Rather, the two parties may have simply adjusted their senses of how it would be appropriate to respond to the accident in light of the possible availability of insurance. Not surprisingly, the insurance company, an entity designed to make profits by taking in and holding onto premium dollars, and more apt and more entitled, in this situation, to insist that it owes only legal, not moral, obligations to the McFalls and Appelhans, took a rather different view of the situation.

Similarly, if we are to have an accurate account of this litigation and litigation more generally, we need a nonreductionist account of the actions of Appelhans's attorney and the intermediate appellate judges who ruled in favor of the McFalls (and their insurer). Of course, the attorney was motivated by the prospect of recovering under his contingent-fee contract. But the snippet excerpted above suggests that we need to add some nuance to this account. Even if his initial motivation for attacking the tender-years doctrine was driven by personal or professional self-interest, by the time of appellate briefing one can also detect the influence of a particular conception of how progressive law reform ought to proceed in an area like tort law. By this point, the case was not just about compensation and fees, but also an idealistic quest to purge from negligence law an odious bit of doctrinal detritus—a historical exception to the supposed general rule of liability for injuries caused by unreasonable conduct. Likewise, it should by now go (almost) without saying that rational-maximization conceptions of judicial behavior will have a great deal of trouble accounting for the appellate

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court's refusal (on grounds of stare decisis) to take up counsel's invitation to engage in this sort of law reform.

Law professors sometimes puzzle over why common law subjects and the case method continue to dominate first-year legal education long after the death of Langdell, usually finding the explanation in some combination of inertia and faculty inattentiveness. Yet, as I hope the foregoing suggests, the case method, and at least a nuanced version of doctrinal analysis, whatever its flaws, can instill in students and faculty an appreciation of the complexity of human motivation; the subtleties of human interaction; the fact-intensiveness of judgments about the propriety of different courses of conduct; the complexity of law's procedures and substance; the delicate interaction between legal, moral, and social norms; and the motivations and constraints under which actors who come into contact with the law operate. It may be that there are other equally good or better methods available, as well as equally good or better sorts of subjects to teach in the first year. However, before one reaches this conclusion, one must appreciate the potential value of the traditional approach. I've not made things easy for myself. My claim has been that there's a great deal to be learned in plumbing the facts and law even of an improbable case turning on an obscure common law rule that few modern law students will encounter in practice. And yet I think it is not at all obvious that one will do better to turn away from the sort of analysis of tort provided here, and instead devote one's teaching (or scholarship) to modeling the differing incentive effects of fault-based versus strict liability, or to explaining why tort law embodies an aristotelian notion of corrective justice, or to teaching about how the regulatory state undertakes risk regulation.

To make a case for casuistry in our thinking and teaching is not to advocate treating law as a hermetically sealed, perfectly coherent body of doctrine. Nor is it to indulge the nihilistic urge to demonstrate that there is no such thing as law, only facts of particular cases. It is instead to avoid these extremes by appreciating how law's categories and concepts help to shape questions and our answers to them, but also how their application is influenced by the details of particular disputes, by the interconnected framework of institutions in which law operates, by history and culture, and by the personal, political, and theoretical commitments of the actors involved in the operation of the law. Cunning's insistence that meaningful questions and meaningful inquiry take place in a conceptual space somewhere between brute fact and abstract theory is, I think, quite compatible with this understanding of law and legal analysis. Indeed, its many messages ought to prove highly congenial to any law professor who sees value in working with—rather than ignoring or explaining away—cases and concepts.

D. A Quibble

This last observation leads me, finally, to lodge a minor complaint. For it seems to me that, as he approaches the end of his book, Herzog strays from
the middle path to which he otherwise so carefully hews. In particular, I have in mind his posing for us the hoary question of why, given the chance, one ought to refrain from acting opportunistically. This puzzle has a distinguished lineage, tracing back at least to The Republic. Nonetheless, it strikes me as the sort of acontextual issue that Herzog in other places suggests isn’t worth fretting over. Just as modern philosophers have been inclined to abandon as fruitless questions such as, “How do we know that we’re not in the middle of an illusion created by an omnipotent evil genius?” it seems to me that we ought likewise to regard as poorly framed the question of whether it is “better to be just” (p. 182). Similarly, although Herzog is right, in my judgment, to argue that there are important ways in which one’s life might not go well if one were to treat every interaction and occasion as an opportunity to act opportunistically, it seems to me that this observation is better framed as a reason counseling for or against particular courses of action in particular settings than as some sort of general justification for morality.

No doubt Herzog is sincere when he describes himself as inches from despair over the difficulty of finding a response to the question of why it is better to be good or just (p. 183). But in this instance, his flair for the dramatic perhaps has led him into the realm of metaphysics. In particular, the reader may be forgiven if Herzog’s last-minute reprieve for morality—offered in two paragraphs as the book hurtles toward its conclusion—conjures up the cinematic image of a last-minute gubernatorial phone call to a death-row inmate. For reasons Herzog himself has articulated here and elsewhere, it is a mistake to suppose that there is a singular answer to the question “why act justly?” because it is a mistake to suppose that this a puzzle that we need to solve rather than dissolve.

By framing the solution to the problem of justice in terms of the goods one would miss out on by acting opportunistically, Herzog also runs the risk of conflating his rejection of the anti-ethic of cunning with a defense of moral behavior, even though he elsewhere clearly recognizes that the two points are distinct. To appreciate this particular danger, it may help to recall a standard plotting device in comic books and cartoons featuring superheroes, namely the moment at which the nemesis eschews an easy opportunity to finish off our champion in favor of an exotic method that provides the necessary chance for escape. My point is that these dastardly villains, no less than the most righteous hero, ought to take to heart Herzog’s worries about shameless opportunism because it would render unavailable to them the goods internal to supervillainy no less than it renders unavailable to us the goods of a life well led. In short, a rejection of the life of pure cunning in the name of experiences such as friendship and excellence does not entail an embrace of morality.

74. Pp. 158–59 (critiquing foundationalist approaches to justification).
75. See generally DON HERZOG, WITHOUT FOUNDATIONS (1985).
Consider also Herzog's claim that the willingness to steal from a friend is incompatible with being a friend. This claim seems overstated for two reasons. First, we can imagine situations in which such behavior might not be disqualifying in the requisite sense, even if we conclude it was wrong. Suppose, for example, we imagine that the friend from whom you are inclined to pilfer twenty dollars is a little on the selfish side, and, indeed, that she acknowledges and occasionally laments that she is such a person. Stipulate further that you have in mind to donate the money to a third person whom you know is thoroughly deserving of assistance. It may still be wrong to steal the money, but can't you claim in good faith that you were being a genuine friend, albeit perhaps a friend with bad judgment? Second, and more generally, it seems too categorical to posit an antinomy between friendship and cunning, as opposed to treating friendship as a domain in which cunning ought to play a much less prominent role than in other forms of interaction. Friends sometimes use each other, but they're still friends.

I should be clear that, in offering these criticisms, I am not taking Herzog to task for his pessimism—for his dismissal, as not "mean-spirited or paranoid enough," of the idea that the solid citizens outnumber or can control the cunning (p. 57). I'm ready to concede that cunning operates in all facets of our social life, and in each of us. Instead, I am charging him with pushing a line that's a little too tragic. To a perhaps astonishing degree, we can and do in our daily lives expect others to act with integrity, in accordance with social norms, or at least within a matrix of rational decision in which the expected payoffs counsel against shirking. Jobs get done well every day that need not have been done well. Individuals take on tasks and burdens that no one orders them to do, and that they are not obligated to do. Items ordered anonymously over the Internet, even from individual sellers without reason to worry about criminal sanctions or reputational effects, arrive as promised. Easy opportunities for illegal and immoral conduct are foregone. Perhaps these observations will seem as saccharine as a Jimmy Stewart monologue in a Frank Capra movie. They aren't meant to be. My point is only that the human condition is not (yet?) so desperate that we are left to address at the wholesale level the question of whether it is better to be just or honorable or honest. Those virtues, and the practices that support them, are still enough a part of our lives that the challenges posed to us by the cunning should be treated on an as-applied rather than a facial basis.

76. Suppose that, in contrast to the example Herzog provides, you arrive at your friend's house to find a well-dressed gentleman about to ring her doorbell. You politely inquire of his business and he reports that he is a retired executive who now makes a habit of stopping randomly at one house each month to give a fifty-dollar bill to the occupant. You compliment him for his generosity, but suggest that he might instead go next door, because the person there is more in need of the money than your friend. He follows your suggestion. Your friend can't fairly accuse you of theft, but she can complain that you have deprived her of potential wealth. Have you betrayed the friendship?
CONCLUSION

At the start of this extraordinary book we are invited to view cunning as
a nobody, and nobody as cunning. By its conclusion, we are left to struggle
with the thought that cunning is everybody, and that everybody is cunning.
Like Odysseus himself, the reader who undertakes this labyrinthine journey
will have many tales to tell, and will be very much the wiser for it.