

## “ELECTIVE AFFINITIES” THE ART OF MEDICINE AND THE COMMON LAW

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### INTRODUCTION

Medicine and the common law are commonly studied in terms of their mutual interaction and interpenetration. The lawyer and the ethicist, the student of regulation ask: how are medical decisions taken up in the law; how do legal rules skew medical practice. However, another perspective is possible: that of the philosopher of knowledge, concerned to draw out the similarities between legal and clinical medical reasoning. Such a perspective is adopted in this essay. It investigates the widespread assumption that the practice of both medicine and the common law is a matter of “art”:<sup>1</sup> *i.e.* that it entails the exercise of fine and ultimately irreducible judgment; that the true nature of practitioner knowledge cannot be exhaustively captured in the form of explicit rules; that clinical and legal reasoning, proceeding on the basis of exemplary cases, are primarily analogical rather than deductive in form; and that, as a result, practitioner skills are most effectively transmitted subliminally through a period of apprenticeship. These features are explicated through a close reading of prominent writers on the philosophy of medicine and on legal theory. What is sought is a coherent account of the art view of practice, rather than a definitive statement of the realities of clinical and legal reasoning. In the concluding section an attempt is made to locate these common theoretical perspectives on medicine and the law within the context of conservative political theory. In both cases an anti-rationalist epistemology can be shown to ground a philosophical defence of accrued inequalities and the institutions which embody them.

### The Art of Clinical Practice

The notion of clinical practice as an art has been frequently deployed by commentators on medicine, as well as by leaders of the profession over the last two centuries.<sup>2</sup> Its strategic value has lain in its valorization of an extensive zone of professional autonomy in the face of attempts to

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<sup>1</sup> For an investigation of other affinities between the two disciplines see J. Harrington, “Red in Tooth and Claw”. The Idea of Progress in Medicine and the Common Law” (2002) 11 *Social and Legal Studies* 211.

<sup>2</sup> C. Lawrence, “Incommunicable Knowledge: Science Technology and the Clinical Art in Britain 1850-1914” (1985) 20 *Journal of Contemporary History* 503; D. Armstrong, “Clinical Sense and Clinical Science” (1977) 11 *Social Science and Medicine* 599; W. Anderson, “The Reasoning of the Strongest: The Polemics of Skill and Science in Medical Diagnosis” (1992) 22 *Social Studies of Science* 653.

commercialize or bureaucratize the practice of medicine. The following subsections seek to elaborate the specific phenomenology and epistemology, as well as the cognitive style and model of training connoted by talk of medicine as an art.

### ***Phenomenology of Medicine – A Science of Particulars***

By medical phenomenology is meant, in this context, the object domain which clinical medicine typically arrogates to itself. The question here is what is the characteristic target of medical intervention? This object domain can be distinguished from those of the basic, or natural sciences, on which clinical medicine draws, but to which it cannot be reduced.<sup>3</sup> As will be seen, it has substantial affinities with the object domain created for itself by the common law. At the heart of this phenomenology lies the idea of the case. In the words of Pellegrino and Thomasma, clinical medicine is “guided by a *telos* of individuation”.<sup>4</sup>

One of the most important attempts in recent decades to theorize the object domain of clinical medicine was made by Gorovitz and MacIntyre.<sup>5</sup> Their intervention was motivated by a practical concern with the so-called malpractice crisis which has beset American medicine since the 1960s. They identify three sources of medical mishaps. The first two are familiar: the culpable errors of practitioners; and the under-developed state of scientific knowledge. The third source of error, which had been overlooked until then, lies in the unique complexity of each patient. Unlike physics or chemistry, which aim to establish law-like generalizations about universal phenomena, clinical medicine is a “science of particulars”.<sup>6</sup> As such, the objects of medicine are, to use their example, more comparable to unique phenomena like hurricanes or salt-marshes, than to chemical compounds, atoms or sub-atomic particles. “Particulars” are not intelligible *in abstracto*, but only through their distinctive histories and their evolving relations with the environment. Given their complexity, diversity and contingency they cannot be adequately comprehended in law-like generalizations. In fact any prediction regarding their future development, either with or without therapeutic intervention, is prone to a “necessary fallibility”.<sup>7</sup> Put another way, each patient-case is a “universe of one”.<sup>8</sup> A diagnosis may be incorrect or a therapy may fail regardless of the care taken by the practitioner and

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<sup>3</sup> See N. Maull, “The Practical Science of Medicine” (1981) 6 *Journal of Medicine and Philosophy* 165.

<sup>4</sup> E.D. Pellegrino and D.C. Thomasma, *A Philosophical Basis of Medical Practice. Toward a Philosophy and Ethic of the Healing Professions* (1981), p.80.

<sup>5</sup> S. Gorovitz and A. MacIntyre, “Toward a Theory of Medical Fallibility” (1976) 1 *Journal of Medicine and Philosophy* 51.

<sup>6</sup> As such clinical medicine “is in fact hardly commensurable with any customary notion of science”: J. Widder, “The Fallibility of Medical Judgment as a Consequence of the Inexactness of Observations” (1998) 1 *Medicine, Health Care and Philosophy* 119, 119.

<sup>7</sup> S. Gorovitz and A. MacIntyre, “Toward a Theory of Medical Fallibility” (1976) 1 *Journal of Medicine and Philosophy* 51, 62.

<sup>8</sup> D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.68.

irrespective of all possible scientific knowledge. Hence the third source of medial accidents is one which implies no culpability.<sup>9</sup>

***Epistemology of Medicine – Segmented Knowledge***

The work of Ludwik Fleck allows us to link the phenomenology of particulars with the form and status of medical knowledge.<sup>10</sup> Anticipating Gorovitz and MacIntyre, Fleck started from a recognition of the complexity and contingency of medical phenomena. Like them, he argued against any reduction of clinical practice to the natural sciences. As he put it in a lecture of 1927:<sup>11</sup>

“A scientist looks for typical, normal phenomena, while a medical man studies precisely the atypical, abnormal, morbid phenomena. And it is evident that he finds on this road a great wealth and range of individuality of these phenomena which form a great number, without distinctly limited units, and abounding in transitional, boundary states.”

The primacy of the individual case is reflected in the indeterminacy and instability of medical knowledge. No other discipline has species with so many specific (*i.e.* non-analyzable) features as medicine. None is characterized by such a proliferation of sub-types and exceptions.<sup>12</sup> The complexity generated by the contingent and variable nature of medical phenomena is compounded by the fact that they are connected to each other “by means of a tremendous number of relations”.<sup>13</sup> Causal connections in medicine can, accordingly, be “developmental, correlative, substituting, synergetic or antagonistic”. This double complexity drives an embarrassing wedge between theory and practice in medicine. As Fleck points out, whereas in the natural sciences no observation can be incompatible with theory, in medicine one commonly hears the saying: “impossible in theory, though it comes up in practice.”<sup>14</sup> He asserts that it is easy in medicine to generate pseudo-logical explanations which hold for the short term, but much more difficult to reach general, all-embracing ideas. Given the variety of medical phenomena, it can be said that the more logical the therapy

<sup>9</sup> For debate and criticism of this thesis, see M.D. Bayles and A. Caplan, “Medical Fallibility and Malpractice” (1978) 3 *Journal of Medicine and Philosophy* 169; and B.P. Minogue, “Error, Malpractice and the Problem of Universals” (1982) 7 *Journal of Medicine and Philosophy* 239.

<sup>10</sup> For an overview, see I. Löwy, “Ludwik Fleck on the Social Construction of Medical Knowledge” (1988) 10 *Sociology of Health and Illness* 133.

<sup>11</sup> L. Fleck, “Some Specific Features of the Medical Way of Thinking”, in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39.

<sup>12</sup> He notes in particular the frequency with which clinical categories are qualified by the prefixes “para-” and “pseudo-”, as in “para-psoriasis” and “pseudo-anaemia”: L. Fleck, “Some Specific Features of the Medical Way of Thinking”, in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), pp.39, 41. For a more detailed elaboration of this theme, see J Widder, “The Fallibility of Medical Judgment as a Consequence of the Inexactness of Observations” (1998) 1 *Medicine, Health Care and Philosophy* 119.

<sup>13</sup> L. Fleck, “Some Specific Features of the Medical Way of Thinking”, in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.43.

<sup>14</sup> L. Fleck, “Some Specific Features of the Medical Way of Thinking”, in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.42.

proposed, the worse the physician is likely to be. Indeed, historically, it has been a common complaint of allopathic medicine that its rivals, such as homeopathy and osteopathy, are *too* logical to be either effective or credible.

At this point Fleck's theses may seem to coincide with an unreflective medical ideology which prioritizes pure and unmediated clinical experience.<sup>15</sup> However, while he rejects dogmatism, Fleck does not embrace such a naïve position. Remarking that "an empty mind cannot see at all",<sup>16</sup> he develops a constructivist and pluralistic account of medical knowledge. He shows, for example, how variations in anatomical drawings over the centuries are a result of the differing "thought-styles" which characterized medicine in each era. Such a plurality of incompatible thought-styles is also characteristic of an increasingly specialized medicine in the contemporary period. Each thought-style is produced and maintained by a historically formed "thought-collective".<sup>17</sup> Initiates have to learn "to see right" in accordance with the canons of that sub-discipline.<sup>18</sup> As Michael Polanyi pointed out, this mode of seeing is acquired through a process of conversion: literally a change of being. He gives the example of a medical student attending a course in the X-ray diagnosis of pulmonary diseases. Initially the novice is wholly puzzled by the pictures they are asked to view.<sup>19</sup>

"Then as he goes on listening for a few weeks, looking ever carefully at new pictures of different cases, a tentative understanding will dawn on him; he will gradually forget about the ribs and begin to see the lungs. And eventually if he perseveres intelligently, a rich panorama of significant details will be revealed to him: of physiological variations and pathological changes, of scars, of chronic infections and signs of acute disease. He has entered a new world."

As well as enabling certain kinds of seeing, this process also necessarily disables others. (Observation is, thus, characteristically creative rather than merely additive.) In other words the complexity of medical phenomena has its epistemological counterpart in the segmentation of medical knowledge.<sup>20</sup>

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<sup>15</sup> On the historical emergence of this epistemic stance, cf M. Foucault, *The Birth of the Clinic. An Archaeology of Medical Perception* (1976); for a contemporary investigation see P. Atkinson, *The Clinical Experience. The Construction and Reconstruction of Medical Reality* (2nd ed, 1997), p.4.

<sup>16</sup> L. Fleck, "On the Question of Medical Knowledge" (1981) 6 *Journal of Medicine and Philosophy* 237, 247.

<sup>17</sup> The notions of "thought style" (*Denkstil*) and "thought collective" (*Denkkollektiv*) were of great influence upon the work of T.S. Kuhn on scientific paradigms.

<sup>18</sup> L. Fleck, "On the Question of Medical Knowledge" (1981) 6 *Journal of Medicine and Philosophy* 237, 251.

<sup>19</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.101.

<sup>20</sup> This point is nicely summarized in I. Löwy, "Ludwik Fleck on the Social Construction of Medical Knowledge" (1988) 10 *Sociology of Health and Illness* 133, p.143.

### *Medical Cognition – The Role of Exemplars*

Fleck was one of the first philosophers to remark on the incommensurability of medical knowledges.<sup>21</sup> As a trained doctor, he was nonetheless aware that clinical decision-making did (and had to) go on. To this end the practitioner had to be capable, somehow, of integrating rival or at least discontinuous perspectives on clinical problems.<sup>22</sup> Fleck noted that in medicine it is “ever and ever necessary to alter the angle of vision and to retreat from a consistent mental attitude”.<sup>23</sup> Only thus would “the world of morbid phenomena, which is irrational in its entirety, become rational in its details”.<sup>24</sup> In his view, this process was ultimately opaque.<sup>25</sup>

“Medical observation is not a point but a small circle. It is placed not in the system of co-ordinate straight lines inclined to one another at a constant angle, but in a system of optional, mutually intersecting curves which we do not know closely.”

The question, however, remains that posed by Donald Schön: how can a medical professional “use what he already knows in a situation which he takes to be unique?”<sup>26</sup> We find a response to this in the work of Kenneth Schaffner who accepts the pluralism revealed by Fleck, but also goes beyond it in developing a more specific account of medical reasoning.<sup>27</sup> As we have seen, clinical medical knowledge falls short of “the Euclidean Ideal”, in not forming “a deductive systematization of a broad class of generalizations under a small number of axioms”.<sup>28</sup> Rather, as Schaffner argues, its concepts are characteristically overlapping, blurred at the edges, and linked by a series of family resemblances.<sup>29</sup> Consequently “exemplar” reasoning (and not deduction or induction) is central to medical practice. Exemplars were originally defined by Thomas Kuhn as concrete problem solutions, or shared examples of how to get the job done.<sup>30</sup> Doctors are equipped with a rich stock or “repertoire” of such patient exemplars drawn from their training on

<sup>21</sup> For a contemporary empirical study of this phenomenon, see A. Mol and M. Berg, “Principles and Practices of Medicine. The Coexistence of Various Anaemias” (1994) 18 *Culture, Medicine and Psychiatry* 247.

<sup>22</sup> Indeed this process of integration amounts to the “spirit of medicine”, taking it beyond the natural sciences according to G. Canguilhem, *Ideology and Rationality in the History of the Life Sciences* (1988), p.33.

<sup>23</sup> L. Fleck, “Some Specific Features of the Medical Way of Thinking”, in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.43.

<sup>24</sup> L. Fleck, “Some Specific Features of the Medical Way of Thinking”, in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.43.

<sup>25</sup> L. Fleck, “Some Specific Features of the Medical Way of Thinking”, in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.45.

<sup>26</sup> D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.138.

<sup>27</sup> K.F. Schaffner, “Exemplar Reasoning about Biological Models and Diseases: A Relation between the Philosophy of Medicine and the Philosophy of Science” (1986) 11 *Journal of Medicine and Philosophy* 63.

<sup>28</sup> K.F. Schaffner, “Exemplar Reasoning about Biological Models and Diseases: A Relation between the Philosophy of Medicine and the Philosophy of Science” (1986) 11 *Journal of Medicine and Philosophy* 63, 69.

<sup>29</sup> For a similar argument see B.P. Minogue, “Error, Malpractice and the Problem of Universals” (1982) 7 *Journal of Medicine and Philosophy* 239.

<sup>30</sup> T.S. Kuhn, *The Structure of Scientific Revolutions* (3rd ed, 1996), p.200.

the wards and their post-qualification experience.<sup>31</sup> With time this knowledge acquires a tacit form, manifesting itself as a certain “feel” for the way cases should be perceived and dealt with. Thus when doctors are confronted by a new case they seek analogies with previous cases they have encountered. The relevant exemplar will indicate what the “right-kind of seeing” is and, thus, what generalizations are applicable in a given situation. In the words of Førde:<sup>32</sup>

“a diagnosis is frequently made before the specific features upon which the diagnosis is built are consciously recognized . . . [The objective] is not so much to discover something new, as to establish familiarity with something previously discovered.”

It is common to seek scientific respectability for medicine by reconstructing the process of analogical reasoning “so that it appears more like a deductive filling in of a general pattern”.<sup>33</sup> But this is merely a type of “instant historical revisionism”, since exemplars are cognitively prior to the axioms or principles which they are supposed to illustrate.<sup>34</sup> Deduction is generally limited to “easy cases” and to decision-making by novices.<sup>35</sup>

### ***Medical Judgment – Prudence and Maxims***

Medicine is a practical discipline directed toward concrete goals. This imposes a burden of decision-making on the individual doctor quite absent from the work of the laboratory scientist. (Though not as we shall see from that of the common law judge.) The doctor has to decide to act, or, which amounts to the same thing for these purposes, not to act in the case of the patient.<sup>36</sup> The practical grounding of medicine is further emphasized by the ineluctable involvement of the patient in the decision making process. The doctor encounters another ethical subject whose consent must presumptively be obtained before any recommended course of diagnosis or treatment is undertaken. Given the now overwhelming rejection of medical paternalism,

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<sup>31</sup> D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983). On the process of acquiring such exemplars, cf P. Atkinson, *The Clinical Experience. The Construction and Reconstruction of Medical Reality* (2nd ed, 1997).

<sup>32</sup> R. Førde, “Competing Conceptions of Diagnostic Reasoning – Is there a Way Out?” (1998) 19 *Theoretical Medicine and Bioethics* 59, 67; see also H.G. Schmidt *et al*, “A Cognitive Perspective on Medical Expertise: Theory and Implication” (1990) 65 *Academic Medicine* 611.

<sup>33</sup> A.L. Caplan, “Exemplary Reasoning? A Comment on Theory Structure in Biomedicine” (1986) 11 *Journal of Medicine and Philosophy* 93, 94.

<sup>34</sup> D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.140; see also P. Bourdieu, *Outline of a Theory of Practice* (1977), p.19.

<sup>35</sup> G.J. Groen and V.L. Patel, “Medical Problem-Solving: Some Questionable Assumptions” (1985) 19 *Medical Education* 95.

<sup>36</sup> S. Tyreman, “Promoting Critical Thinking in Health Care: *Phronesis* and Criticality” (2000) 3 *Medicine, Health Care and Philosophy* 117-124; for a more critical view see D. Waring, “Why the Practice of Medicine is not a Phronetic Activity” (2000) 21 *Theoretical Medicine and Bioethics* 139.

the choice of therapy will be informed and further complicated by the preferences and value choices of the autonomous patient.<sup>37</sup>

The process of clinical decision-making has been analyzed from this perspective by Pellegrino and Thomasma. For them, the *telos* of healing imposes an “atmosphere of prudence” on the whole process of diagnosis and recommendation of therapy. At each stage a doctor seeks to weigh, balance and eliminate certain factors, to recall and test the applicability of various exemplars, in a judicious manner which cannot be reduced either to logical reasoning or to technical competence.<sup>38</sup> In this the practitioner is guided by a variety of prudential maxims. Pellegrino and Thomasma give the following examples: a doctor should: “act to optimize as many benefits, minimize as many risks as possible”; “be wary of hunches and intuitions”; “recognize his or her own clinical style, prejudices, and beliefs about what is good for patients”; and so on.<sup>39</sup> Maxims are, thus, rules of thumb. They indicate factors to be taken into account in clinical decision-making, but never dictate specific outcomes. They cannot be ranked in any hierarchical order and no single maxim is indispensable to right clinical action. Furthermore, they are only useful when re-integrated into the doctor’s practical or tacit knowledge of the discipline. The relative weight and application of each maxim has to be determined by the ends of medical action and by the need to reach a decision in the particular case. Pellegrino and Thomasma hold that:<sup>40</sup>

“Each clinical decision is . . . a terminal and unique event in that it cannot remain forever open and it is not universalizable. It must close on the selection of one of a series of remedial actions or none. The action chosen must be the right one for this particular patient.”

As has been indicated, a profound consideration of the choices and preferences of the particular patient must form part of the doctor’s prudential weighing. Not only will the patient’s competent refusal constitute a ban on the relevant procedure; even where a specific course of action is chosen the manner in which it is executed and monitored will be shaped by the wishes and lifestyle of the patient. Respect for the patient’s autonomy cannot, on this model, be a simple matter of taking and following instructions. It is achieved continually over the course of the therapeutic relationship and it depends on the ongoing exercise of the doctor’s judgment. In Britain the Human Rights Act 1998 provides further direction to the doctor’s deliberations. Clinical decisions, for example, to withdraw or withhold treatment, are now subject to scrutiny in accordance with the guarantees of

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<sup>37</sup> For an elaboration of the nature and implications of patient autonomy and its relation to other goals and values in medicine see T.L. Beauchamp and J. Childress, *Principles of Biomedical Ethics* (5th ed, 2001).

<sup>38</sup> To this extent it can be said that the prudential aspects of medicine go beyond the art idea of skill and competence, see F. Daniel Davis, “*Phronesis, Clinical Reasoning, and Pellegrino’s Philosophy of Medicine*” (1997) 18 *Theoretical Medicine* 173.

<sup>39</sup> E.D. Pellegrino and D.C. Thomasma, *A Philosophical Basis of Medical Practice. Toward a Philosophy and Ethic of the Healing Professions* (1981), p.137.

<sup>40</sup> E.D. Pellegrino and D.C. Thomasma, *A Philosophical Basis of Medical Practice. Toward a Philosophy and Ethic of the Healing Professions* (1981), p.124.

the European Convention on Human Rights.<sup>41</sup> While the National Health Service has stated that the majority of its practices already complied with the Convention, it has provided systematic guidance to doctors and other staff on human rights issues. The representative bodies of the medical profession have also been active educating their members on their legal and ethical obligations.<sup>42</sup>

### ***Transmitting Medical Knowledge – The Apprenticeship Model***

The foregoing discussion leads us to examine a final, distinctive aspect of the idea of medicine as an art, namely the means by which medical knowledge or more precisely the style of clinical reasoning is transmitted. We have seen that practitioners need to integrate knowledge generated in a number of segmented domains. It was suggested that this process depends: first, on the availability of a repertoire of exemplars which indicate the right way of seeing clinical problems; and second, on the exercise of prudential reasoning in which maxims guide, but do not fully determine the doctor's practical intervention.

The priority of these embodied attributes is linked with a distinctive model of education in the work of Michael Polanyi. He argues that since medical, or indeed any kind of useful knowledge can never be specified in full, explicit detail it cannot be transmitted by prescription. What is necessary instead is exposure to concrete cases during a period of apprenticeship.<sup>43</sup>

“By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art including those which are not explicitly known to the master himself.”

For Polanyi, therefore, the relationship between master and student is necessarily hierarchical. To be initiated into the hidden wisdom of medicine is to submit to authority, to surrender oneself “uncritically to the imitation of another”.<sup>44</sup> Elsewhere he describes this as a process of affiliation: literally the adherence of son to father.<sup>45</sup>

Since true knowledge takes the form of embodied experience, the master attains to his position through longevity of practice.<sup>46</sup> As Schön puts it:<sup>47</sup>

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<sup>41</sup> B. Hewson, “Why the Human Rights Act Matters to Doctors” (2000) 321 *British Medical Journal* 780.

<sup>42</sup> For a consideration of one area of practice see R. Macgregor-Morris, J. Ewbank and L. Birmingham, “Potential Impact of the Human Rights Act on Psychiatric Practice: the Best of British Values?” (2001) 322 *British Medical Journal* 848.

<sup>43</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.53; cf also, G. Marckmann, “Teaching Science vs. the Apprentice Model – Do we Really Have the Choice?” (2001) 4 *Medicine, Health Care and Philosophy* 85.

<sup>44</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.53.

<sup>45</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.207.

<sup>46</sup> See further, W. Wieland, “The Concept of the Art of Medicine”, in *Science, Technology and the Art of Medicine* (Delkeskamp-Hayes and Cutter eds, 1993), p.165.

“The artistry of a practitioner . . . hinges on the range and variety of the repertoire that he brings to unfamiliar situations . . . Moreover each new experience [in practice] enriches his repertoire.”

It follows that the most senior (*i.e.* the most experienced) members of a profession are those best able to testify to its authentic instances, to successful and unsuccessful performance.<sup>48</sup> They are the custodians and repositories of a traditional knowledge which ultimately lies beyond the written word. The apprenticeship mode of training doctors is, of course, much diluted. A great deal of scientific learning in classrooms and laboratories now precedes training on the wards. The relentless rise of evidence based medicine and the dense regime of clinical guidelines have also reduced the scope for unfettered judgment in everyday practice. Nonetheless fieldwork has shown that the latter period continues to be privileged in the ideological self-portrayal of the medical profession.<sup>49</sup> Indeed medical students themselves affirm that their true initiation into the profession begins with their clinical training.<sup>50</sup> We now turn to examine the extent to which the idea of medicine as an art is echoed in the self-understandings of common lawyers.

### **The Art of Common Law Reasoning**

This section traces a view of the common law in many important respects similar to that of clinical medicine rendered above. It focuses particularly on the precedent-based system of reasoning used by lawyers in England and other common law jurisdictions. Of course the law in these jurisdictions is not wholly, nowadays not even chiefly, composed of case law. Statute law, including explicit codes of rights, and detailed regulations now abound. Nonetheless it is still true to say that case law methods are at the heart of juristic technique in the common law countries. As with clinical training in medicine, case-base reasoning is at the ideological core of what it is to be a common lawyer. University law students learn in the first instance how to interpret, apply and distinguish precedents.<sup>51</sup> The key substantive areas of contract, tort, constitutional law, and criminal law are still significantly based on case law. Furthermore the meaning and scope of legislative enactments can only be known through the precedent cases in which they have been applied.

### ***Phenomenology of the Common Law***

It is perhaps a truism to say that the common law is concerned with individual cases. Nonetheless, as Tim Murphy has shown this orientation, entailed by the adjudicative nature of the legal process, is quite distinctive.

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<sup>47</sup> D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.140.

<sup>48</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.163.

<sup>49</sup> W. Anderson, “The Reasoning of the Strongest: The Polemics of Skill and Science in Medical Diagnosis” (1992) 22 *Social Studies of Science* 653.

<sup>50</sup> P. Atkinson, *The Clinical Experience. The Construction and Reconstruction of Medical Reality* (2nd ed, 1997).

<sup>51</sup> P.S. Atiyah, *Pragmatism and Theory in English Law* (1987), p.29.

The common law, he argues “is geared to generating a situation of immediacy”, a direct apprehension of individuals and their disputes.<sup>52</sup> The parties and any witnesses to a dispute are brought in person before the court. The facts of the case are established through oral examination and the presentation of documentary evidence. Its outcome will often depend on the credibility of witnesses established in the presence of judge and jury. Through these individualizing processes “the knowledge of “society”, the management of disagreement, and the practical experience of the business of government are woven together in an indissoluble manner”.<sup>53</sup> As such the common law can be contrasted with the statistically-based social sciences, such as economics, which are both abstract and future-oriented.<sup>54</sup>

It is of course true that decisions in individual cases furnish the normative stuff of the common law: precedents applicable in future cases with similar facts. Nonetheless a certain methodological prudence has tended to favour the particularist framing and interpretation of judicial opinions. English judges, in particular, have usually been wary of establishing broad principles from which legal consequences can be drawn “automatically”, that is without reference to social consequences and without giving any consideration to the specific facts of possible future cases.<sup>55</sup> At the extreme end of this particularism is Lord Halsbury’s oft-quoted opinion that since “a case is only authority for what it actually decides” it cannot “be quoted for a proposition that may seem to flow logically from it”.<sup>56</sup> To take one example, judicial shyness of generalization in the specific context of liability for negligence is attributed to the fact that:<sup>57</sup>

“circumstances may differ infinitely and, in a swiftly developing field of law, there can be no necessary assumption that those features which have served in one case to create the relationship between the plaintiff and the defendant on which liability depends will necessarily be determinative of liability in the different circumstances of another case.”

### ***Epistemology of the Common Law***

This orientation to the individual case has strongly influenced the form taken by the common law. In particular it is reflected in the traditional view that the common law does not constitute a system of clearly defined rules.<sup>58</sup> How is this seemingly counter-intuitive position reached? The reasoning in precedent cases is normally a close weave of facts and norms. Rules can be

<sup>52</sup> W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997), p.116.

<sup>53</sup> W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997), p.88; see also, M. Lobban, *The Common Law and English Jurisprudence 1760-1860* (1991), pp.14-15.

<sup>54</sup> W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997), p.149.

<sup>55</sup> P.S. Atiyah, *Pragmatism and Theory in English Law* (1987), p.15.

<sup>56</sup> *Quinn v Leatham* [1901] A.C. 459 at 506, HL.

<sup>57</sup> *Caparo v Dickman* [1990] 2 A.C. 605 at 623 per Lord Oliver, HL .

<sup>58</sup> A.W.B. Simpson, “The Common Law and Legal Theory”, in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed., 1973), p.77, 95; see also, J. Frank, *Law and the Modern Mind* (1963), p.134.

extracted from cases. But this is always a tentative process which does not furnish definitive statements of the law, but merely evidence or opinion as to what it might be. This is so since appellate court judges commonly offer divergent reasons for reaching the same outcome in the same case; and since the reasoning of any judge in any case is subject to interpretation and re-interpretation in future decisions.<sup>59</sup> Thus, although the common law can be said to be composed of authoritative materials in the form of previous decisions, this increases, rather than eliminates, the scope for judicial creativity and conceptual instability.<sup>60</sup> Precedent cases are, therefore, epistemologically prior to the rules which they are taken to instantiate.

This embarrassment is increased by the fact that words in law as elsewhere may stand for a range of diverse, though related things.<sup>61</sup> In English law, for instance, the meaning of “possession” varies significantly when used in relation to larceny, trespass, land tenure, or bailment.<sup>62</sup> Even in a single area of law, such as negligence, the particular instances of a general concept do not all exhibit a fixed set of universal features corresponding to those of an ideal entity. Rather, they are linked by similarities “which some bear to others but not necessarily to all, like family resemblances”.<sup>63</sup> If the common law is not composed in the first instance of clearly delimited rules, then it cannot be a system either. Indeed for Brian Simpson systematization is merely:<sup>64</sup>

“the ideal of an expositor of the law, grappling with the untidy shambles of the law reports, the product of the common law mind which is repelled by brevity, lucidity and system, and it is no accident that its attraction as a model grows as the reality departs further and further from it.”

The anti-system view is supported by Charles Sampford’s critique of leading common law theorists.<sup>65</sup> To take one example, he rejects Ronald Dworkin’s model of “law as integrity”, according to which legal rules and decisions are justified by a fairly coherent set of high-level principles, and ultimately by a theory of political philosophy.<sup>66</sup> Sampford shows that in practice the achievement of consistency or “integrity” in law is impaired by the intractable heterogeneity of the very material of the common law: precedent

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<sup>59</sup> J. Stone, *Legal System and Lawyers’ Reasonings* (1964), p.267.

<sup>60</sup> J. Stone, *Legal System and Lawyers’ Reasonings* (1964), p.281.

<sup>61</sup> C. Perelman, *Justice, Law and Argument. Essays on Moral and Legal Reasoning* (1980), p.126.

<sup>62</sup> See W. Twining and D. Miers, *How to Do Things with Rules* (3rd ed 1991), p.259.

<sup>63</sup> R. Stone, “Ratiocination not Rationalisation” (1965) 74 *Mind* 463, 478.

<sup>64</sup> A.W.B. Simpson, “The Common Law and Legal Theory”, in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed, 1973), p.77, 99. The idea of law as system can be traced to aesthetic understandings of law as geometry (17th century) or as architecture (18th century) see P. Stein, “Elegance in Law” (1961) 77 *L.Q.R.* 242, 252.

<sup>65</sup> His analysis relies on a list of “system-features” derived from John Dewey: wholeness; elements; interrelation of elements; and structure or pattern see C. Sampford, *The Disorder of Law. A Critique of Legal Theory* (1989), p.14.

<sup>66</sup> For an early formulation see R.M. Dworkin, “The Model of Rules”, 35 *University of Chicago Law Review* 14 (1967).

cases establishing various rules are often actuated by opposing principles or policy considerations; judges are prone to distinguish and confine difficult precedents rather than to reject them openly on the basis of high-level principles. This is exacerbated by the fact that judges are engaged primarily in adjudication rather than justification.<sup>67</sup> Spurning the all-embracing idea, they seek to impose order on “a tiny part of the law” sufficient to reach a decision in the particular case.<sup>68</sup>

It is true, of course, that the Human Rights Act 1998 has introduced a set of explicit general principles applicable in all areas of English law. Indeed commentators have noted that the Act is of constitutional significance since it not only incorporates the substantive values of the European Convention on Human Rights, but also guides judicial interpretation of both statutes and the common law.<sup>69</sup> It has been argued, for example, that the Act allows the law of tort to be ‘energized by principle’ and rooted in a broader ‘ethical base’ than before.<sup>70</sup> To achieve this will, however, require a more expansive approach to interpretation than that outlined above, one which breaks decisively with traditional common law methods.<sup>71</sup> The difficulties of realizing this break have prompted some to recommend a wholly new constitutional court whose members would be drawn more widely than the present House of Lords.<sup>72</sup> Restraint has also been noted in relation to the courts’ obligation under section 3(1) Human Rights Act where ‘possible’ to give legislation an interpretation consistent with the Convention rights enjoyed by citizens. Case law indicates that judges have in general spurned the option of radically changing the import and meaning of statutes by way of transformative interpretation under section 3(1).<sup>73</sup> They have, thus far, opted instead for a broad fidelity to their incremental traditions.<sup>74</sup>

### ***Reasoning in the Common Law***

Given the infinite variability of fact situations and the vagueness and imprecision of many legal concepts we can expect deductive and syllogistic reasoning to play a subordinate role in the common law. It is true that there is a role for deduction where the rule, forming the major premise of the

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<sup>67</sup> C. Sampford, *The Disorder of Law. A Critique of Legal Theory* (1989), p.87.

<sup>68</sup> “Your Lordships’ task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England”: *Read v Lyons* [1947] A.C. 156 at 175 per Lord Macmillan, HL; see also D. Lloyd, “Reason and Logic in the Common Law” (1948) 64 L.Q.R. 468.

<sup>69</sup> R. Clayton, “Developing Principles for Human Rights” [2002] *European Human Rights Law Review* 175.

<sup>70</sup> C. Gearty, “Tort Law and the Human Rights Act”, in *Sceptical Essays on Human Rights* (Campbell, Ewing and Tomkins eds, 2001), p.243, 259.

<sup>71</sup> See M. Hunt, “The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession” (1999) 26 *Journal of Law and Society* 86.

<sup>72</sup> K.D. Ewing, “The Unbalanced Constitution”, in *Sceptical Essays on Human Rights* (Campbell, Ewing and Tomkins eds, 2001), p.103.

<sup>73</sup> For an exploration of the functional and ideological constraints upon judicial creativity in this regard see A. Kavanagh, “The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998” (2004) 24 *Oxford Journal of Legal Studies* 259.

<sup>74</sup> A good example can be found in *Bellinger v Bellinger* [2003] 2 A.C. 467 at para 45 per Lord Nicholls, HL.

relevant legal syllogism is clear; *e.g.* “to be valid, contracts for the sale of land must be in writing; this contract is in writing; therefore, all else being equal, it is valid”.<sup>75</sup> Most appellate cases arise, however, because just this clarity is missing; *e.g.* “does writing include email”. In such cases deduction is only of secondary importance. Rather the judge and advocates must use other heuristic techniques to construct out of the precedent cases a rule (*i.e.* a major premise) applicable to the facts of the case at hand; *e.g.* “writing does not include email; therefore a contract for the sale of land in email form is not valid”. In the search for a major premise common lawyers seek:<sup>76</sup>

“non-necessary truths [by] reflection on the likenesses and dissimilarities of particular instances either actual or hypothetical, particular to particular.”

In other words legal cognition is at bottom analogical cognition;<sup>77</sup> *e.g.* “email and paper documents are not substantially similar (analogous) in this context”.

It is, of course, possible to analyse analogical reasoning in the law as a combination of deduction and induction.<sup>78</sup> Indeed judges commonly present their reasoning in this more pristine form as a token of their objectivity and their adherence to rule of law values in adjudication.<sup>79</sup> Yet this process is commonly one of reconstruction, since the crucial moment in analogy is the seeing of a similarity (or similarities) between earlier and later cases.<sup>80</sup> Only then can formal logical procedures be undertaken.<sup>81</sup> The vital question at this point is how the lawyer can be brought to see correctly. In other words, it is necessary to move beyond the empty formalism of the injunction that like be treated alike, and to inquire as to the procedures for determining what counts as similar, and what not.

Some writers suggest that analogy is only possible within an overarching rational context which links legal relationships among themselves “harmoniously”.<sup>82</sup> Natural law theorists, for instance, affirm a realist ordering of things into “natural classes”. Reference to these classes allows one to discriminate conclusively between the accidental and the essential features of any case and, thus, to reason analogically, *i.e.* to say that a later

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<sup>75</sup> It has been argued that a number of crucial analogy-based, pre-judgments are required before syllogistic reasoning can get under way in any case see A. Kaufmann, “Analogy and the ‘Nature of Things’. A Contribution to the Theory of Types” (1966) 8 *Journal of the Indian Law Institute* 358.

<sup>76</sup> R. Stone, “Ratiocination not Rationalisation” (1965) 74 *Mind* 463, 481.

<sup>77</sup> G.J. Postema, *Bentham and the Common Law Tradition* (1986), p.31ff.

<sup>78</sup> E.H. Levi, *An Introduction to Legal Reasoning* (1948), p.1; for a thorough analysis see J. Horowitz, *Law and Logic. A Critical Account of Legal Argument* (1972), pp.32-44.

<sup>79</sup> The legal profession seeks “to maintain the image of the rule of law [as] the law of rules”: P. Goodrich, *Reading the Law. A Critical Introduction to Legal Method and Techniques* (1986), p.156.

<sup>80</sup> J. Stone, *Legal System and Lawyers’ Reasonings* (1964), p.315.

<sup>81</sup> The two stages can be distinguished in terms of the Popperian contrast between discovery and justification.

<sup>82</sup> G. Zaccaria, “Analogy as Legal Reasoning. The Hermeneutic Foundation of the Analogical Procedure” in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.42, p.57.

case is essentially similar and should be treated in the same way. However, as Maris correctly notes, any realist metaphysics would now be regarded as untenable and its revival would in any case cut across important normative understandings in liberal society.<sup>83</sup> Rather, as Sandford's critique suggests, the rational context of analogical reasoning in the common law is necessarily plural and regional. i.e. specific to a give area of law.<sup>84</sup> Similarities are usually identified between cases that are conceptually proximate.<sup>85</sup> Clearly the more problematic (i.e. novel) the case, the wider the judge will be tempted to stray in search of analogous cases and relevant principles. But this search is never exhaustive.<sup>86</sup>

### ***Judgment, Training and Tradition***

Reasoning in the common law, thus, involves a search for appropriate analogies. It requires the judge and advocates to consider and interpret competing precedents; to adopt some and reject others. The foregoing discussion suggests that arguments in this mode are never wholly compelling. Ultimately while legal decisions should be reasonable, they cannot be rational.<sup>87</sup> Given the impossibility of a "mechanical jurisprudence" there remains a considerable role for the exercise of prudential judgment.<sup>88</sup> This is acknowledged by many writers. Clifford Geertz, for instance, saw lawyers as "connoisseurs of cases in point, connoisseurs of matters in hand".<sup>89</sup> Julius Stone drew attention to the:<sup>90</sup>

"wisdom, which has always been the governing, moderating and evaluating core of good judgment, is [an] intangible and inarticulate presupposition . . . of the reasoning of lawyers and judges."

This practical wisdom is sometimes referred to as the "personal element" in judicial work or, more bluntly, as hunch.<sup>91</sup>

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<sup>83</sup> Particularly those concerning pluralism and choice in matters of value; see C.W. Maris, "Milking the Meter. On Analogy, Universalisability and World Views" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.71, p.85.

<sup>84</sup> The latter phrase is to be found in K.H. Ladeur, "The Analogy between Logic and Dialogic of Law" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.12, p.17.

<sup>85</sup> C.W. Maris, "Milking the Meter. On Analogy, Universalisability and World Views" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.71, p.102.

<sup>86</sup> See W. Twining and D. Miers, *How to do Things with Rules* (3rd ed, 1991), p.152.

<sup>87</sup> C. Perelman, *Justice, Law and Argument. Essays on Moral and Legal Reasoning* (1980), p.160.

<sup>88</sup> G.J. Postema, *Bentham and the Common Law Tradition* (1986), p.70.

<sup>89</sup> C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1993), p.168.

<sup>90</sup> J. Stone, *Legal System and Lawyers' Reasonings* (1964), p.337.

<sup>91</sup> J.C. Hutcheson, "The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision", 14 *Cornell Law Quarterly* 274 (1929); see also C.M. Yablon, "Justifying the Judge's Hunch: An Essay on Discretion", 41 *Hastings Law Journal* 231-279 (1990).

It would, however, be incorrect to view the exercise of judgment in the common law as a wholly subjective or discretionary affair. Though not finally constrained by formal logic it is nonetheless subject to a number of less rigid normative, social and cultural controls.<sup>92</sup> Karl Llewellyn identified fourteen “steadying factors” in common law decision-making, including: the mental conditioning of lawyers; prior identification and sharpening of issues before trial; accepted ways of handling authoritative sources of law and of presenting arguments in court; constraints of group decision-making and of publicity; judicial security and honesty.<sup>93</sup> In particular, as Brian Simpson has pointed out, within groups like the legal profession, especially among its most powerful members, there must exist strong pressures against innovation. Young members of the group must be thoroughly indoctrinated before they can achieve any position of influence. There should be a “gerontocratic structure” which privileges the wisdom and experience of older members of the profession. The apprenticeship method of training lawyers has traditionally guaranteed this effect.<sup>94</sup> In the common law cohesion is thus preserved, not by rational means, but through a “combination of institutional arrangements and conservative dogma”.<sup>95</sup>

The importance of a suitable initiation is made clear when we recall the analogical style of reasoning characteristic of the common law. We noted that there were no explicit, immutable principles, and no realist metaphysics available to instruct the judge or lawyer in how to see resemblances between cases. Instead as Bankowski says:<sup>96</sup>

“ ‘Same’ is a public concept which makes sense only within the context of a particular form of life. Thus we do not understand the “same” by adding any new facts but, by looking at it from within a context and tradition, we make valid and rational choices. It is within the context of this legal tradition then, with its interlocking network of principles, rules etc. that we find the conditions for making valid assertions of analogy and disanalogy. Analogy is at base a social concept.”

Training in law must, therefore, be an extended induction into the professional context, into the tradition which makes it possible to see resemblances between cases. To quote Bankowski again:<sup>97</sup>

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<sup>92</sup> A.W.B. Simpson, “The Common Law and Legal Theory”, in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed, 1973), p.77, 95.

<sup>93</sup> K. Llewellyn, *The Common Law Tradition. Deciding Appeals* (1960), p.19ff.

<sup>94</sup> See J. Harrington and A. Manji, “Mind with Mind and Spirit with Spirit”. Lord Denning and African Legal Education” (2003) 30 *Journal of Law and Society* 376.

<sup>95</sup> A.W.B. Simpson, “The Common Law and Legal Theory”, in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed, 1973), p.77, 96; see also D. Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology”, 36 *Journal of Legal Education* 518 (1986).

<sup>96</sup> Z. Bankowski, “Analogical Reasoning and Legal Institutions” in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.198, 208.

<sup>97</sup> Z. Bankowski, “Analogical Reasoning and Legal Institutions” in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.198, 211; see also P. Goodrich, *Reading the Law. A Critical Introduction to Legal Method and Techniques* (1986), p.154.

“It is this knowing how of the practitioner which comes through socialization, a knowledge of the correct answer without necessarily being well-versed in the structure of the argument which is often evidence of a tradition.”

### CONCLUSION

The practices of clinical medicine and the common law are thus seen to share a number of significant features. Both disciplines have a primary orientation to the individual case. The clinical gaze and the procedural forms of the common law create “the case” and elevate it to phenomenological and ethical primacy. In this they differ from the aggregative social sciences which emerged in the nineteenth century and which are oriented to a collective field that they themselves call into being.<sup>98</sup> The historical differences between clinical and, say, public health medicine, or between law and public administration are thus reproduced at the level of the phenomenological.

The case is also primary in the domain of epistemology. In both clinical medicine and the common law the record or memory of cases has traditionally been the storehouse of disciplinary knowledge. Rules can be abstracted from various concatenations of cases, but this is always a contingent and revisable process. As a result concepts are never wholly specifiable, having blurred and overlapping meanings; and neither discipline can be fully and exhaustively articulated as a system. Deductive or syllogistic reasoning plays a subordinate part in the procedures of each. Historically both doctors and common lawyers have contrasted the responsive, pragmatism of their own practice with the inflexible dogmatism of rival practitioners.<sup>99</sup> The margin of uncertainty freed up by the analogical style of thought allows the doctor or judge to attend to the particularity of the case at hand.

The primacy of the case, the non-systematic nature of disciplinary knowledge and the importance of exemplary precedents mean that there remains an important role for judgment in the practice of medicine and the common law. Practitioners draw upon a kind of prudential wisdom in deciding on right action in clinical or curial matters. This judgment is guided by non-compelling maxims and principles, but also by certain social and cultural constraints. Both the faculty of judgment and its constitutive parameters are developed in the individual practitioner first during a period of apprenticeship to a more experienced practitioner, and later through constant practice. Though its precise form varies, training usually includes a prominent period of “imitative submission” by pupil to master. Only in this way do initiates acquire the needed stock of exemplary cases and, thus, the ability to see new cases in accordance with the traditions of the discipline.

The shared vision of medical and legal practice which has been developed in this essay is both traditional and traditionalist. It has a distinctively pre-

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<sup>98</sup> See M. Foucault, *The History of Sexuality. The Care of Self vol 1* (1979).

<sup>99</sup> “The lawyer who is not moderately alive to the fact of the limited part that rules play is of little service to his clients. The judge who does not learn how to manipulate these abstractions will become like that physician . . . “who preferred that patients should die by rule rather than live contrary to it””: J. Frank, *Law and the Modern Mind* (1963), p.141.

modern flavour and is obviously rooted in a general conservative and anti-rationalist philosophy. The work of Michael Polanyi, referred to earlier, makes clear the connections between politics and epistemology in this context. Polanyi’s well-known theory of tacit knowledge was developed out of a critique of what he diagnosed as the fallacious, but dominant positivism of the mid-twentieth century. This rested on the assumption that the world was completely knowable and representable “in terms of its exactly determined particulars”.<sup>100</sup> The ideal knower was free of bias and commitment, detached from the subject of their inquiries, and fully conscious of all they knew. The completeness and objectivity of this knowledge legitimated the aspirations of democrats and collectivists. Available to expert and layperson alike, it could be used instrumentally to remould the world. The result was totalitarianism which both filled the spiritual void created by value-free science, and made best use of that same science as a tool of planning.<sup>101</sup>

Against this objectivism Polanyi argued that both personal judgment and tradition were indispensable to knowing. The objectivity of knowledge could not be guaranteed by method, but only by the personal commitment of the inquiring subject.<sup>102</sup> The investigator’s orientation to the universal and the objective was sustained by an irreducible quotient of belief. Furthermore a great deal of knowledge was held at the tacit or subconscious level. Specific cognitions were only possible on the basis of this “subsidiary” knowledge. Its role increased the more the subject sought to apprehend concrete reality in all its diversity. The languages of the real world, said Polanyi, were necessarily inexact, metaphorical, analogical. The abstractions of physics offered greater precision and coherence, but thinner description. Law and medicine come somewhere on the spectrum between abstract generality and concrete particularity.<sup>103</sup> The aim of medical and legal reformers has been to pull both disciplines towards abstraction: clinical guidelines and protocols; the problem-oriented medical record; codification of the common law. The reaction of practitioners and their philosophical defenders has been to assert the primacy of embodied knowledge and the individual case.

Yet Polanyi is not proposing a wild subjectivism. The knowing subject is for him inevitably inserted into the traditions of the discipline or of society as a whole. Hence the importance which he attributed to apprenticeship. Lacking an appropriate initiation the layperson is incapable of knowing what doctors and lawyers do. The egalitarian democratization of professional knowledge is at the same time its impoverishment. In an irony writ large in the work of Edmund Burke a century and a half before him, Polanyi argues that tradition is the only true bulwark of freedom against totalitarianism. Only self-selecting, self-sustaining elites of practitioners and scholars could

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<sup>100</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.139.

<sup>101</sup> For a similar exposition of this anti-rationalist and anti-democratic epistemology see M. Oakeshott, *Rationalism in Politics and other Essays* (2nd ed, 1991).

<sup>102</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.64.

<sup>103</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.86.

guarantee the integrity and continued reproduction of the various disciplines. Tradition depends not on demonstration and argument, but on authority.<sup>104</sup> A free society founded on tradition (or traditions) is necessarily unequal.

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<sup>104</sup> M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.164.