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***257 TRANSLATION COSTS: A COMMENT ON SOCIOLOGY AND ECONOMICS**

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[T]he difference between economics and sociology is very simple. Economics is all about how people make choices. Sociology is all about why they don't have any choices to make.

-- James S. Duesenberry [\[FN1\]](#)

IN her essay, *The Silicon Valley Lawyer as Transaction Cost Engineer*, Professor Bernstein offers a skillful economic reading of several central aspects of my research on Silicon Valley lawyers. [\[FN2\]](#) My work is both complimented by her careful attention and enriched by her insightful analysis. I am not, however, entirely convinced that her economic account is either more descriptively accurate or more aesthetically appealing than my original sociological rendition; and I would urge caution in extrapolating from arguments about the role of lawyers in Silicon Valley to arguments about the legal profession in general -- or from arguments about the economic value of transaction-cost engineering to arguments about the fundamental nature of "good" lawyering. Since my caution in this regard revolves less around *258 specific empirical points than around broader questions of philosophical outlook, I will limit myself to a brief discussion of the differences between Professor Bernstein's economic perspective on the Silicon Valley data and my own sociological account, and to a reiteration of some sociological features of the Silicon Valley story that economic models tend to obscure.

I EXPLANATION VERSUS TRANSLATION

Often, in the positivistic social sciences (among which I include much of sociology and economics), [\[FN3\]](#) we talk as if One True Reality existed 'out there,' and we, as researchers, are simply in the business of constructing the Right Theory to describe it. Unfortunately, even if this might be the case in the abstract, [\[FN4\]](#) it is nonetheless abundantly clear that the current state of the social scientist's art falls far short of this positivistic ideal. Rather than offering comprehensive, empirically-verifiable theoretical accounts, different social science disciplines (and different paradigms within disciplines) serve primarily as lenses, metaphors or *259 vocabularies -- highlighting certain features of the social world, while downplaying others. [\[FN5\]](#)

Accordingly, when one puts the findings of one discipline into the language of another, as Professor Bernstein has done, one is engaged in an act of translation, as much as in an act of explanation. By this analysis, I do not mean to denigrate the effort: translation is an intellectually challenging creative act in its own right, and it is absolutely essential to the development of a healthy exchange of ideas among academic disciplines. Nonetheless, it is important to recognize the considerable difference between demonstrating that observations arising within the framework of one discipline also make sense within the framework of another, and demonstrating that the second discipline offers a better account than the first. [\[FN6\]](#) While Professor Bernstein's analysis of my data is quite clever and quite subtle, I would argue that it works better as a translation from the language of organizational sociology into the language of

transaction-cost economics than as a comprehensive scientific statement of the One True Model of business lawyering. [\[FN7\]](#)

II SOCIOLOGY AND ECONOMICS

Recognizing a translation for what it is allows one to ask which features of the phenomenon under consideration are highlighted by each theoretical language and which are obscured. Ultimately, ***260** metatheoretical debate is less a matter of who is right and who is wrong than whose account reveals which aspects of a complex and multivocal reality. [\[FN8\]](#) In this spirit, readers might profitably consider the differences in emphasis between Professor Bernstein's economic orientation and my own sociological alternative. [\[FN9\]](#) In essence, these differences are threefold. First, economics and sociology often diverge in their views of individual action, with the former emphasizing rational self-interest while the latter emphasizes cultural rule-following. Second, economics and sociology disagree in their images of social interaction, with the former highlighting voluntary exchange while the latter highlights power and social constraint. Third, economics and sociology differ in their perspectives on systemic change, with the former stressing general equilibria while the latter stresses developmental trajectories, historical path-dependencies and local contexts. This section will examine each of these oppositions.

A. Individual Action

In describing human behavior, economists generally assume that individual action is best understood as the instrumental pursuit of material self-interest. We are all, in essence, rational utility-maximizers, and our underlying preference functions are ***261** primarily pecuniary or voluptuary in nature. [\[FN10\]](#) Sociologists, in contrast, tend to favor models that emphasize the cultural underpinnings of human action. Rather than seeking to maximize our personal material well-being, we often act on the basis of socially-sanctioned normative standards and socially-constructed cognitive assumptions. Not only does culture tell us what we should want, but also it provides us with schemata that define who we are and scripts that explain what we can do. The difference between economics and sociology, in this regard, is the difference between seeing self-interested choice as the fundamental unit of action underlying all larger social structures, and seeing self-interested choice as, at most, the residual variation remaining after larger social structures have authorized a particular set of actors, furnished them with a narrow selection of roles, and imbued them with a limited set of values. [\[FN11\]](#)

This difference in outlook is exemplified by Professor Bernstein's and my divergent treatments of information in Silicon Valley. Coming from an economic perspective, the Bernstein account views information primarily in operational terms, as a commodity that organizations require in order to optimize their strategic decision-making. Thus, for example, in discussing the activities that I term "proselytizing," she stresses the usefulness of lawyers in producing business plans that can provide a sound basis for informed investment decisions; and in discussing "gatekeeping" and "matchmaking," she highlights the ability of law firms to verify and transmit reputational information between clients and potential transactional partners.

All of these processes are, indeed, significant components of the Silicon Valley lawyer's role, and all are comprehensible ***262** within the transaction-cost framework. What this economic account elides, however, is the fact that information is often a carrier of culture -- and as such, it can serve a constitutive, as well as an operational, role. [\[FN12\]](#) In many contexts, Silicon Valley lawyers seem to be formulating, applying, and enforcing fundamental community understandings about what is proper, expected and meaningful within the local belief system -- not attempting to maximize the decision-support data available within the local market. Thus, contrary to Bernstein's implications, [\[FN13\]](#) it is not entirely apparent that Silicon Valley's "well-lawyered" business plans actually contain more operational information than their amateur counterparts; what is apparent, however, is that the lawyered drafts are more "ritually pure" than the lay alternatives. As one prominent attorney indicates, the law firm's contribution is often largely stylistic:

What you do is you have a business plan. You refine that to the point where it meets the standards and the criteria that venture capitalists expect in business plans. It shouldn't be 800 pages long, and so forth and so on. It should be crisp, precise, clear, tell the story well. [\[FN14\]](#)

Although one might argue that such presentational efforts economize on information costs, the lawyer's primary contribution seems to be ensuring that the plan appears normal, reassuring and plausible -- even if the constraints of

genre actually *263 obscure (or stylize) certain potentially relevant pieces of operational information.

Similar applications of constitutive information also arise in cases of matchmaking and gatekeeping. While Bernstein is certainly correct in suggesting that lawyers frequently serve as reputational brokers in Silicon Valley, the information that they convey often has less to do with economic risk than with cultural standards and typologies. Lawyers generally disavow technical or financial expertise, while at the same time emphasizing their ability to construct "appropriate" matches between "suitable" transactional partners, and to weed out proposals that are "so outlandish as to be unreasonable." Such assessments of appropriateness, suitability, outlandishness and reasonableness all involve evaluation relative to local expectations, not application of universal technical criteria. [\[FN15\]](#) Even if a lawyer need not be thought of as a spreader of norms in order to understand his or her economic usefulness, any account that ignores such cultural activities leaves out a substantial portion of the Silicon Valley picture. Like most communities, Silicon Valley is driven as much by its members' taken-for-granted assumptions about what is possible and appropriate for various actors in various contexts as by its members' instrumental negotiations and conscious strategies. As one venture capitalist notes:

I grew up in Michigan, and I go back there once a year, and I continually look for deals. But definitely something is missing. In the Midwest, maybe one person gets that idea and that fire, but then they get picked to death. There's a way to shoot holes in almost any deal you can find. Around here there's this culture and feeling that you can do it. That doesn't exist in Ann Arbor. It doesn't exist quite as much in Austin, Texas. It doesn't exist in the state of Washington. Even around L.A., San Diego, it's not quite the same. [\[FN16\]](#)

Thus, where an economic analysis emphasizes the ways in which attorneys produce, transmit and verify operational information, a sociological analysis highlights the ways in which attorneys formulate, apply and enforce constitutive information. Strictly speaking, the question is not one of cultural versus economic *264 functions. Often, cultural norms comport quite well with economic needs, if for no other reason than that culture has constructed both the tastes that economic actors seek to gratify [\[FN17\]](#) and the institutions within which economic actors seek their gratification. [\[FN18\]](#) Culture and self-interest do not always pull in the same direction, however, and while economists are quick to point out instances of opportunistic rule-breaking, sociologists are equally quick to point out the extent to which taken-for-granted premises constrain human choice without ever rising into discursive consciousness. [\[FN19\]](#) Culture, in this account, provides both the blueprint and the toolkit for action [\[FN20\]](#) -- even for action that deviates from publicly espoused norms. [\[FN21\]](#) Sociologically, then, Silicon Valley lawyers do not simply assist particular businesses in conducting isolated, instrumentally-rational transactions; rather these attorneys help to construct the cultural milieu -- both the normative rules and the cognitive typifications -- that make such transactions comprehensible, desirable, feasible and meaningful.

*265 B. Social Interaction

A second tension between economic and sociological analyses lies in the contrast between the economist's emphasis on voluntary exchange and the sociologist's attention to power, influence and social constraint. Although not fundamentally unsuited to the description of inequality and domination, [\[FN22\]](#) economics has traditionally relied on essentially aggregative models of individual choice; [\[FN23\]](#) and such models generally assume that social interaction arises primarily because isolated Robinson Crusoes voluntarily choose to act in concert. Sociologists, on the other hand, traditionally proceed from essentially holistic models of contextual embeddedness; [\[FN24\]](#) and such models tend to see social interaction as reflecting structural pressures that bring individuals into contact, willy-nilly -- often to the great detriment of the less-advantageously positioned party. [\[FN25\]](#) Where economics sees *266 the fundamental social event as being a meeting between equally-endowed strangers in an open marketplace, sociology sees it as being an encounter between unequally-endowed acquaintances in an enclosed compound. [\[FN26\]](#)

These distinct orientations toward social interaction manifest themselves in disparities between the images of law firm "dealmaking" and "proselytizing" in Professor Bernstein's writing and in my own. From an economic perspective, the central question about deal-making is "Why are lawyers good brokers?" In other words, how might lawyers add enough value to a transaction to lead the contracting parties to voluntarily seek (and pay for) legal assistance? Professor Bernstein answers this question by suggesting that lawyers possess ongoing data on investor reputations and company intentions, allowing them to assemble an informational bundle that both parties find useful and uniquely cost-efficient. Certainly, there is some truth to this claim. Lawyers are, indeed, central long-term monitors in Silicon Valley, and my own account of deal-making gives reputational mediation ("brokerage," in Bernstein's terminology) an important place. On the other hand, however, sociological analysis also highlights the

structural advantages that lawyers bring to the deal-making process, independent of their ability to add value to individual transactions. [\[FN27\]](#) Access to new companies, for example, is largely a product of the larger American legal regime, which brings would-be entrepreneurs into law offices early and often during *267 the start-up process; [\[FN28\]](#) a "personal champion" model of legal ethics further enhances attorneys' power by obscuring potential agency problems and thereby fostering client trust; [\[FN29\]](#) and the position of lawyers within elite social networks helps to cement their access to and influence in the local venture- capital community. [\[FN30\]](#)

Similarly, where Bernstein's economic analysis portrays proselytizing as an effort to reduce information and transaction costs, my own interpretation highlights somewhat less voluntaristic features. [\[FN31\]](#) In "selling" the Silicon Valley model, local law firms are attempting to persuade their clients to sacrifice autonomy for social acceptance. That these efforts (like most missionary activities) are undertaken with the best of intentions cannot change the fact that law firms are, in essence, indoctrinating new community entrants and thereby perpetuating the existing order. [\[FN32\]](#) Certainly, local business leaders seem to value lawyers as much for the cooperative attitudes that they inculcate in clients as for the efficiencies that they achieve in transactions. In part, Silicon Valley lawyers may earn their pay as transaction-cost engineers; but a truly sociological account cannot help but introduce the alternative hypothesis that lawyers earn their pay primarily as touts and bouncers for the prevailing legal regime. [\[FN33\]](#) *268 Whether one sees this as good or bad depends on one's attitude toward that regime; but either way, it is hardly the open, anonymous marketplace of traditional economic theory. As one venture capitalist describes it:

Silicon Valley gets very insulated. People think that if you know everything that everyone else knows, you know everything; and yet, you don't. Everyone is into this little chatty stuff -- not technically, but personally. It's also a very cliquish community, so for the younger entrepreneur, it's hard to break in. So there's that "clubbiness" and also the "ghettoness" of it all, that separates you from the real world. That's nothing like how it is in Portland or Seattle, or Minneapolis, or Austin. [\[FN34\]](#)

In highlighting voluntary exchange, an economic view of Silicon Valley lawyers focuses on "value creation," and on the law firm's ability to maximize allocative efficiency. In highlighting structural constraint, a sociological view of Silicon Valley lawyers focuses on "socialization" and on the law firm's ability to suppress distributional conflict. The significance of this distinction extends well beyond the present case, since unlike atomistic exchanges, structural conditions are likely to vary significantly across social and historical settings. While lawyers in Silicon Valley seem to operate primarily as community-builders and defenders of the faith, the sociological relationship between law, conflict and power might lead to quite different results elsewhere. [\[FN35\]](#) To the sociologist, neither "good lawyering" nor "profitable lawyering" can be defined independently of history and politics.

*269 C. Systemic Change

Questions of context and generalization echo throughout the third debate between economics and sociology, as well. Here, the economic predilection for general equilibria confronts the sociological preference for developmental dynamics, with significant consequences for each discipline's assumptions about the efficiency and universality of observed regimes. If, as economists frequently assume, social systems quickly reach general equilibrium (either through rational choice or through competitive selection), then any structure that persists for a protracted period of time is likely to represent an efficient solution to an important allocative problem. Buoyed by a faith that competition will drive sub-optimal social arrangements from the field, economists often feel free to reason from the "is" to the "ought," and back again -- assiduously explicating the rationality of observed social formations and then boldly extrapolating this analysis into wide-ranging policy prescriptions. Sociologists, in contrast, tend to be far more skeptical about the optimality of existing conditions, emphasizing, instead, the ways in which historical coincidences, power imbalances, structural constraints and cultural commitments can channel real-world events down idiosyncratic, occasionally disastrous, paths. [\[FN36\]](#) History, in this view, often locks social systems into sub-optimal -- but astoundingly stable -- configurations. While existing arrangements may enjoy a certain functional logic and internal coherence, [\[FN37\]](#) a sociological sensitivity to developmental dynamics mitigates against extrapolating this logic into universal prescriptions. [\[FN38\]](#)

In recent years, several iconoclastic economists have embraced this same skepticism about general equilibrium, producing a *270 small but growing literature on "path dependence," "positive feedback," "historical lock-in," and "network externality." [\[FN39\]](#) The fundamental conclusion of this research is that, especially in highly interconnected network-like settings, small initial coincidences [\[FN40\]](#) can steer economic regimes onto increasingly divergent and incommensurable trajectories, producing conditions that may be locally-efficient without being

globally optimal. One of the most frequently cited examples in this regard is the history of the "QWERTY" typewriter keyboard -- a history of early coincidences combining to produce a stable but sub-optimal regime, wherein the individually-rational decisions of typists, manufacturers and purchasers all interact to "lock-in" a demonstrably inferior technology. [\[FN41\]](#) If taken to heart, scholarship on path dependence might substantially reduce the gap between the economic and sociological outlooks. Unfortunately, to date, most economic research (especially in the legal arena) has either ignored path dependence entirely, or has treated it as a trifling anomaly. Certainly, few mainstream economists have given developmental dynamics the kind of centrality that they hold within the sociological world view.

Once again, the disparities between economics and sociology manifest themselves in divergent accounts of Silicon Valley lawyering. Professor Bernstein, for example, tries valiantly to construct an efficiency explanation for standard-form contracting, invoking arguments ranging from the reduction of negotiation costs, to the avoidance of transactional breakdowns, to the signalling of post-deal intentions. [\[FN42\]](#) While this analysis is both creative ^{*271} and thought provoking, it largely avoids the question of whether the application of highly routinized contracts to idiosyncratic and uncertain transactions should be "explained" in efficiency terms at all. In contrast, a sociological account would point out that uncertainty and ambiguity tend to evoke symbolic display, stylized behavior and ritualistic mimicry, so as to construct and preserve a coherent and meaningful social reality. [\[FN43\]](#) Faced with the unknown, our first impulse is often to seek comprehension, not profit. These sense-making pressures, in turn, engender a path-dependent cascade of typification and institutionalization, through which certain practices acquire symbolic value or come to be taken for granted, independent of their technical efficacy. [\[FN44\]](#) At the end of the day, it is, of course, "efficient" to signal with the signs of the community. However, one must look beyond efficiency to history if one wishes to understand how those particular signs gained semantic value in the first place. [\[FN45\]](#) Moreover, one must recognize that, over time, signals tend to become habits, gradually moving from being deliberate statements to being pre-conscious routines. [\[FN46\]](#)

Beyond standard-form contracting, one could level a similar critique at Bernstein's broader assertion that the prominence of ^{*272} law firms in Silicon Valley demonstrates both the nature and the value of transactional lawyering across social locations and historical periods. [\[FN47\]](#) A sensitivity to path-dependence (as well as to other non-optimizing developmental dynamics) raises serious questions about whether "all good transactional lawyers" create value through transaction-cost engineering, or whether, instead, the Silicon Valley experience may simply reflect a happy historical coincidence. My own research suggests that, while Silicon Valley lawyers are not unique, their roles as dealmakers, counselors, gatekeepers, proselytizers and matchmakers are highly contingent on conditions in the region's nascent inter-organizational environment -- conditions that may not exist in other, more established communities. A sociological perspective cautions against overly-ambitious claims about which legal activities are good or bad, profitable or unprofitable, value creating or value destroying, independent of context; and it stresses that demonstrating the benefits of particular practices within a particular setting constitutes a very different enterprise from demonstrating the superior efficiency of that setting and those practices over other, perhaps unobserved, alternatives.

D. Summary

In short, economics tends to depict social life as a loose web of voluntary exchanges between materialistic, self-interested rational actors operating within a quickly-equilibrating, allocatively-efficient quasi-market. Sociology, on the other hand, tends to view social life as a deeply-embedded system of structured relations between culturally-constructed role-players operating within historically-contingent, largely-incommensurable local regimes. The economic perspective is well-illustrated by Ronald Gilson's assertion that: "The continued presence of a voluntary social convention -- for example, the pervasive use of business lawyers -- raises an inference that it is a cost-saving, in my terms value-creating, phenomenon." [\[FN48\]](#) In response, however, a sociologist might ask: (1) Could the persistence of the social convention indicate its taken-for-grantedness, normative endorsement and ritualization, rather than its cost-benefit rationality? (2) Could ^{*273} the voluntariness of the convention be an illusion? And (3) could the value-creating aspects of the convention reflect a local equilibrium that might be resistant to change, but not be globally optimal? Needless to say, an affirmative answer to any of these questions would yield a dramatically different portrait of the phenomenon under consideration.

CONCLUSION

In laying out the "economic" and "sociological" orientations, I do not intend to suggest that one or the other is uniquely and unequivocally applicable to the case of Silicon Valley. Rather, I would argue that each casts a distinctive and interesting light on the Silicon Valley lawyer's multifaceted role. Indeed, this is precisely why interdisciplinary translation constitutes such an exceptionally useful and rewarding enterprise; by easing communication across intellectual boundaries, translation adds valuable diversity to all of our world-views. Significantly, however, if we wish to preserve and exploit this diversity, we must recognize that overzealous translation has certain costs as well. In particular, we must guard against the ever present risk that translation will shade into cultural imperialism -- that, in moving from one language to another, we will undermine, obscure or deny the vitality and coherence of the worldview that produced the text that we found worth translating in the first place. In the increasingly interdisciplinary context of the modern law school, a certain intellectual cosmopolitanism is clearly a virtue. The true cosmopolitan, however, is not the colonialist who seeks to remake the world in the image of home, but rather the adventurer who recognizes the value of autonomous realms as incubators of diversity -- and who acknowledges the validity of borders, even in the act of traversing them.

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[\[FN1\]](#). James S. Duesenberry, Comment on "An Economic Analysis of Fertility" by Gary Becker, in *Demographic and Economic Change in Developed Countries: A Conference, Report of the Nat'l Bureau of Econ. Research* (1960).

[\[FN2\]](#). Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Costs Engineer?*, 74 *Or. L. Rev.* (1995). My comments in the following pages are based on a preliminary draft of Professor Bernstein's article and on her verbal remarks at the Law and Entrepreneurship Symposium. Since I have not had the opportunity to review her final text, my commentary may criticize some arguments that she has subsequently moderated and may neglect some arguments that she has subsequently inserted. Given this, readers should interpret my observations more as reactions to Professor Bernstein's general approach than as responses to her specific claims.

[\[FN3\]](#). The description of sociology as a "positivistic social science" is, itself, somewhat controversial. While many scholars, both classical and contemporary, identify sociology with the systematic search for empirically- falsifiable knowledge claims and general "covering laws" (e.g., Bernard P. Cohen , *Developing Sociological Knowledge* (2nd ed. 1989); Emile Durkheim , *The Rules of Sociological Method* (Sarah A. Solovay & John H. Mueller trans., 8th ed. 1938)); others argue for a more humanities-like focus on "interpretation" (e.g., Ben Agger , *Socio(onto)logy: A Disciplinary Reading* (1989); Max Weber , *On Law in Economy and Society* 8-9 (Max Rheinstein ed. & Edward Shils trans., 1954)); or a more political emphasis on "praxis" (e.g., Jurgen Habermas , *Theory and Practice* (John Viertel, trans., 1973); Michael Burawoy, *The Limits of Wright's Analytical Marxism and an Alternative*, *Berkeley J. Soc.* , Mar. 1987, at 51).

[\[FN4\]](#). Here, I am agnostic, at best. Kuhnians (e.g., Thomas S. Kuhn , *The Structure of Scientific Revolutions* (2nd ed. 1970)), social constructionists (e.g., Peter L. Berger & Thomas Luckmann , *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1966); Bruno Latour & Steve Wollgar , *Laboratory Life: The Construction of Scientific Facts* (1986)) and postmodernists (e.g., Ben Agger, *Critical Theory, Poststructuralism, Postmodernism: Their Sociological Relevance*, 17 *Ann. Rev. Soc.* 105 (1991)) all make strong cases that "reality" and "truth" are best viewed as the products of collective sense-making within "communities of discourse" -- not as attributes of an external world whose operating principles represent objective facts independent of social awareness. Of course, these arguments do not settle the issue: the ontological question of whether external reality exists cannot be resolved through recourse to epistemological claims about the inevitable social construction of human understandings of such a reality; and if an objective reality exists, then there is always the possibility that some subjective account will "get it right" -- even if we currently have no way of knowing which account that might be.

[FN5]. See, e.g., Kenneth Burke, *Permanence and Change* 49 (3rd ed. 1984) ("A way of seeing is also a way of not seeing"); see also Joseph R. Gusfield, *Introduction to Kenneth Burke, On Symbols and Society* 11-12, 26 (Joseph R. Gusfield ed., 1989); cf. Max Weber, *On Methodology of the Social Sciences* 106 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) ("[C]oncepts are primarily analytical instruments for the intellectual mastery of empirical data [not full descriptions of underlying reality]").

[FN6]. As an analogy, readers might consider Akira Kurosawa's film *Ran*, which offers a cross-cultural translation of William Shakespeare's *King Lear*. *Ran* is not *Lear*, nor vice versa, and each rendition highlights certain story elements while down-playing others. Nonetheless, few would argue that the power of Kurosawa's rendition demonstrates that Shakespeare's script was actually about feudal Japan. Similarly, a compelling translation from sociology to economics does not, in itself, demonstrate that the underlying processes are actually economic in character.

[FN7]. I am not entirely certain whether Professor Bernstein intends to be offering a co-equal translation or a preferred explanation. Certain passages suggest the former: "This essay suggests another characterization ..."; "reexamines some of Suchman's most salient findings ... from Gilson's economic perspective ..."; others suggest the latter: "[A]nalyzing Suchman's findings from an explicitly economic perspective can yield insights...." See Bernstein, *supra* note 2, at 241-42.

[FN8]. See, e.g., *Metatheorizing* (George Ritzer ed., 1992).

[FN9]. Readers should note that, despite a certain degree of disciplinary cohesion, neither economics nor sociology represent unitary meta-theoretical wholes. Cf. George Ritzer, *Sociology: A Multiple Paradigm Science* (1975). Thus, although for brevity's sake the present discussion refers broadly to "sociological" and "economic" outlooks, I am in fact primarily concerned with the comparison between Professor Bernstein's orientation (which I label "economic") and my own (which I label "sociological"). While the distinctions outlined here do, indeed, recur throughout the ongoing dialogue between economics and sociology, there are many sociologists who adopt elements of the orientation that I label "economic" (see, e.g., James S. Coleman, *Foundations of Social Theory* (1990); Rodney Stark, *Sociology* (4th ed. 1992)), and there are at least a few economists who favor elements of the orientation that I label "sociological" (see, e.g., Robert H. Frank, *Passions Within Reason: The Strategic Role of the Emotions* (1988); W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-in by Historical Events*, *Econ. J.*, Mar. 1989, at 116). Further, within legal scholarship, several individuals have developed reputations as skillful polyglots who move relatively freely between the two "competing" discourses (e.g., Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 *Law & Soc'y Rev.* 837 (1990)).

[FN10]. While preferences are, technically, exogenous to the neo-classical paradigm (see, e.g., George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 *Amer. Econ. Rev.* 76, Mar. 1977), most concrete applications of economic theory treat "utility" and "monetary gain" as virtually synonymous. See Robert H. Frank, *A Theory of Moral Sentiments*, in *Decision Making: Alternatives to Rational Choice Models* 158, 179 (Mary Zey ed., 1992).

[FN11]. John W. Meyer et al., *Ontology and Rationalization in the Western Cultural Account*, in *Institutional Environments and Organizations: Structural Complexity and Individualism* 9 (W. Richard Scott & J. Meyer eds., 1994); Amartya Sen, *Behavior and the Concept of Preference*, 40 *Economica* 241 (1973). Compare Pierre Bourdieu, *Outline of a Theory of Practice* 15 (Richard Nice, trans., 1977) (on culture as habitus); Margaret M. Marini, *The Role of Models of Purposive Action in Sociology*, in *Rational Choice Theory: Advocacy and Critique* 21 (James S. Coleman & Thomas J. Fararo eds., 1992). But see Coleman, *supra* note 9; Stark, *supra* note 9 at 71.

[FN12]. Operational information is information that decision makers use to achieve pre-existing goals -- for example, to maximize expected utility with regard to exogenously-determined tastes. Constitutive information, on the other hand, consists of cultural norms, definitions and scripts that construct both decision makers and decisions -- chartering certain entities as purpose-bearing actors; imbuing those entities with particular tastes, values and objectives; and establishing for those entities menus of strategic options and typologies of situational considerations. Cf. Mark C. Suchman, *On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley* 50 (1994) (unpublished Ph.D. dissertation, Stanford University) (on file with the Oregon Law Review). Operational information tells the admiral where the enemy fleet is located; constitutive information tells the admiral what it means to be a fleet commander, what it means to face a military command decision, which issues (territorial conquest, self-defense, personal safety, honor, etc.) are legitimate considerations in such decisions, and which options are plausible and meaningful responses to which conditions. Cf. *Ambiguity and Command: Organizational Perspectives on Military Decision Making* (James G. March & Roger Weissinger-Baylon eds., 1986).

[FN13]. E.g., Bernstein, *supra* note 2, at 246-47.

[FN14]. Interview with Anonymous Attorney, July 15, 1991. See also Suchman, *supra* note 12, at 112.

[FN15]. Even when evaluating the litigiousness of a potential client, the question is less whether the company presents a suit risk to transactional partners than whether the company presents so great a suit risk that it violates the socially-constructed expectations of the Silicon Valley community.

[FN16]. Interview with Anonymous Attorney, July 9, 1991; see also Suchman, *supra* note 12, at 105.

[FN17]. See Sen, *supra* note 11; James G. March, *Decisions in Organizations and Theories of Choice*, in *Perspectives On Organization Design and Behavior* 205 (Andrew H. Van de Ven & William F. Joyce eds., 1981).

[FN18]. At least since the time of Durkheim, sociologists have argued that social norms undergird all economic transactions (including market transactions) and that, in the absence of such norms, economic activity would prove impossible. Emile Durkheim, *The Division of Labor in Society* (W.D. Halls trans., 1984) (1893); cf. Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 *Am. Econ. Rev.* 728 (1986); John Lie, *The Concept of Mode of Exchange*, 57 *Am. Soc. Rev.* 508 (1992). Economists, for their part, have suggested that competitive selection pressures may bring culture and economy into alignment by driving out misguided attempts to promulgate "inefficient" norms. See, e.g., Ellickson, *supra* note 9; cf. Gareth R. Jones, *Transaction Costs, Property Rights, and Organizational Culture: An Exchange Perspective*, 28 *Admin. Sci. Q.* 454 (1983); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984).

[FN19]. Faced with the question why standard-form contracts are used even in transactions where it would appear to be in the joint interest of the parties to alter them, Bernstein adduces additional cost advantages that are often ignored. Bernstein, *supra* note 2, at 249-51. I, on the other hand, emphasize the extent to which certain contracting practices may acquire symbolic status or become institutionalized as scripted routines within the developing community culture. See *infra* pp. 270-71.

[FN20]. Clifford Geertz, *The Interpretation of Cultures* (1973); Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 *Am. Soc. Rev.* 273 (1986).

[FN21]. Howard S. Becker, *Outsiders* (2d ed. 1973); Edwin M. Schur, *Labeling Deviant Behavior* (1971).

[FN22]. Witness antitrust analysis, e.g., Peter Asch , *Economic Theory and the Antitrust Dilemma* (1970); Roger D. Blair & David L. Kaserman , *Antitrust Economics* (1985); Terry Calvani & John Siegfried , *Economic Analysis and Antitrust Law* (2d ed. 1988); *Economics and Antitrust Policy* (Robert J. Lerner & James W. Meehan, Jr., eds., 1989).

[FN23]. Coleman , *supra* note 9, at 6 ("[O]ne of the central deficiencies in economic theory is the weakness of the linkage between [micro and macro levels of analysis], a weakness papered over with the idea of 'aggregation....'").

[FN24]. Witness Durkheim's assertion that "[social order is] more than the spontaneous agreement between individual interests....[Normative constraint] constitutes the foundation of our contractual relationships ... [and] exercises over us a regulatory action of the utmost importance, since it determines in advance what we should do and what we can demand." Durkheim , *supra* note 18, at 152-61; see also Talcott Parsons , *The Structure of Social Action* (2d ed., 1949); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *Am. J. Soc.* 481 (1985). But cf. George C. Homans, *Bringing Men Back In*, 29 *Am. Soc. Rev.* 809 (1964); Douglas W. Maynard & Thomas P. Wilson, *On the Reification of Social Structure*, in 1 *Current Perspectives in Social Theory* 287 (Scott G. McNall & Gary N. Howe eds., 1980).

[FN25]. It is important to recognize that an assertion of structural embeddedness need not deny the reciprocal role of human agents in recreating and transforming the social context that surrounds, empowers and constrains them. The differentia between economic and sociological views is less that economics is voluntaristic and sociology deterministic than that economics tends to derive social structure from individual action within an atomistic state-of-nature, whereas sociology tends to depict both action and structure as interacting elements within an unfolding historical dynamic. See *infra* pp. 270-72. This is the gist of Marx's famous dictum that "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past." Karl Marx , *The Eighteenth Brumaire of Louis Bonaparte* 15 (Int'l Publishers 1963) (1852). Recently, a concern with this "duality of structure" has emerged as a central theme in several leading works of historical sociology. See, e.g., Anthony Giddens, *The Constitution of Society* (1984); William H. Sewell, *A Theory of Structure: Duality, Agency, and Transformation*, 98 *Am. J. Soc.* 1 (1992). My own research, too, highlights such issues -- primarily in analyzing the ways in which Silicon Valley law firms transformed the region's inter-organizational environment while, at the same time, being themselves vulnerable to ongoing selection and construction pressures within that environment. See, e.g., Suchman, *supra* note 12, at 3 ("[L]aw firms are creations as well as creators of [Silicon Valley's] shifting community structure, simultaneously shaping and reflecting surrounding flows of resources and information in a complex co- evolutionary dance.").

[FN26]. Another way to frame this contrast is to say that when sociologists discuss social interaction, they tend to be more concerned than economists with the impact of "initial endowments" -- including the endowments associated with individuals' positions in larger social structures. I would like to thank my colleague Gerald Marwell for suggesting this alternative formulation.

[FN27]. While Bernstein also mentions lawyers' structural position in the market, her account sees structure primarily as a source of price advantage; issues of professional monopoly, legal ethics, and elite networks lie largely beyond the scope of her analysis. Bernstein, *supra* note 2, at 249-51.

[FN28]. John L. Nesheim , *High Tech Startup: The Complete How-To Handbook for Creating Successful New High Tech Companies* 20-22 (1992).

[FN29]. It seems unlikely that lawyers would enjoy quite so much influence if they were perceived as officers of the state, agents of the venture capital community, or self-interested head-hunters.

[FN30]. Cf. Mark S. Granovetter, *The Strength of Weak Ties*, 78 *Am. J. Soc.* 1360 (1973); John F. Padgett & Christopher K. Ansell, *Robust Action and the Rise of the Medici, 1400-1434*, 98 *Am. J. Soc.* 1259 (1993).

[FN31]. Bernstein, *supra* note 2, at 250 n.48.

[FN32]. My previous research argues for the somewhat broader claim that Silicon Valley law firms have not simply perpetuated the existing regime, but have, in fact, played a significant role in constructing that regime as well -- primarily through the combined impact of their dealmaking and counseling activities during the community's early, formative years. See, e.g., Suchman, *supra* note 12, at 2-3; Mark C. Suchman, *On the Role of Law Firms in the Structuration of Silicon Valley* (University of Wisconsin-Madison Institute for Legal Studies, Dispute Processing Research Program Working Paper No. DPRP 11-7, April 1994).

[FN33]. Professor Bernstein seems to include the domestication of unruly clients under the rubric of minimizing relational costs. Bernstein, *supra* note 2, at 249-50. This terminological device, however, obscures the distinction between coordinating behaviors for the common good and suppressing challenges to conventional authority. Silicon Valley lawyering contains elements of both; however, to collapse the two into "simply another species of transaction cost" is to impose the economist's voluntaristic-weltanschauung-by fiat.

Ironically, Bernstein conveys the impression that my research depicts Silicon Valley contracts as evenhandedly balancing the interests of entrepreneurs and investors, whereas her economic analysis would predict that the incentives of the drafting process should consistently skew these contracts toward the investors' side. While I applaud her willingness to acknowledge the impact of social structures and initial endowments in this particular setting, I believe that she somewhat mischaracterizes my empirical claims. In my description of "financing archetypes," I argue that these general models are not clearly biased toward either entrepreneurs or investors, in the abstract. I do not, however, argue that the use of a particular archetype in a particular transaction will never favor one party over the other. As Bernstein suggests, the equities of any given transaction will depend on a trade-off between price and other contractual provisions -- as well as on the specific characteristics of the transacting parties. My claim is only that the general archetypes, themselves, do not seem inherently to favor one side or the other across all implementations.

[FN34]. Interview with Anonymous Attorney, July 1, 1991.

[FN35]. Cf. Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988); Richard L. Abel, *Lawyers, in Law and the Social Sciences* 369 (Leon Lipson & Stanton Wheeler eds., 1986); Susan Sterett, *Comparing Legal Professions*, 15 *Law & Soc. Inquiry* 363 (1990).

[FN36]. This skepticism, although predominant, is not universal in sociology. For a rosier view, see Kingsley Davis, *Human Society* (1949); Kingsley Davis & Wilbert E. Moore, *Some Principles of Stratification*, 10 *Am. Soc. Rev.* 242 (1945).

[FN37]. See, e.g., Robert K. Merton, *Social Theory and Social Structure* 73 (1957); Talcott Parsons, *The Social System* (1951).

[FN38]. This tension between economics and sociology recalls the turn-of-the-century European "Methodenstreit" (methodology struggle), in which the Austrian School of Marginal Economics, led by Karl Menger, debated the German Historical School, led by Gustav von Schmoller. Central to this struggle was the question of whether general economic principles can be meaningfully abstracted from the concrete uniqueness of particular historical settings. Neo-classical economics traces its ancestry to the universalizing claims of the Austrians, while sociology (via Max Weber) incorporates substantial elements of the Germans' more historicist views. See Joseph A. Schumpeter, *History of Economic Analysis* 814 (1954); Weber, *supra* note 5.

[FN39]. E.g., Paul A. David, *Understanding the Economics of QWERTY: The Necessity of History*, in *Economic History and the Modern Economist* 30 (William N. Parker ed., 1986); W. Brian Arthur, *Competing Technologies, Increase Returns, and Lock-in by Historical Events*, 99 *Econ. J.* 116 (1989); W. Brian Arthur, *Positive Feedbacks in the Economy*, *Sci. Am.*, Feb. 1990, at 92.

[FN40]. Readers should note that the exogenous factors that economists label "coincidence" and "random fluctuation" often stem from processes which sociologists explicitly theorize under headings such as power, culture, and social structure.

[FN41]. David, *supra* note 39; see also Paul A. David, *Clio and the Economics of QWERTY*, 75 *Am. Econ. Rev.* 332 (1985).

[FN42]. Bernstein, *supra* note 2, at 249-50. With regard to Bernstein's specific claims, it is perhaps worth noting that the asserted "benefits" of standard-form contracting raise questions about the economic view of contracts as carefully engineered governance structures. The reduction of negotiation costs and the avoidance of transactional breakdowns are certainly valid objectives; but these goals only justify adopting boilerplate contracts if hand-tailoring would add little economic value to the deal -- a position somewhat at odds with the image of legal drafting as transaction cost engineering. Similarly, although the signalling of post-deal intentions through standardized contracting is an interesting and potentially important phenomenon, it can hardly be characterized as a reduction in transaction costs. Indeed, the need to "send a signal" by acquiescing to economically inappropriate governance structures would seem to be precisely the kind of market failure that one might expect lawyers, as reputational brokers, to alleviate. In short, Bernstein's discussion of standard-form contracting suggests (correctly, I believe) that Silicon Valley lawyers are helping their clients to get deals done; however, it says little about whether the deals themselves are "better" than they would be if hand-tailoring were the norm and good intentions were conveyed through other, non-contractual symbols.

[FN43]. See James G. March & Johan P. Olsen, *Ambiguity and Choice in Organizations* (2d ed. 1979); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 *Am. Soc. Rev.* 147 (1983).

[FN44]. E.g., Berger & Luckmann, *supra* note 4; John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *Am. J. Soc.* 340 (1977).

[FN45]. In addition to signalling intentions, the adoption of "standard" contractual provisions may reduce the risk of misunderstanding between the parties and may increase the likelihood that future disputes will fall into "familiar" categories governed by community norms. Once again, however, efforts to promote such stable expectations -- like efforts to convey clear signals -- are likely to elevate the level of path dependence in a community's contractual regime, creating ample opportunities for sociological coincidence to displace economic efficiency as the determinant of systemic development.

[FN46]. Cf. Charles Camic, *The Matter of Habit*, 91 *Am. J. Soc.* 1039 (1986).

[FN47]. See, e.g., Bernstein, *supra* note 2, at 242 ("[A]nalyzing Suchman's findings from an explicitly economic perspective can yield insights into what it means to be a good transactional lawyer....").

[FN48]. Ronald J. Gilson, [Value Creation by Business Lawyers: Legal Skills and Asset Pricing](#), 94 *Yale L.J.* 239, 254 (1984).