

# Art or Science?

## Understanding Medicine and the Common Law

*John A. Harrington\**

Those of you who have either had or seen the process of a magnetic resonance imaging (MRI) scan cannot fail to be impressed with the scientific or technologic marvel of this huge diagnostic machinery. After a relatively noisy series of manoeuvres, the machine turns out a beautiful set of images on film. That is the science. What happens next, though, is that the films are given to a radiologist who gazes at them, puzzles for awhile and then gives an opinion on what they might mean. That is the art.<sup>1</sup>

### I. Introduction

The relationship between law and medicine has been considered from a number of perspectives. Dominant among these is ethics, conceived of as a normative system distinct from and superior to both practices. Particular features of health care provision and particular forms of legal regulation can on this model be evaluated by reference to the values and principles of various moral philosophies.<sup>2</sup> Such theorizing normally takes the content and modes of medical knowledge and practice as given and proceeds directly to examine their significance for individuals and the wider society. Chiefly in dispute is the nature of moral personhood: when it begins, when it ends, what procedures and rules it entails, and so on.<sup>3</sup> The emphasis is, thereby, more upon questions of ontology than of epistemology. The substance of medical knowledge is only opened up to philosophical consideration at its experimental margins.<sup>4</sup> Even then the chief object of inquiry is to ascertain the noumenal implications of increasing medical

---

\*John A Harrington is a Jean Monnet Fellow, European University Institute, Florence, Italy. The author is grateful to Gavin Anderson, John McEldowney, Ambreena Manji, and Gary Watt for discussing with him the ideas contained herein. The comments of Barbara von Tigerstrom are also gratefully acknowledged. All responsibility is the author's.

<sup>1</sup>R. Marks, "The Art, the Science and the Practice of Dermatology in the Next Millenium" (1999) 38 Int'l J. Dermatology 343 at 344.

<sup>2</sup>One of the most influential examples of this is to be found in T.J. Beauchamp & J.F. Childress, *Principles of Biomedical Ethics*, 4th ed. (Oxford: Oxford University Press, 1994).

<sup>3</sup>This, for example, is the starting point of H.T. Engelhardt, *The Foundations of Bioethics* (New York: Oxford University Press, 1986).

<sup>4</sup>A noteworthy exception to this is E. Pellegrino & D. Thomasma, *A Philosophical Basis of Medical Practice: Toward a Philosophy and Ethic of the Healing Professions* (New York: Oxford University Press, 1981).

knowledge and advances in medical technology. Cloning, embryo research and animal-to-human transplantation, for example, are seen as threats to stable understandings of what it is to be a human being and a moral person.<sup>5</sup> Law is usually taken to have an instrumental role: that of protecting the moral subject against the unethical and unjust actions of others and of restraining progress which threatens the ontological foundations of human personhood and of society.<sup>6</sup>

Sociological writing under the particular influence of Max Weber has, by contrast, focussed upon the legal and medical professions as elite social groupings and upon professionals as privileged economic actors.<sup>7</sup> On this view doctors and lawyers seek to monopolize the provision of valuable services to the rest of society, by circumscribing or de-legitimizing the work of rival practitioners and the knowledge of laypersons. The law is seen as an important resource in achieving and legitimating this occupational closure and the status and economic gains which go with it.<sup>8</sup> Most importantly, licensing requirements and the state-supported monopoly are anchored in legislation. However, although largely produced by Anglo-American scholars, this work has not concerned itself to any significant extent with the relevance to professionalization of the common law, the most distinctive element of the legal system in Anglophone countries.

This essay seeks to develop these hitherto neglected perspectives. On the one hand, it moves beyond traditional philosophical writing in advancing a tentative understanding of the legal regulation of medicine based upon widely accepted epistemological foundations of both practices. It seeks to explain the specific similarities which allow medicine and the law to interact as practices and as forms of knowledge. On the other hand, it expands upon the familiar sociological literature by focussing on the relationship between medicine and the common law. The discussion is structured as follows. First we note the distinctively favourable liability regime to which medicine is subjected in English law. Reasons for this – none of them wholly satisfying – can be found in the shared background of doctors and judges, in the political origins of the British health care system, and in judicial concern to conserve scarce resources. A more profitable line of inquiry focuses on the similarities between medicine and the common law, as constructed in the discourses of their leading practitioners. Through a representative study, we consider the manner in which a variable ideal of medicine has been constructed out of an opposition between art and science models of practice. In each case the profession as a whole or groups within it have sought to attain specific material and symbolic objectives. Thereafter an attempt is made to reconstruct these strategic

---

<sup>5</sup>See e.g. H. Jonas, *Philosophical Essays: From Current Creed to Technological Man* (Chicago: University of Chicago Press, 1980).

<sup>6</sup>A classic statement of this position is to be found in I. Kennedy, *The Unmasking of Medicine* (London: Allen & Unwin, 1981).

<sup>7</sup>See particularly, F. Parkin, *Marxism and Class Theory* (London: Tavistock, 1979); and T.J. Johnson, *Professions and Power* (London: Macmillan, 1972).

<sup>8</sup>See A. Witz, *Professions and Patriarchy* (London: Routledge, 1992) at 53-69.

discourses in philosophical terms. From the work of Michael Oakeshott and Michael Polanyi we derive a number of ideal typical elements of medicine as an art. These can also be seen to feature strongly in judicial and theoretical characterizations of the common law as a practical activity and as an implicit body of knowledge. We rely on the epistemological writings of Karl Popper to help clarify the central features of medicine as a pluralistic and progressive science. The common law too has been shown to obey an evolutionary dynamic. At a quotidian level the engine of this progress is frequently taken to be the phenomenon of plural and minority judgments in the higher courts. We conclude by commenting briefly on the ideological value of talk about art and science in medicine and law. The varied elaboration of professional self-understandings does not just serve to legitimate the status of doctors and lawyers. It also articulates the ideals of dominant socio-economic groups and, thus, contributes to the achievement of consensus in unequal societies.

## II. Judging Medicine in English Law

The English courts have traditionally set the standard of care by which doctors' work is judged in terms particularly favourable to the medical profession. Under the well-known "Bolam test" a doctor will not be held liable in negligence if they have conformed to the practice of a "responsible body of medical practitioners."<sup>9</sup> This practice does not even have to be followed by a majority of professionals working in the same field as the defendant. All that is required is that the practice have a logical basis, meaning that it is only proposed after a careful risk-benefit analysis.<sup>10</sup> In consequence, professional custom as attested to by expert witnesses almost always determines what is culpable and what not in the context of diagnosis, treatment and the disclosure of risks.<sup>11</sup> This is more or less exceptional as regards professions generally in English law.<sup>12</sup> It is the subject of more or less plausible explanations which are set out in the following passages.

What we might term the "*class conspiracy*" theory has been advanced by a leading Australian judge who saw judicial lenience as "arising from the class system and the hierarchical nature of English society and reflecting the unwillingness of one profession ... to countenance ordinary people challenging the rules laid down by another profession."<sup>13</sup> However, this of itself does not explain

---

<sup>9</sup>The test comes from the decision of McNair J. in *Bolam v. Friern Hospital Management Committee*, [1957] 1 W.L.R. 582 (Q.B.).

<sup>10</sup>The responsible body of opinion must have a "logical basis," meaning that it has to have been preceded by an analysis of risks: *Bolitho v. City and Hackney Health Authority*, [1988] A.C. 232 (H.L.). This is a fairly weak qualification in practice.

<sup>11</sup>For a recent discussion, see J. Miola & M. Brazier, "Bye-Bye Bolam: a Medical Litigation Revolution?" (2000) 8 Med. L. Rev. 85.

<sup>12</sup>*Edward Wong Finance Co Ltd v. Johnson Stokes & Master*, [1984] 1 A.C. 296 (P.C.); *Cavanagh v. Ulster Weaving Co.*, [1960] A.C. 145 (H.L.).

<sup>13</sup>M. Kirby, "Patients' Rights - Why the Australian Courts Have Rejected 'Bolam'" (1995) 21 J. Med. Ethics 5.

the courts' exceptional response to doctors, as opposed to architects or even solicitors. A crude sense of class loyalty should bind the judiciary to members of these other professions too, yet the relevant rules of the common law evince considerably less solicitude of their interests.

A more politically informed understanding would note the *implicit contract* between the medical profession and the Labour government which ceded control of health care resources to doctors in return for their participation in the National Health Service (NHS) from 1948 on.<sup>14</sup> It can be hypothesized accordingly that the courts sought to reinforce the macro-contract by preserving the autonomy of doctors in the micro-situation of decisions as to diagnosis, therapy and disclosure. This theory explains too little, however. Judicial tenderness towards medical defendants was already evident in the decades before 1948.<sup>15</sup> Furthermore, it has survived several fundamental changes in the structure and governance of the NHS since then, changes which have diminished the authority of the medical profession within the health care system.<sup>16</sup>

The "*scarce national resources*" theory reflects the persistent concern among the judiciary that funds be retained within the NHS for the primary purpose of health care rather than effectively reallocated to injured patients in the form of damages.<sup>17</sup> Negligence decisions also note the importance of not deterring "young men from entering the profession" through fear of litigation.<sup>18</sup> This theory is certainly plausible as regards judicial motivation. However, it is insufficiently specific as an account of judicial reasoning. Since the early 1980s, English courts have been wary of basing their negligence decisions on explicit grounds of policy.<sup>19</sup> Reasonableness tests are preferred which reflect both the nuances of the activity under scrutiny and the constraints of precedent.<sup>20</sup> Thus, an adequate explanation of the origins of the Bolam test will have to be based on the distinctive features of medical activity, as reconstructed by the law.

---

<sup>14</sup>R. Klein, *The New Politics of the NHS*, 3d ed. (London: Longman, 1995) at 1-27.

<sup>15</sup>Consider, for example, the decisions in *Marshall v. Lindsey County Council*, [1935] 1 K.B. 516 (C.A.); and *Hillyer v. The Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820 (C.A.).

<sup>16</sup>For a discussion of these changes, see Klein, *supra* note 14 at 147-54.

<sup>17</sup>*Whitehouse v. Jordan*, [1980] 1 All E.R. 650 (C.A.), Denning M.R.; *Wilsher v. Essex Area Health Authority*, [1986] 3 All E.R. 801 (C.A.), Mustill L.J.. In a closely related context it has been held that an application for judicial review of NHS allocation decisions is likely to fail since "a court [cannot] properly express opinions upon the way in which national resources are allocated or distributed... The courts of this country cannot arrange the lists in the hospital ...": *R v. Central Birmingham Health Authority, ex parte Collier*, (C.A.) 6 January 1988 per Stephen Brown L.J.) extracted in I. Kennedy & A. Grubb, *Medical Law. Text with Materials*, 2d ed. (London: Butterworths, 1994) at 428-29.

<sup>18</sup>*Whitehouse v. Jordan, ibid.* at 658d, Denning M.R. This has been discussed in terms of a "need to secure a socially valued service" in J. Montgomery, "Medicine, Accountability and Professionalism" (1989) 16 J. L. & Society 319 at 328-30.

<sup>19</sup>M. Jones, *Textbook on Tort*, 7th ed. (London: Blackstone, 2000) at 41.

<sup>20</sup>*Ibid.* at 174.

By contrast with the foregoing explanations, the theory of “*identification*” focusses specifically on the formal similarities between medical and legal practice. As Allen Linden put it: “[e]vidence of general practice is accorded more respect in medical matters than it receives in other types of cases because there is a greater judicial trust in the reasonableness of the practices of a sister profession than there is in the methods of commercial men.”<sup>21</sup> Both medicine and law can be shown to be oriented to uncertain phenomena which call forth the exercise of fine judgment; both are taken to exhibit progress through a pluralistic contest of ideas. There is much in this explanation. Lord Denning, for one, took a “there but for the grace of God go I” approach to medical negligence cases.<sup>22</sup> In fact, the present essay is an attempt to reconstruct judicial intimations of the similarity between medicine and the law. It explores the “epistemic underscore”<sup>23</sup> of both disciplines through an elaboration of the distinction, familiar from medical rhetoric, between art and science.

### III. The “Art-Science” Distinction in Medicine

In exploring the distinction between art and science in medicine we turn to medical history, not in search of definitional certainty, but in order to find examples of the work done by both terms in specific professional and social contexts. Both have been deployed strategically in a discourse of opposites in order to advance the interests of the whole profession or factions within it.

In the early decades of the nineteenth century general practitioners and provincial doctors in England promoted an idea of scientific medicine as a means of overcoming the social and occupational barriers to their advancement erected by the metropolitan, consultant elite.<sup>24</sup> Tertius Lydgate, a character in George Eliot’s novel *Middlemarch*, is a typical example of such reforming doctors.<sup>25</sup> Lydgate had studied first in Edinburgh, then in Paris, where he encountered the new science of pathological anatomy. In England, by contrast, “this was a dark period” for medicine, when the “venerable colleges used great efforts to secure purity of knowledge by making it scarce and to exclude error by a rigid exclusiveness in relation to fees and appointments.”<sup>26</sup> Rejecting the “empty bigwiggism” of London, Lydgate “was absorbed ... in the ambition of making his life recognized as a factor in the better life of mankind like other heroes of science who had nothing but an

---

<sup>21</sup>A.M. Linden, “Custom in Negligence Law” (1968) 11 Can. Bar J. 151 at 157.

<sup>22</sup>*Whitehouse v. Jordan*, *supra* note 17 at 658, Lord Denning M.R.

<sup>23</sup>This phrase is used in a related context in W.T. Murphy, “The Oldest Social Science? The Epistemic Properties of the Common Law Tradition” (1991) 54 Mod. L. Rev. 182.

<sup>24</sup>See J.H. Warner, “The Idea of Science in English Medicine: The ‘Decline of Science’ and the Rhetoric of Reform, 1815-1845” in R. French & A. Wear, eds., *British Medicine in an Age of Reform* (London: Routledge, 1991) 136.

<sup>25</sup>Its fidelity is confirmed by studies in the history of medicine; for a useful summary, see C. Lawrence, *Medicine in the Making of Modern Britain 1700-1920* (London: Routledge, 1994) at 27 [hereinafter *Making of Modern Britain*].

<sup>26</sup>G. Eliot, *Middlemarch* (Harmondsworth: Penguin, 1994) at 141.

obscure country practice to begin with.”<sup>27</sup> The contrast between progressive, scientific medicine and its unscientific counterpart is manifest in the very different diagnoses and treatments offered by Lydgate and his traditionalist rival Wrench. On being called to attend the young Fred Vincy, Wrench hastily concludes that the stricken man is suffering from “a slight derangement.” He prescribes and provides, at a profit to himself, “the usual white parcels which this time had black and drastic contents.”<sup>28</sup> When these prove useless, Lydgate is called. He observes the patient closely and hears “a narrative which insisted on every point of minor importance.” As a result Vincy is diagnosed precisely as suffering from “the pink-skinned stage of typhoid fever,” exacerbated by taking the wrong medicines. Immediate rest is ordered, along with the use of “various appliances and precautions ... about which Lydgate was particular.”<sup>29</sup> In a couple of days Fred Vincy is cured.<sup>30</sup> What is important in this incident is not so much Lydgate’s fictional success as the positive dimensions of scientific medicine which it communicates: careful observation and reasoning towards an inductive diagnosis, contrasted with hunch; systematic experimentation and revision of knowledge, contrasted with stagnation; a dynamic of progress which identifies medicine with public well-being, contrasted with the financial exploitation of patients.

By the mid nineteenth century scientific medicine had been broadly accepted by the leaders of the profession. Indeed it provided the cognitive and corporate unity which in turn led to the legal enshrinement of the medical monopoly in 1858.<sup>31</sup> Over the following century the social and material status of the profession profited handsomely from scientific breakthroughs in physiology, bacteriology and pharmacology.<sup>32</sup> Neither factionalism within the profession, nor threats to its autonomy from without were entirely eliminated, however; and it is in the defensive strategies of practitioners thus concerned that we find the fullest articulation of the art conception of medicine. As Lawrence has shown, many late Victorian practitioners resisted experimental physiology and the introduction of new medical devices with epistemological arguments which privileged experience, common sense and personal character over technical and generalizable knowledge. For instance, Professor Frederick Roberts of University College London, writing in the *British Medical Journal* in 1892, ridiculed the notion of organ specific disorders. In his view, such theories were inspired by a scientific monomania, quite alien to the holistic philosophy of English medicine and the generalism of its gentleman

---

<sup>27</sup>*Ibid.* at 160.

<sup>28</sup>*Ibid.* at 250.

<sup>29</sup>*Ibid.* at 251.

<sup>30</sup>Unsurprisingly Lydgate’s “showy foreign ideas” and his social impudence provoked both scepticism and resentment among his rural peers. Eliot has Chicheley, the coroner, say that “[y]ou never hear of reform, but it means some trick to put in new men,” a comment which also points up the material dimension to struggles over medical knowledge and links them with the political conflict between radicalism and reaction in the 1820s and 30s: see *ibid.* at 152.

<sup>31</sup>*Making of Modern Britain*, *supra* note 25 at 56.

<sup>32</sup>R. Porter, *The Greatest Benefit to Mankind. A Medical History of Humanity from Antiquity to the Present*. (London: Harper Collins, 1997) at 428.

practitioners.<sup>33</sup> Instruments such as the sphygmometer, for measuring blood pressure, or the better-known stethoscope, were denounced as threatening to “pauperize the senses and weaken clinical acuity.”<sup>34</sup> The doctor was better off relying “upon the information yielded by the trained finger ... [which], if not very precise, would be sufficient for all practical purposes.”<sup>35</sup> In response to the initiation of controlled clinical trials of new drugs in the 1930s and 40s critical commentators again stressed the limited applicability of science to medicine.<sup>36</sup> Professor Lionel Whitby of Cambridge informed readers of the *Lancet* in 1946 that, “it is true that medicine will never be an exact science because the normal variations in individuals have such a wide range that automatic and mechanical treatment is prohibited.”<sup>37</sup>

On the art view, therefore, medical knowledge is embodied, personal, and ineffable. Science provides a base for practice, but at the bedside it must yield to the fine and irreducible judgment of the experienced practitioner. This emphasis on “producer virtualities”<sup>38</sup> remains a feature of polemics concerning medical knowledge up to the present day. As much has been demonstrated by Anderson in his account of a failed attempt to replace the traditional, impressionistic medical record with a computer-generated system at the Royal Melbourne Hospital in the 1970s.<sup>39</sup> The new system was designed by clinical scientists to force doctors to make explicit, logical connections between all the available clinical knowledge and the individual patient’s diagnosis. Perhaps surprisingly, the project’s failure was not due to any crucial experimental result which demonstrated its inefficacy. Rather, computerization was perceived to impinge upon physicians’ “symbolic domain of competence” by downgrading craft knowledge and clinical memory. Though keen to have science ratify their judgments, the medics were unwilling to let it restructure the clinical encounter completely.<sup>40</sup> Art values have also been reaffirmed programmatically in an attempt to extract contemporary medicine from its perceived crisis. In a recent popular critique James Le Fanu traces this crisis to the profession’s hubristic desire for scientific knowledge and its concomitant willingness to treat patients merely as bundles of clinical material.<sup>41</sup> A re-

---

<sup>33</sup>C. Lawrence, “Incommunicable Knowledge: Science Technology and the Clinical Art in Britain 1850-1914” (1985) 20 *J. Contemp. Hist.* 503 at 513.

<sup>34</sup>*Ibid.* at 505.

<sup>35</sup>Quoted in *ibid.* at 516.

<sup>36</sup>This was an important challenge to existing therapeutics, much of which had remained unchallenged since the Middle Ages: see D. Armstrong, “Clinical Sense and Clinical Science” (1977) 11 *Soc. Science & Med.* 599 at 599.

<sup>37</sup>Quoted in *ibid.* at 600.

<sup>38</sup>See R. Whitley, “The Transformation of Expertise by New Knowledge: Contingencies and Limits to Skill Scientification” (1988) 27 *Soc. Science Information* 391 at 403.

<sup>39</sup>W. Armstrong, “The Reasoning of the Strongest: The Polemics of Skill and Science in Medical Diagnosis” (1992) 22 *Soc. Stud. of Science* 653. For other examples, see M. Balint, “The Other Part of Medicine” [7 January 1961] *The Lancet* 40; S.C. Schoenbaum, “Improving the Art and Science of Medical Practice” (1998) 10 *Int’l J. for Quality in Health Care* 81.

<sup>40</sup>Armstrong, *ibid.* at 672.

<sup>41</sup>J. Le Fanu, *The Rise and Fall of Modern Medicine* (London: Abacus, 1999) at 196.

moralization of clinical practice is necessary to restore public trust in medicine. This is only possible, however, on the basis of an epistemic reorientation of medical activity away from the present “obsession with the new” and toward “the wisdom of the past”.<sup>42</sup>

#### IV. The “Art” Model: Practical Knowledge

In this section we attempt to reconstruct the idea of medicine as an art using the insights of the philosophers Michael Oakeshott and Michael Polanyi. Oakeshott identifies knowledge in modern societies as having a dual form: technical and practical.<sup>43</sup> Technical knowledge is explicit and precise. It can be formulated in rules of the sort contained in cookery books and the Highway Code. By contrast, practical knowledge exists only in use. As with the knowledge actually used in cooking and driving, it cannot be formulated in rules. Polanyi characterizes this as personal knowledge, subsidiary to that of which the subject is focally or consciously aware.<sup>44</sup> It forms the indispensable “tacit coefficient” of all knowledge and of all practice based on that knowledge. For both philosophers practical (or personal) knowledge is logically prior to technical knowledge: the rules and maxims of the latter are merely an ex post facto abridgement of the former.

This demotion of explicit knowledge has a number of important implications.

First, the authentic form of knowledge is that which is personal to the knower. Polanyi in particular emphasizes the significant cognitive input of the individual subject. He rejects external criteria of objectivity on the basis that such criteria have no referent. There is no detached, universal knowledge to which they apply. A commitment to finding the truth on the part of an investigator is the only warrant of the objectivity of the knowledge that he or she produces.<sup>45</sup>

Second, whereas technical knowledge is taught and learned in the abstract, practical knowledge is imparted and acquired by imitative participation in the relevant activity.<sup>46</sup> Explicit knowledge can only be transmitted through books and other written materials, tacit knowledge through a period of apprenticeship to a master.

Third, technical knowledge is of its nature equally available to the veteran, the newcomer and even the uninvolved layperson. By contrast, since practical knowledge is acquired over time, those who know most about a given practice will

---

<sup>42</sup>*Ibid.* at 408.

<sup>43</sup>M. Oakeshott, *Rationalism in Politics and Other Essays*, 2d ed. (Indianapolis: Liberty Fund, 1991).

<sup>44</sup>M. Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (London: Routledge, 1958) at 55.

<sup>45</sup>*Ibid.* at 65.

<sup>46</sup>Polanyi refers to the latter as “mimetic transmission”: *ibid.* at 206.

be those who have been involved in it for the longest time. Experience, therefore, should determine seniority within a given discipline.

Fourth, the significance of individual experience has as its corollary the pre-eminent status of tradition as a storehouse of wisdom and as a guide to future activity. Apprenticeship is first and foremost an initiation into the ineffable traditions of the particular discipline. These are not static however. For Oakeshott, each tradition represents “a flow of sympathy,” an ongoing series of attempts to pursue intimations revealed in present practice.<sup>47</sup> This in turn suggests a constraint upon the “commitment” theory of objectivity which was mentioned above. Knowledge can only be extended or practice modified in ways which cohere with the traditions of the discipline.

Fifth, reading the previous two points together, we can conclude that those best able to testify to the traditions of a discipline at any given time are those with the greatest personal experience of it. This means that they are the best judges of what is and is not an authentic instance of the practice. In Polanyi’s terms they constitute an “organized consensus” which distinguishes authoritatively between, for example, the scientific and the unscientific.<sup>48</sup>

In the following section we consider the extent to which these ideal-typical attributes of medicine as an art are reflected in the historic self-understandings of common lawyers.

## V. The Common Law as Art: Tradition and Judgment

The common law has long been taken to be a form of practical knowledge.<sup>49</sup> Indeed Polanyi himself argued that it was “the most important system of reasoned traditional activities.”<sup>50</sup> As *lex non scripta* the common law exists before and beyond the judgments in which it is applied.<sup>51</sup> In fact the decision of the individual judge, on this view, does not itself amount to law. Rather it is (merely) the opinion of an expert as to what the law is.<sup>52</sup> As such the content of judicial reasoning is inherently contingent and revisable: there is no “possibility of a court, however elevated, reaching a final, authoritative statement of what the law is in a general abstract sense.”<sup>53</sup> Not only this, it is even possible that the judge involved may give

---

<sup>47</sup>Oakeshott, *supra* note 43 at 15.

<sup>48</sup>Polanyi, *supra* note 44 at 163.

<sup>49</sup>For a recent discussion, see M. Loughlin, “Rights Discourse and Public Law Thought in the United Kingdom” in G.W. Anderson, ed., *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (London: Blackstone, 1999) 193.

<sup>50</sup>Polanyi, *supra* note 44 at 54.

<sup>51</sup>For a discussion of this with particular reference to work of Coke, Hale, Blackstone and Burke, see G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) at 37ff.

<sup>52</sup>*Ibid.* at 9.

<sup>53</sup>A.W.B. Simpson, “The Common Law and Legal Theory” in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence (2nd series)* (Oxford: Clarendon, 1973) 77 at 90.

an incorrect explanation of what he or she has done in the case itself. This “essentially shadowy character of the common law”<sup>54</sup> clearly distinguishes it from both English statute law and the codes in force in civilian jurisdictions. Critics of the common law, usually proponents of codification such as Jeremy Bentham, held that it was not law at all since it could not be given a fixed verbal formulation.<sup>55</sup> The resulting uncertainty was at one and the same time detrimental to the general welfare and beneficial to an elite caste of lawyers, who alone were able to report on what the law was. Bentham’s legal theories were, thus, of a part with his other plans for the rationalization of society as a whole. It is worth noting, in this connection, that these plans marked Bentham out for scathing criticism more than a century later by Michael Oakeshott.<sup>56</sup> The work of the utilitarian philosopher anticipated the rationalist elevation of technical knowledge which Oakeshott deplored in his own contemporaries. The rules contained in such codes were mere abridgements, equivalent to grammarians’ rules which summarize but can never sum up the living languages (or laws) to which they refer.<sup>57</sup>

The common law can be seen as an art in application, as much as in form. This has two related dimensions: namely, that cases arising are unique; and that the decision of each is a matter of fine and irreducible judgment. It is not unusual for judges to refer to the novelty of the case before them and to limit the precedential value of their decision to a very specifically defined type of fact-situation. But this flight into particularism is not necessarily a bad faith attempt to evade the burden of establishing and following precedents. Just as no two patients presenting for diagnosis are completely alike, so no two cases are wholly comparable. Indeed it is the concern of both medicine and law with a variable subject matter which distinguishes them from more theoretical or speculative sciences, like physics and chemistry. Each of the former, as a non-comprehensive “science of particulars,” requires the exercise of an inevitably fallible judgment.<sup>58</sup> Lawyers do not reason entirely by deduction or by induction. The mass of legal material, and the ineffable nature of the common law make this impossible. Instead, as Stone observed, they operate an informal logic of analogy, which he labels “paraduction.” This involves “the ferreting out from particular instances of those resemblances which need not belong to every particular of a kind, but which some bear to others but not necessarily to all, like family resemblances.”<sup>59</sup> The ability to reason effectively in this manner requires the cultivation of skills of discrimination and distinction; the development, that is, of a “feel” for the similarities and dissimilarities between cases. As we have seen, medical practitioners also commonly affirm the primacy of personal experience as a basis for knowledge and action. To paraphrase Geertz,

---

<sup>54</sup>*Ibid.* at 87.

<sup>55</sup>Postema, *supra* note 51 at 290.

<sup>56</sup>Oakeshott, *supra* note 43 at 140-41.

<sup>57</sup>Simpson, *supra* note 53 at 94.

<sup>58</sup>For an illuminating discussion, see S. Gorovitz & A. MacIntyre, “Toward a Theory of Medical Fallibility” (1976) 1 *J. Med. & Phil.* 51.

<sup>59</sup>R. Stone, “Ratiocination not Rationalisation” (1965) 74 *Mind* 463 at 477-478.

both doctors and “lawyers are connoisseurs of cases in point, cognoscenti of matters in hand.”<sup>60</sup>

How is this connoisseurship, this judgment to be taught? As Hale wrote, “[m]en are not born common lawyers, neither can the bare exercise of reason give a man a sufficient knowledge of it.”<sup>61</sup> The “artificial reason” of the common law could not be acquired through the study of systematic or generalized principles either. In fact it was just this type of education in technical knowledge which Oakeshott condemned as useless “training.”<sup>62</sup> Rationalists started from the ideal of an empty mind, a blank sheet on which knowledge could be directly imprinted. If, as is always the case in reality, the mind is not empty, the teacher should administer a “mental purgative” and start afresh.<sup>63</sup> However, nothing of any worth could be imparted in this manner. By definition, ineffable or tacit knowledge could not be taught directly but only through a lengthy initiation into the traditions of the relevant discipline. Thus, common lawyers had long been educated by apprenticeship to admitted practitioners. The pre-eminence of this model was however, challenged in the nineteenth century by the rise of academic law in England.<sup>64</sup> Proponents of the latter were frequently Benthamite utilitarians. They regretted that the law had nothing comparable to British medical schools, which provided a thorough scientific education as a prelude to an apprenticeship on the wards.<sup>65</sup> However, as Cocks shows, reform, if not wholly thwarted, was certainly domesticated and weakened by conservatives in the profession.<sup>66</sup> Their arguments emphasized practical experience over formal learning. Some went as far as to suggest that “the only real test of a good lawyer was success in practice - examinations were irrelevant.”<sup>67</sup>

## VI. The “Science” Model: Progress Through Pluralism

We have seen that the idea of medicine as a science has also been deployed by the medical profession (or factions within it) to defend its social status and occupational privileges. It is central to this idea that medicine demonstrates progress beneficial to humanity. By contrast, its rivals, such as folk or non-

---

<sup>60</sup>C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (London: Fontana Press, 1993) at 168.

<sup>61</sup>Quoted in Postema, *supra* note 51 at 33.

<sup>62</sup>Oakeshott, *supra* note 43 at 16.

<sup>63</sup>In a similar vein Oakeshott quotes Voltaire as saying that “the only way to have good laws is to burn all existing laws and to start afresh”: Oakeshott, *supra* note 43 at 9.

<sup>64</sup>D. Sugarman, “Legal Theory, the Common Law Mind and the Making of Tradition” in W. Twining, ed., *Legal Theory and the Common Law* (Oxford: Basil Blackwell, 1986) 26.

<sup>65</sup>R. Cocks, *Foundations of the Modern Bar* (London: Sweet & Maxwell, 1983) at 191; for a study of this form of education, see P. Atkinson, *The Clinical Experience: The Construction and Reconstruction of Medical Reality* (Aldershot: Gower, 1981).

<sup>66</sup>Cocks, *ibid.* at 194.

<sup>67</sup>*Ibid.* at 180.

European medicine, are portrayed as static and irrational.<sup>68</sup> The value of orthodox, Western medicine is thus closely associated with a specific epistemic property: the fact that it is seen to renew its knowledge base in an orderly, open and intelligible manner. In this section we seek to reconstruct the idea of medicine as a progressive science with reference to the work of Karl Popper. This work has been highly influential and embodies an ideal of rational progress which corresponds to that shared by many scientists and doctors themselves, as well as by the wider lay public.<sup>69</sup>

Change in science, according to Popper, can be modelled upon Darwinian evolutionary biology.<sup>70</sup> Like plant and animal life, scientific knowledge develops through a continuous process of variation and selection.<sup>71</sup> At the first stage, just as the gene structure of an organism responds to environmental pressures by internal mutation and recombination, so science responds to theoretical problems by developing tentative new theories. At the second stage, just as there is selection as between available genetic mutations and variations, so scientific theories are tested experimentally and the erroneous eliminated. Science is accordingly not characterized by attempts to generate true statements about nature inductively, as had previously been assumed. Instead the scientist seeks to falsify experimentally the theories which have been proposed by themselves or others.<sup>72</sup>

This evolutionary model and the method of falsification allow us to distinguish science from non-science.

First, statements which are not capable of being falsified are by definition not scientific. Where they are nonetheless put forward as such they are in the nature of mere dogma or ideology. The latter are generally hindrances to progress.

Second, scientists take (or should take) a thoroughly critical attitude both to their own theories and to those which are already well established. As a matter of intellectual good faith, it is not permitted systematically to reject experimental

---

<sup>68</sup>I.A.J. Semali, "Associations and Healers: Attitudes towards Collaboration in Tanzania" in M. Last & G. Chavunduka, eds., *The Professionalization of African Medicine* (Manchester: Manchester University Press, 1986) 87; for further discussion of the interaction between medicine and law in a colonial and post-colonial setting, see J. Harrington, "Between the State and Civil Society: Medical Discipline in Tanzania" (1999) 37 *J. Mod. Afr. Stud.* 207.

<sup>69</sup>B. Magee, *Popper*, 3d ed. (London: Fontana, 1985) at 10; I. Lakatos, "History of Science and its Rational Reconstructions" in I. Hacking, ed., *Scientific Revolutions* (Oxford: Oxford University Press, 1981) 107 at 113.

<sup>70</sup>K. Popper, "Evolution and the Tree of Knowledge" in K. Popper, *Objective Knowledge - An Evolutionary Approach*, rev. ed. (Oxford: Clarendon, 1979) 256.

<sup>71</sup>K. Popper, "The Rationality of Scientific Revolutions" in Hacking, *supra* note 69, 80 at 82ff.

<sup>72</sup>In developing this model of science, Popper built upon the work of the nineteenth century pioneer of physiology Claude Bernard. See G. Canguilhem, *A Vital Rationalist: Selected Writings* (New York: Zone Books, 1994) at 139.

results which confound theoretical explanations: for example, by appealing to problems of observation or by postulating unapprehended interfering factors.<sup>73</sup>

Third, science does not progress towards any type of immutable or transcendental truth. It is instead immanently or procedurally rational, seeking only to generate well-tested theories and solutions to current problems.<sup>74</sup> Accordingly the knowledge produced thereby is inevitably contingent and subject to revision or rejection.

Fourth, the evolutionary model is based on a process of rational learning by feedback.<sup>75</sup> Information as to the success or failure of an experiment is returned to the theoretical level whereupon new research problems are generated for further testing and so on. The knowledge produced thereby is public, not private in form. It is laid down in the objective form of written sources and is therefore available for all to study and to criticize.<sup>76</sup>

Fifth, scientific ideas are most likely to evolve under conditions of free and open competition. In other words, theoretical pluralism drives progress.<sup>77</sup> Centralization and uniformity in the production of scientific ideas leads inevitably to a failure of adaptation; that is, to stagnation and backwardness.

Sixth, the existing state of scientific knowledge sets limits to the extent of permissible pluralism at any given time. It is implicit in the evolutionary model that new theories can only be generated recursively; that is, they must draw upon and modify previous theories. The tradition of the discipline is therefore an important, although ever-shifting constraint upon scientific work.<sup>78</sup> Only hypotheses which are developed in this way (and which meet the “falsifiability” criterion) can be classed as truly scientific. The rest fall into the category of pseudo-science and can be disregarded.

In the following section we examine the extent to which the common law is equally seen as embodying an evolutionary, conflict-driven dynamic.

---

<sup>73</sup>“The Rationality of Scientific Revolutions,” *supra* note 71 at 96.

<sup>74</sup>See L. Laudan, “A Problem Solving Approach to Scientific Progress” in Hacking, *supra* note 69, 144.

<sup>75</sup>See Magee, *supra* note 69 at 65.

<sup>76</sup>K. Popper, “Epistemology without a Knowing Subject” in *Objective Knowledge - An Evolutionary Approach*, *supra* note 70, 106 at 112.

<sup>77</sup>This corresponds to “organized scepticism,” one of Merton’s four organizational norms of science: see R. Merton, *The Sociology of Science* (Chicago: University of Chicago Press, 1973).

<sup>78</sup>“The Rationality of Scientific Revolutions,” *supra* note 71 at 87.

## VII. The Common Law as Science: Evolution and Dissent

It is useful to examine the idea of progress in the common law from two perspectives.<sup>79</sup> First, we discuss briefly an influential tradition in legal history and legal anthropology which sees law as evolving over centuries from primitive origins to modern complexity. Second, we consider the routine development of the common law from case to case and, in particular, the distinctively Anglo-Saxon phenomenon of the dissenting judgment.

The most important formulation of the evolutionary understanding of the common law is undoubtedly to be found in Henry Maine's *Ancient Law*,<sup>80</sup> first published in 1860. Maine sketched a history of law, from pre-customary decrees, through the law of the Roman republic and empire, and on to the legal systems of Western Europe in the nineteenth century. Law had developed, he argued, from custom to rule-based systems, from disparate to centralized power structures, and from dominating its subjects to guaranteeing individual self-determination. Maine famously summed up the dynamic by saying that "the movement of the progressive societies has hitherto been a movement from *Status to Contract*."<sup>81</sup> Two features of Maine's work are significant for this discussion. First, he distinguished progressive from stationary societies. This was necessary to explain the divergence between contemporary European law and that of newly colonised regions, such as India. The colonies were Europe's past made present to itself, affirming both its origins and the immense progress which it had achieved.<sup>82</sup> Second, Maine was influenced by the uniformitarian doctrine of Charles Lyell, a contemporary geologist. According to this, changes in the Earth's surface were constant, gradual and imperceptible, the result of regular physical forces. As Stein has noted, "this provided an attractive analogy with the traditional view of the common law."<sup>83</sup>

Notwithstanding, or perhaps because of, his lack of detailed research, Maine's grand generalizations rapidly became "the common currency of legal thought."<sup>84</sup> Furthermore, they were seen as being in accord with the natural scientific writings of Charles Darwin, "the predominant mythmaker of evolution."<sup>85</sup> Thus, Pollock could write that: "Maine showed that legal ideas and institutions have a real course of development as much as the genera and species of living creatures. [And also] that law has a history of its own, not at all confined to its political and constitutional

---

<sup>79</sup>These ideas are discussed more fully in J. Harrington, "'Red in Tooth and Claw': The Idea of Progress in Medicine and the Common Law" (2002) 11 Soc. & Legal Stud. 211.

<sup>80</sup>H. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (London: John Murray, 1870).

<sup>81</sup>*Ibid.* at 141.

<sup>82</sup>See P. Fitzpatrick, *The Mythology of Modern Law* (London, New York: Routledge, 1992) at 100.

<sup>83</sup>P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 1980) at 88.

<sup>84</sup>*Ibid.* at 98.

<sup>85</sup>*The Mythology of Modern Law*, *supra* note 82 at 93. It should, however, be noted that Darwin's specific ideas had not been widely disseminated by the time *Ancient Law* was published. As stated in the text, they significantly conditioned its reception.

aspects.”<sup>86</sup> Fitzpatrick has explained the popularity of Maine’s thesis on the grounds that it located law within a general nineteenth century epistemic scheme predicated upon “pervasive and inexorable change.”<sup>87</sup> In particular, middle and upper class Victorians were eager to embrace theories which ascribed the immense changes through which they were living to ineluctable and irresistible forces.<sup>88</sup> Current circumstances of inequality were thus justified and removed from the realm of political contestation and intervention. To lawyers the evolutionary perspective revealed that the law was able to adapt itself gradually, that is without convulsion or revolution, to new social and economic circumstances.<sup>89</sup> This pattern was also taken to be characteristic of medicine in the late 1800s, whereby the sectarianism and theoretical disjunctions of the early century were replaced by a unified knowledge base and a regime of orderly progress.<sup>90</sup> The growing armoury of medical techniques and the responsiveness of the common law to new conditions were both identified strongly with the public interest.

The common law can be viewed as progressing, not just over the *longue durée* from time immemorial to the present, but also from case to case. The engine of this progress is, in the higher courts at least, the production of plural opinions and dissenting judgments. It is in the form of the latter, we would submit, that the common law exhibits progress through ordered conflict in the manner of medical science. Majority, as opposed to consensus decision making has been practised in the English courts since at least the fifteenth century. In a recent study, Alder has helped to clarify the chief practical and political justifications for this distinctive phenomenon.<sup>91</sup> Most obviously, the possibility of open contradiction serves to sharpen majority judgments. In addition, minority opinions provide the resources for future correction and reform of the law.<sup>92</sup> This view of the dissent is nicely captured by E.H. Carr’s comments on progress generally. “Pregnant failures are not unknown in history. History recognizes what I may call “delayed” achievement: the apparent failures of today may turn out to have made a vital contribution to the achievement of tomorrow - prophets born before their time.”<sup>93</sup> This quasi-religious language evokes the important political and moral dimension of dissent. Alder argues that in a liberal society, judges must be taken to have their own profoundly-held views on matters of ethical and political importance. Their rights as ordinary citizens demand that these views should not be suppressed. Furthermore, judges can be said to give utterance in their reasoning to the range of moral positions held in society. Thus, a move to single-judgment decisions would effectively stigmatize unorthodox beliefs and disenfranchise their adherents.<sup>94</sup>

---

<sup>86</sup>Quoted in Stein, *supra* note 83 at 98.

<sup>87</sup>*The Mythology of Modern Law*, *supra* note 82 at 93.

<sup>88</sup>Stein, *supra* note 83 at 99.

<sup>89</sup>*Ibid.* at 113.

<sup>90</sup>*Making of Modern Britain*, *supra* note 25 at 45.

<sup>91</sup>J. Alder, “Dissents in Courts of Last Resort: Tragic Choices?” (2000) 20 Oxford J. Legal Stud. 221.

<sup>92</sup>*Ibid.* at 241.

<sup>93</sup>E.H. Carr, *What is History?*, 2d ed. (Harmondsworth: Penguin, 1987) at 128-29.

<sup>94</sup>Alder, *supra* note 91 at 223.

### VIII. The Ideological Uses of "Art" and "Science"

In the preceding discussion we have seen that ideas of art and science figure prominently in talk about medicine and law. It will have been clear that these ideas have been articulated in specific historical contexts. In this section we seek to reflect briefly upon these contexts and to investigate the role of professional rhetoric in the production and reproduction of social and occupational structures.

Up to the 1960s, sociologists tended to employ a so-called "trait approach" in their work on the professions.<sup>95</sup> Accordingly, professional status was read off from the possession of a list of essential attributes: for example, a code of ethics, self-regulation, altruism, etc.<sup>96</sup> More recently this approach has been rejected because of its uncritical reliance upon the self-definitions of professional elites.<sup>97</sup> Instead, as was mentioned in the introduction to this essay, professionalism has come to be understood in processual terms as the monopolization of lucrative work through the creation of legally supported market shelters.<sup>98</sup> A structure of subordination is established whereby the successful occupational group closes off opportunities to outsiders defined as inferior and ineligible.<sup>99</sup> However, the sinecures, thus created, are endemically prone to usurpation by excluded groups and to dissolution by state or market forces.<sup>100</sup> The groups making (and resisting) these challenges are obliged to engage in political and cultural work. As Murphy puts it, "[t]he structural fault of exclusion is the source of a moral and ideological struggle to make that fault either obscure or transparent, legitimate or illegitimate."<sup>101</sup> It is as part of this struggle that discourses of art and science are articulated in the occupational context. Talk of doctors as intrepid scientific researchers, or of common lawyers as exercising fine and irreducible judgment, serves to create common professional cultures, or pseudo-ethnicities,<sup>102</sup> which increase the cohesion and impermeability of the relevant occupational group. Beyond this, as Larson has shown, the distinctive ideas of art and science support occupational closure in specific ways. In so far as a practice is taken to be based on implicit, uncodifiable knowledge, it is impossible to subject it to precise regulation.<sup>103</sup> In so far as it is held to display orderly, cumulative progress, it participates in the form of cognition dominant since

---

<sup>95</sup>A.M. Carr Saunders & P.A. Wilson, *The Professions* (London: Frank Cass, 1933); H.M. Vollmer & D.L. Mills, *Professionalisation* (Englewood Cliffs, N.J.: Prentice Hall, 1966).

<sup>96</sup>For further discussion, see B. Turner, *Medical Power and Social Knowledge*, 2d ed. (London: Sage, 1995) 132.

<sup>97</sup>The most searching critique is to be found in Johnson, *supra* note 7.

<sup>98</sup>G. Larkin, *Occupational Monopoly and Modern Medicine* (London: Tavistock, 1983).

<sup>99</sup>Witz, *supra* note 8 at 40.

<sup>100</sup>Parkin, *supra* note 7 at 75.

<sup>101</sup>R. Murphy, *Social Closure: The Theory of Monopolization and Exclusion* (Oxford: Clarendon, 1988) at 48.

<sup>102</sup>The phrase and the supporting analysis are taken from R. Collins, *Conflict Sociology: Toward an Explanatory Science* (New York: Academic Press, 1975) at 87.

<sup>103</sup>M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977) at 42.

the Enlightenment, and becomes, thereby, indispensable to the pursuit of the common good.<sup>104</sup>

The foregoing analysis is persuasive as far as it goes. However, it too has been criticized for failing to situate occupational exclusion within broader patterns of social subordination.<sup>105</sup> Murphy provides us with a useful model in this regard. Drawing on Weber, he identifies legal title to private property as the principal form of exclusion in society.<sup>106</sup> Invocation or enforcement of this title facilitates the accumulation of capital and the monopolization of opportunities on grounds of wealth. By contrast, the monopolies enjoyed by medical and legal practitioners are of a secondary nature, being predicated in the first instance upon legislative enactments, rather than upon the rights of private property.<sup>107</sup> Both forms of exclusion are nonetheless linked in a reciprocal relationship.<sup>108</sup> On the one hand, considerable barriers to entry into both professions mean that practitioners have traditionally been drawn disproportionately from the capital-owning classes. On the other hand, legal monopolies enable professionals to cream off surplus wealth and, thus, to participate directly in the principal form of exclusion in society. There results, therefore, a convergence of interests between wealth-owning classes and self-employed professionals.<sup>109</sup>

Just like occupational closure, broader forms of domination are subject to contestation and usurpation. The fault lines of social and economic exclusion are, thus, the focus of competing ideological explanations and bids for legitimacy.<sup>110</sup> It is in this connection that we can apprehend a hegemonic dimension to professional rhetoric, which transcends its merely corporatist effects.<sup>111</sup> In reflecting on their own practice, doctors and lawyers simultaneously function as conceptive ideologists, articulating the interests of the dominant classes and generalizing them as the interests of society as a whole.<sup>112</sup> Thus, as well as creating their own pseudo-

---

<sup>104</sup>*Ibid.* at 32.

<sup>105</sup>M. Cain, "The General Practice Lawyer and the Client: Towards a Radical Conception" in R. Dingwall & P. Lewis, eds., *The Sociology of the Professions: Lawyers, Doctors and Others* (London: Macmillan, 1983) 106 at 108.

<sup>106</sup>Murphy, *supra* note 101 at 70.

<sup>107</sup>*Ibid.* at 72.

<sup>108</sup>*Ibid.*

<sup>109</sup>It is important to distinguish between those professionals who are traditionally self-standing and those in salaried employment. The latter, far from being reliable class allies of the dominant group, tend to support strategies of usurpation against the principal form of exclusion. The role of teachers in leftist political movements is an important example of this: see *ibid.* at 173.

<sup>110</sup>M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1922) at 635.

<sup>111</sup>For a discussion of this distinction, see R. Bellamy & D. Schechter, *Gramsci and the Italian State* (Manchester: Manchester University Press, 1993) at 130.

<sup>112</sup>K. Marx, *Collected Works*, vol. 5 (London: Lawrence and Wishart, 1976) at 60. For a discussion of this idea in relation to the legal profession, see M. Cain, "Gramsci, the State and the Place of Law" in D. Sugarman, ed., *Legality, Ideology and the State* (London: Academic Press 1983) 95 at 97.

ethnicities, doctors and lawyers have been significant contributors to elite culture.<sup>113</sup> In this connection we part company with the notion that the ideas of the dominant classes are exclusively directed at subordinate classes in order to assure the consent of the latter to the order of things.<sup>114</sup> A moment's consideration of the restricted diffusion of the ideas of leading doctors, lawyers, philosophers, clerics, and so on, will bear out the limited possibilities for complete intellectual and moral domination of the working classes, particularly in the formative period of the nineteenth century. More nuanced accounts show that elite culture also functions to sustain unity of purpose among members of the elite itself.<sup>115</sup> We would argue, in fact, that the primary hegemonic effect of talk about art and science has been to facilitate the creation and consolidation of a historic bloc between different fractions of capital in Britain over the last two centuries.<sup>116</sup>

In the early nineteenth century, British society was characterized by the emergence of an industrial bourgeoisie which challenged the political and economic dominance of the old landed aristocracy.<sup>117</sup> During this period the fault line between old and new wealth was a site of ideological contest, whose terms were also those of the parties to contemporary intra-professional struggles in medicine and law. Aristocratic wealth legitimated itself through a traditionalist ideology, which emphasized the implicit, natural order of unequal social relations and the importance of custom and usage. It also sanctioned a web of regulatory and protective controls that tended to prevent the penetration of market forms of exchange and the unencumbered accumulation of capital.<sup>118</sup> The art model of medical and legal practice can easily be shown to participate in and contribute to this ideology. As has been seen, it justifies professional autonomy, and thus market restrictions, with reference to the tacit form of practitioner knowledge and the ineffable traditions of the discipline. The emerging bourgeoisie legitimated its advances through an individualist and utilitarian philosophy, which was premised upon the formal equality of market relations, as ratified in the law of contract.<sup>119</sup> According to this ideology, competitive pluralism was the chief engine of social and economic progress.<sup>120</sup> Again it is not difficult to demonstrate the significant extent to which the science model of medicine and law drew upon and contributed

---

<sup>113</sup>*Making of Modern Britain*, *supra* note 25 at 57; P. Goodrich & Y. Hachamovitch, "Time out of Mind: An Introduction to the Semiotics of the Common Law" in P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto, 1991) 167.

<sup>114</sup>For a useful discussion, see P. Anderson, "The Antinomies of Antonio Gramsci" (1976-77) 100 *New Left Rev.* 5 at 20.

<sup>115</sup>N. Abercrombie, S. Hill & B.S. Turner, *The Dominant Ideology Thesis* (London: George Allen and Unwin, 1980) at 6.

<sup>116</sup>On the importance of ideology in the creation of alliances between dominant groups, see A. Gramsci, *Quaderni del Carcere* (Torino: Einaudi, 1977) at 1526.

<sup>117</sup>For a general introduction, see A. Briggs, *The Age of Improvement: 1783-1867* (London: Longman, 1979).

<sup>118</sup>Abercrombie, Hill & Turner, *supra* note 115 at 96.

<sup>119</sup>A. Norrie, "Pashukanis and the Commodity Form Theory: a Reply to Warrington" (1982) 10 *Int'l J. Sociology of L.* 429.

<sup>120</sup>Abercrombie, Hill & Turner, *supra* note 115 at 97.

to this ideology.<sup>121</sup> A valorization of pluralism and a rejection of dogmatic encumbrances has been shown above to be central to the scientific character of medicine and the common law.

Thus, talk about medicine and law contributed to the ideologies of the two main groups within the ruling elite in Britain in the nineteenth century. The variable emphases placed on either art or science, suggest both the contingency of professional formations and the uneasy nature of the historic compromise between the aristocracy and the bourgeoisie. This measure of contingency has not been fatal, however, either to professional or class-based supremacy. Ideologies of art and science would seem on the contrary to provide a means of expressing tensions while also containing them. Indeed it has been noted that in the later nineteenth century the bourgeoisie underwent a process of gentrification, whereby it adopted much of the culture of the aristocracy.<sup>122</sup> At the same time the landed gentry absorbed much the individualist philosophy of the utilitarians. Traditionalism became for them a peripheral, rather than a guiding ideology.<sup>123</sup> Equally in medicine, the art idea of practice has taken on the role of a supplementary discourse which aims at refining and humanizing the now dominant scientific mode. The idea of legal knowledge as tacit and ineffable has also been dislodged by a flood of highly detailed statute law. The recent incorporation of the European Convention on Human Rights furthers this trend toward codification (however unsystematic) of British law.<sup>124</sup> Nonetheless the common law remains at the idealized core of the legal system in the curricula of British law schools and in the texts of scholars and judges.<sup>125</sup> Tradition, it seems, remains an indispensable legitimating device.

## IX. Conclusion

This essay originated in a concern to explain the extremely favourable liability regime to which doctors are subject under English law. The attempt to do so led us to consider the interaction between medicine and law, not from the familiar perspective of philosophical ethics, but from that of epistemology. To be more precise, we examined historical evidence of what doctors and lawyers say about what they do. This revealed a largely shared set of self-understandings structured around a distinction between art and science. An ideal-typical reconstruction of the poles of this distinction was possible through a consideration of work on the philosophy of knowledge. The idea of medicine and law as an art was seen to rest on a view of knowledge as implicit or tacit in its pristine form, and on a ratification of tradition as the ultimate source of authority in practice. The idea of medicine and

---

<sup>121</sup>A qualified individualism also structures the English law on informed consent, see J. Harrington, "Privileging the Medical Norm: Liberalism, Self-Determination and Refusal of Treatment" (1996) 16 *Legal Stud.* 348.

<sup>122</sup>Abercrombie, Hill & Turner, *supra* note 115 at 106.

<sup>123</sup>*Ibid.* at 107.

<sup>124</sup>Loughlin, *supra* note 49.

<sup>125</sup>Goodrich & Hachamovitch, *supra* note 113.

law as a science rested on a view of knowledge developing incrementally through vigorous conflicts of opinion. Pluralism and the toleration of pluralism were integral to this view of science. Finally, we noted the important ideological effects of this talk about the nature of professional knowledge and practice. It was argued that doctors and lawyers, in theorizing their own work, functioned as conceptive ideologists on two planes. Elaboration and reiteration of the art-science distinction served both to bolster professional monopolies and to solidify alliances between the dominant classes in British society. We suggested that there was a significant tension between tradition and progress in the professional and political discourses examined. This tension is nicely captured in the following comment of Michael Polanyi:

Can we face the fact that no matter how liberal a free society may be, it is also profoundly conservative. For this is the fact. The recognition granted in a free society to the independent growth of science, art and morality, involves a dedication of society to the fostering of a specific tradition of thought, transmitted and cultivated by a particular group of authoritative specialists, perpetuating themselves by co-option. To uphold the independence of thought implemented by such a society is to subscribe to a kind of orthodoxy which, though it specifies no fixed articles of faith, is virtually unassailable within the limits imposed on the process of innovation by the cultural leadership of a free society.<sup>126</sup>

In sum, the rhetoric of art and science reflects both the reality and the contingency of structures of dominance and inequality at work and in society at large.

---

<sup>126</sup>Polanyi, *supra* note 44 at 244.