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Thinking, Big and Small

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Stephen B. Burbank*

In his recent book, *Thinking, Fast and Slow*, Daniel Kahneman explores two different modes of thinking. One of them, System One, is automatic. It enables us to function without mental paralysis but can lead us into error. The other, System Two, requires effort. It enables us to resist the beguiling simplicity of many hard problems but can yield to habits of mental sloth and, for most mortals, requires selective deployment.¹

Kahneman's book makes available to the public the fruits of work that has had a major impact on academic research. Whenever we construct models—or encounter models constructed—on the rational actor assumption, a little bird should be reminding us of reasons to doubt that assumption—doubt that may toll the thirteenth hour.²

Reading Kahneman's book and thinking about a tribute to Ed Cooper that has more substance than a bouquet have caused me to reflect on a phenomenon within the world of legal scholarship. I would call it a cognate phenomenon, but that would dishonor the empirical basis of Kahneman's work by suggesting a firmer basis for my reflections than the power of analogical reasoning. The phenomenon is the view that the goal of legal scholarship is or should be big ideas, particularly if they can claim the mantle of theory, rather than small ideas, particularly if they can be tarred with the feathers of doctrine. My reflections about this phenomenon and the work and career of Ed Cooper led me to the title of this essay.

Oliver Wendell Holmes once observed that “[i]gnorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning.”³ Law in general requires both the capacity and special knowledge for engaging in what Holmes

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1. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–21 (2011) (“*System 1* operates automatically and quickly, with little or no effort and no sense of voluntary control. *System 2* allocates attention to the effortful mental activities that demand it, including complex computations. The operations of *System 2* are often associated with the subjective experience of agency, choice, and concentration.”).

2. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1476–79 (1998) (arguing that rational behavior often is influenced by bounded rationality, bounded willpower, and bounded self-interest).

3. OLIVER WENDELL HOLMES, *THE COMMON LAW* 64 (Mark DeWolfe Howe ed., 1963).

called “technical reasoning.” Perhaps nowhere in the corpus juris are these qualities more important than in the field of procedure.

Not everybody has the capacity for technical reasoning, and not everybody has the patience to acquire the special knowledge necessary to fructify it.⁴ Moreover, even those with both the capacity and special knowledge may become impatient with the constraints that knowledge can impose on legal change, particularly if the technical reasoning that it fructifies is itself constrained by a system of precedent. As a result, in an academic community that privileges the big idea, incentives may be structured in such a way that junior faculty members skip the special knowledge and the technical reasoning, producing work that either avowedly liberates them from any obligation of fidelity to the past or, more commonly, yields a different way of conceptualizing the past. In the latter situation, fidelity to the past may be either a fiction or a fortuity. Both types of project may be pursued in search of a new theory.

I was exposed early in my academic career to “legal scholarship in the aid of reform”⁵ in the work of Charles Clark, the Reporter of the original Federal Rules of Civil Procedure. Clark was willing to put aside what he knew as a scholar to secure change as a rulemaker that he regarded as progress.⁶ Moreover, the same research project that unearthed evidence of Clark’s compromises also persuaded me that John Ely was aware of, and chose to suppress, aspects of the Rules Enabling Act that were inconvenient to his scholarly project. As he acknowledged in a conversation in the early 1980s, one need not consult the preenactment legislative history of that statute to doubt a central premise of his justly famous 1974 article, *The Irrepressible Myth of Erie*,⁷ and of the Supreme Court’s opinion in *Hanna v. Plumer*,⁸ which he likely drafted as law clerk to Chief Justice Warren.⁹ The premise is that federalism concerns animated limitations on court rulemaking in a statute that was drafted in the mid-1920s and enacted in 1934—four years before

4. Those who do have these qualities “could be called ‘engaged.’ They are more alert, more intellectually active, less willing to be satisfied with superficially attractive answers, more skeptical about their intuitions.” KAHNEMAN, *supra* note 1, at 46.

5. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1186 (1982).

6. *See id.* at 1135–37, 1159–60 n.620 (discussing examples of Clark and other members of the Advisory Committee ignoring or misrepresenting legislative and doctrinal history).

7. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

8. 380 U.S. 460 (1965).

9. *See Ely, supra* note 7, at 693 n.* (noting that Ely served as law clerk to Chief Justice Warren when *Hanna* was decided).

*Erie Railroad Co. v. Tompkins*¹⁰—and that authorized rulemaking in cases governed by federal or state substantive law.¹¹

I emerged from my first article as a law professor suffering from disillusionment. The research for my next major project could have turned that disillusionment into cynicism if it had not been for Ed Cooper. As so often with Ed, the source of encouragement was the power of his example.

In the course of research for an article on interjurisdictional preclusion¹² that I thought would accept and build upon insights in another famous article from the 1970s, Ronan Degnan's *Federalized Res Judicata*,¹³ I came to realize that, in one way or another, Degnan had managed to get a number of nineteenth-century Supreme Court decisions wrong.¹⁴ Even though these errors probably were due to mere sloppiness, they caused me to take a hard look at the author's treatment of aspects of the relevant history that were important to his project. Degnan's thesis was essentially that the law of preclusion should be and has been a reflex of the law of procedure, with both having the same source of authority, federal or state.¹⁵ That is when I discovered that he had elided language that quite clearly supported a contrary interpretation¹⁶ from a passage in a critical nineteenth-century Supreme Court decision on which he relied.¹⁷

About the time I started research on interjurisdictional preclusion, Ed Cooper completed his magisterial volume on preclusion for the treatise of which Charles Alan Wright was the lead author.¹⁸ When I read the relevant section of the treatise, it was clear that Ed

10. 304 U.S. 64 (1938).

11. Compare *Hanna*, 380 U.S. at 465, 471, and Ely, *supra* note 7, at 720–21 (arguing that the Enabling Act's limitations on court rulemaking were intended to protect federalism values), with *Burbank*, *supra* note 5, at 1106–12 (concluding that the Enabling Act's limitations were intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress).

12. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

13. Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

14. See *Burbank*, *supra* note 12, at 742 n.32, 745, 750 n.67.

15. See *id.* at 747 (summarizing Degnan's account); Degnan, *supra* note 13, at 755–71.

16. See *Burbank*, *supra* note 12, at 749 n.64 ("In both places, the quotations omit the language, 'was in the exercise of jurisdiction to administer the laws of the State.'"); *id.* at 750 ("The Court's opinion in *Dupasseur*, carefully crafted to address only the preclusive effects of a judgment of a federal court sitting in alienage diversity, thus supports neither an attempt to assimilate preclusion law to procedure, nor the notion that state law provided the measure of preclusive effects for all federal judgments, prior to 1938.").

17. See *Dupasseur v. Rochereau*, 88 U.S. 130, 135 (1875); Degnan, *supra* note 13, at 745–46, 756.

18. 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE (1981).

had noticed what I noticed.¹⁹ I can imagine his dilemma. Ron Degnan was Charlie Wright's best friend.²⁰ It would have been easy simply to pass the matter by. Easy, yes—but not true to Ed's values as a scholar. So he navigated between friendship and integrity by providing the information necessary for any careful reader to discover for himself what had taken place. Degnan had fudged the historical record, reconceptualizing nineteenth-century preclusion law in aid of something approaching a theory. Degnan had thought big. Ed was the little bird, enabling those who were interested in the facts to understand that the theory was, as a positive matter, a house of cards. Ed had thought small.

We have been asked to concentrate on Ed's work as a rulemaker. Like the last anecdote, the rulemaking effort I have chosen to highlight—the Style Project—evidences Ed's capacity for thinking small. Obviously I do not apologize for that enterprise; indeed, as readers already may have inferred, I think that an apology is more often appropriate for attempts to think big, at least in the field of procedure. Nonetheless, I will belabor that which is obvious to anyone who knows Ed and which is so well illustrated by the aforementioned volume of *Federal Practice and Procedure*. Ed Cooper is quite capable of thinking big, but he will favor us with those thoughts only if they pass the rigorous tests that thinking small requires.

Ed's work on preclusion is the best single account of the law—its history, policies, complexities, synergies, and loose ends—in the literature. Clear, comprehensive, and analytically acute, it is for me the model of what a great treatise should be. Together with the Restatement (Second) of Judgments,²¹ it is an essential resource for the bench and bar in a part of the legal landscape where those who venture without a map are likely to get stuck in quicksand.

The bench and bar typically care not a whit what law professors have to say about constitutional theory or many of the other topics that enthrall law professors. They care what Ed Cooper and his co-authors of *Federal Practice and Procedure* have to say about preclusion, about subject matter jurisdiction, and about so much else that is the bread and butter of procedure.²² For the bench and the bar, the

19. See *id.*, § 4468, at 655; Burbank, *supra* note 12, at 750 n.65.

20. See Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1055 n.115 (2002) (quoting letter from Wright stating that “Ron Degnan was as close a friend as I have ever had”).

21. See RESTATEMENT (SECOND) OF JUDGMENTS (1982).

22. These claims differ from claims about reliance by courts on legal scholarship as a whole. Recent work “suggests that there has been no decline in the proportion of reported [federal court of appeals] opinions citing legal scholarship.” David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1363 (2011). The same work also suggests that “[t]he higher the number

fact that the legal treatise may be on the cutting edge of obsolescence, and that there are precious few Ed Coopers on the horizon, should be a cause of great concern.

I believe that some current criticism of legal education is off base. For instance, I support interdisciplinary scholarship and teaching, just as it supports me.²³ That said, one valid source of criticism of legal education is the incentive structure to which I referred earlier and the utility function it reflects. Doctrinal scholarship is devalued in favor of that which can claim to be theory, without adequate attention to the fact that the former need not be epistemically shallow²⁴ or that, like models, theories, however elegant, may themselves be epistemically shallow.

Too many law schools have either ruined promising scholars of procedure by inducing them to attempt what they cannot do or have effectively abandoned the field, recruiting scholars who write in other areas to teach procedure as a service. Too many law schools talk the talk of forging close ties with the bench and bar without walking the walk, apparently hoping that alumni will spend all their time on campus visiting legal clinics. An occasion like this is a fine way to focus attention on the risks of such an institutional strategy, as well as to help ensure that Ed Cooper's example of public service remains an attractive alternative—to applause in an echo chamber—for scholars of procedure deciding what they want to maximize.

Ed's twenty years of service as Reporter matches the tenure in that position of Charles Clark.²⁵ When one considers that their combined service (so far) spans forty years, it is less surprising that there have been only seven Reporters since 1935.²⁶ The book-ends—Clark and Cooper—could not be more different. I have already referred to Clark's willingness to put aside what he knew as a scholar in the quest for what, as a rulemaker, he viewed as progress.

of opinions dealing with a constitutional law issue, the more a federal court of appeals uses legal scholarship." *Id.* at 1367. That may be, but the finding speaks not at all to the bar, to district courts, to nonprecedential appellate decisions, or to reliance on scholarship as opposed to its "use" as mere window-dressing.

23. See, e.g., Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT'S LAW GOT TO DO WITH IT?* 41 (Charles Gardner Geyh ed., 2011).

24. But see RICHARD A. POSNER, *OVERCOMING LAW* 88 (1995) (discussing the "epistemic shallowness of the enterprise" of doctrinal scholarship).

25. Clark was Reporter from 1935 to 1939, see Steven S. Gensler, *Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth: Forever Young*, 46 U. MICH. J.L. REFORM 593, 593 n.1 (2013), and again from 1942 to 1956, see Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976).

26. They are Charles Clark, 1935–39, 1942–56; Benjamin Kaplan, 1960–66; Albert Sachs, 1966–70; Bernard Ward, 1970–78; Arthur Miller, 1978–85; Paul Carrington, 1985–92; Edward Cooper, 1992–present.

He was also very sure of himself and, when it came to the Federal Rules, very sure that his view of how they should be interpreted was right. Clark, of course, thought big and, in part as a result, he and his colleagues were flying blind over much of the landscape covered by the original Federal Rules.²⁷ Clark's protectiveness was that of a parent who knew that his child's legitimacy depended much more on continuing acceptability than it did on pedigree, and who sought to secure that acceptability through the force of his personality. In truth, I think he was a bit of a bully.²⁸

Ed became Reporter when the continuing acceptability of Clark's child was already in serious question, as also the proper rulemaking response. The risk that rulemakers with a different normative view about litigation and its proper role in governance than that which animated Charles Clark would follow his example in the opposite direction was real. The turn to sanctions in the 1980s had been revealed to have an experiential foundation just as shallow as some of the original Federal Rules.²⁹ Moreover, there was no reason for confidence that the rulemakers would consistently seek to fill gaps in their knowledge with evidence.

Like precedent in the common law, knowledge derived from documented experience is the best protection against improvident rulemaking. For twenty years, Ed has provided or encouraged the production of that knowledge, on which he has brought to bear an

27. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 600 (2004) (arguing that notwithstanding the original Advisory Committee's study of existing approaches to summary judgment, pleading, and discovery, the draftsmen "essentially [were] flying blind" regarding how their rules on those subjects would work in practice).

28. See Smith, *supra* note 25, at 951–52. In a letter to the author, the late Henry Friendly, who sat with Clark on the Second Circuit, observed:

I could tell you a batch of stories about Charlie Clark. He took any suggestion that one of the rules was not 100% clear as a personal insult; *he* knew what was intended and the rest of us should jolly well keep out of it. All of which, of course, resulted in our being readier to find ambiguities than we might otherwise have been.

In the years when I knew him, Charlie was not a great scholar but a great doer; he would arrive quickly at a sense how a case should be decided, often quite correctly, and nothing would stand in his way. If there was a division in the panel, he would make life miserable for the other judges until he got the majority.

Letter from Hon. Henry J. Friendly, Circuit Judge, U.S. Court of Appeals for the Second Circuit, to the author 1–2 (Feb. 12, 1983) (on file with author).

29. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927 (1989) ("The Advisory Committee knew little about experience under the original Rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of Rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the benefits and costs of sanctions as a case management device.") (footnotes omitted).

exquisite capacity for technical reasoning. For those tempted to disparage the virtues of thinking small, consider where we might be without it. Holmes said that ignorance is “the best of law reformers,” not that it is the best law reformer. *Twombly*³⁰ and *Iqbal*³¹ demonstrate the wisdom of both the observation and the distinction.³²

Ed’s tenure as Reporter has included virtually all of the Civil Rules Committee’s protracted consideration of amendments to Rule 23, where the damage that could be done by improvident rulemaking rivaled that which could have been wrought by amendments to the pleading rules. Mindful that other participants in this celebration would want to discuss Ed’s contributions to our understanding of class actions, and because of a small personal role, I chose another rulemaking activity that demonstrates the importance of thinking small, even if less obviously: the Style Project.

I did not need Ed’s encouragement to interest me in the Style Project, although no one could have made the dilemmas of restyling as interesting as Ed did in his plea to “all Civil Rules constituents to engage actively in reviewing the restyled rules when they are published for comment.”³³ Who else could summon images of Indiana Jones—discovering “wonders” in the “more obscure corners of this fascinating procedural machine”³⁴—as an inducement to engage in work that he elsewhere acknowledged “require[d] diligent and devoted work by hundreds, perhaps even thousands, of volunteer participants?”³⁵

Ed’s encouragement was not necessary—indeed I did not become aware of his invitation until I had already accepted it—because I was deeply skeptical that it was possible to “translate present text into clear language that d[id] not change the meaning.”³⁶ My skepticism was in part a product of years of study of the history of the Federal Rules. It also derived from my service on *the National*

30. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (introducing the plausibility pleading requirement).

31. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (entrenching the plausibility pleading requirement).

32. See Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116 (2009) (“[A] number of the policy questions presented by *Twombly* and *Iqbal* would have benefited from the fruits of empirical research, even if only research whose results had already been published.”).

33. Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1762 (2004).

34. *Id.* at 1786.

35. *Id.* at 1762.

36. *Id.* at 1761.

Commission on Judicial Discipline and Removal.³⁷ The Commission's chief of staff, who seemed frustrated that its members insisted on actually writing the report and that they were cool to some of his preferred policies, had persuaded the chairman to allow him to hire an editor, ostensibly to bring unity of style to the various chapters. He distributed the preliminary work product to the members without prior notice. I was told that steam could be seen issuing from my ears as I entered the room where the Commission was meeting to discuss the editor's work. Fortunately, it was not difficult to demonstrate how, time and again, "mere editorial changes" in fact changed meaning, often upsetting compromises not evident in the language used in the original.

Although Ed's encouragement was not necessary to persuade me and Greg Joseph to undertake our own project to review the proposed restyled rules—recruiting ten two-person teams, each with an academic and a practitioner³⁸—both the guidance he provided in his article and his unflagging support for the enterprise were important to the group's final product and thus to whatever contribution our work made to the restyled rules.³⁹ However difficult it may be for academics to surrender a healthy chunk of time in the summer to a late-arising project with little prospect of a publication,⁴⁰ how much more difficult it must be for practicing lawyers with no prospect of a fee. For most users of the Federal Rules, including most academics, I imagine, the task to which Ed beckoned them had all the allure of editing a dictionary. At least, that is an inference one might draw from the fact that the number of comments submitted does not suggest "hundreds, perhaps even thousands, of volunteer participants."⁴¹

37. See Report of the National Commission on Judicial Discipline & Removal, 152 F.R.D. 265 (1993).

38. The members of the Ad Hoc Committee of Academics and Practitioners, or Restyling Project, were: from the academy, Professors Janet Alexander, Stephen Burbank, Kevin Clermont, Edward Hartnett, Geoffrey Hazard, Arthur Miller, James Pfander, David Shapiro, Linda Silberman, Catherine Struve, and Tobias Wolff; and from practice, Scott Atlas, Allen Black, David Buchanan, Robert Byman, Robert Ellis, Francis Fox, William Hangle, Gregory Joseph, Loren Kieve, and Patricia Lee Refo. See PROFESSOR STEPHEN B. BURBANK & GREGORY P. JOSEPH, ESQ., MEMORANDUM ON RESTYLED FEDERAL RULES OF CIVIL PROCEDURE TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, OCTOBER 24, 2005, at 7 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202005/05-CV-022.pdf>.

39. See *id.*

40. But see Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006). Professor Hartnett was a member of our Ad Hoc Committee, see *supra* note 38, who believed that the costs of restyling would outweigh the benefits, see *infra* text accompanying note 42.

41. Cooper, *supra* note 33, at 1762; see also Memorandum, *supra* note 38 (listing comments received on restyled rules).

As I recall that experience, two incidents involving Ed stand out. First, I was both surprised and impressed that Ed encouraged Greg and me to include in our communication to the Advisory Committee a judgment about what came to be called the “big picture question”—that is, whether the benefits of restyling outweighed the costs.⁴² We had not planned to offer such a judgment, probably because we thought the train was too far out of the station and we were not confident that we would have an adequate basis for judgment. Ever seeking to expand the Advisory Committee’s knowledge base, and accustomed to much less diffident attitudes towards bottom-line judgments, Ed has consistently refused to allow pride of authorship to get in the way of the search for better solutions.

Second, Greg and I had the pleasure of presenting our group’s findings and recommendations to the Advisory Committee at a session where they were the sole order of business.⁴³ The intellectual interest and exhilaration of that experience derived in part from a thirty-five page memorandum that Ed had written commenting on our findings and recommendations,⁴⁴ and in part from the discussion at the Advisory Committee meeting. The learning, precision, and common sense evident in Ed’s memorandum remind me how lucky the Advisory Committee has been these past twenty years. They also suggest that Greg and I were right to be diffident about bottom-line judgments. Above all, however, I remember the excitement, the sheer pleasure,⁴⁵ Ed expressed about exploring some of

42. Here is the pertinent portion of Ed’s e-mail to me:

It is indeed a remarkable group that you have assembled, both from the academy and from the bar. If the fun you all have even approaches the enormous value of your project, you will be repaid many times over. For the Committee, this will be great reassurance—not only for the things that are accepted without demur, but for everything that is vigorously questioned. *I trust that in addition to the uncounted number of possible fine points of debate, your deliberations will include the question whether the potential benefits of the project outweigh the potential costs.* In some ways that will prove more difficult than the rule-by-rule and word-by-word examination, but it remains an important question.

E-mail from Edward H. Cooper, Reporter, Civil Rules Advisory Committee, to the author (May 9, 2005) (emphasis added) (on file with author).

43. See John K Rabiej, Memorandum from John K. Rabiej to the Civil Rules Advisory Committee (Oct. 7, 2005) (on file with author) (discussing a public hearing on November 18, 2005); e-mail from the author to Ad Hoc Committee of Academics and Practitioners (Nov. 21, 2005) (on file with author) (reporting on a three-and-a-half-hour discussion on November 18, 2005).

44. See Edward H. Cooper, Notes on Burbank/Joseph Report (Nov. 14, 2005) (on file with author).

45. See, e.g., *id.* at 3 (“This is a neat point.”); *id.* at 12 (“This one is fascinating.”); *id.* at 13 (“This one is intriguing.”); see also Cooper, *supra* note 42 (“If the fun you all have even approaches the enormous value of your project, you will be repaid many times over.”).

the potential problems created by the proposed restyling that he evidently had not previously recognized and the generosity with which he treated our efforts.

It takes a person whose ego is under control to be an effective Reporter. Durability in that role also requires that the individual have his or her ambition under control. The sacrifices Ed has made should not be underestimated; they are suggested by his bibliography. He has preferred the interests of institutions, whether the University of Michigan Law School or the federal judiciary, to his own interests. In doing so, he has brought great credit to both institutions and helped to preserve one of them from all sorts of trouble.