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Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on *O'Brien v. Cunard S.S. Co.*

Introduction

*Richard W. Bourne**

In late 1989 a small group of law teachers gathered at the University of Baltimore Law School to discuss "Ideology in the Classroom" with four panelists, each representative of a modern "school" of jurisprudence. The goals of the seminar were to explore what role a teacher's ideology should play in structuring the learning process for students, and to do so in a unique way, by having teachers with clearly defined ideological commitments demonstrate how they would teach the same material.

At the outset we were confronted with ticklish problems of organization. One panelist objected to the program title, "Ideology in the Classroom," as falsely implying that teachers can or should teach without an ideology. Recognizing the tendency of global topics to encourage teachers who identify themselves with one or another jurisprudential "school" to talk past one another—and in the process to drive away those with less self consciously defined jurisprudential bents—we determined that the best way to focus the discussion was to ask our panelists to describe how they would go about the day-to-day task of "teaching a case" in one of the traditional "core curriculum" courses. The panelists' selection of the case, *O'Brien v. Cunard S.S. Co.*,¹ had to be negotiated. What was needed was an adequate vehicle for illustrating each teacher's approach to law, and fixing on one case required compromise by all concerned. Another panelist was quick to point out that this strategy could be viewed as implying the legitimacy of the traditional curriculum and its nineteenth century doctrinal categories of private law. Our intent was less sinister: we wanted a focus which was narrow enough to lower the decibel level of discussion among teachers with divergent and strong ideological commitments and yet broad enough to attract the interest of teachers from all viewpoints. We believed that if we gave apostles of critical legal studies, feminist legal thought, law and economics, and critical race theory, a chance to "show and tell" how their views play in teaching, they

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1. 28 N.E. 266 (Mass. 1891), reprinted at 57 MO. L. REV. 347.

might reach out in ways which would touch the rest of us. We chose a basic course from the traditional curriculum not because we endorse such a curriculum but because, this side of the revolution, most of us who want to teach law have little choice but to teach in it. As a sop to those who would have held out for a more ideologically correct focus to the program, and perhaps because we saw no need to showcase "traditional" teaching we decided to let the "ideologues" monopolize the program and not invite a single "traditional" or "legal process" type to show how she would have approached the task of teaching a case.

Papers which follow² are the panelists' [formalized for publication] discussions of what they would do in leading first year students through *O'Brien v. Cunard S.S. Co.*, a century-old decision appearing in a number of Torts casebooks in the section devoted to the defense of consent to a claim for battery.³ At the suggestion of others, I have added my own "traditionalist" response to the papers.⁴ At the seminar I played moderator, and my only role regarding *O'Brien* was to "state the case" in the manner of a first year law student. This I shall do here, albeit at considerably greater length than was done in the seminar since I shall not only state what the court said but also provide a reasonably full-dress review of its doctrinal analysis.⁵ Following the discussion of *O'Brien*, I shall briefly introduce the other papers.

2. See Jay M. Feinman, *The Ideology of Legal Reasoning in the Classroom*, 57 MO. L. REV. 363 (1992); Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 MO. L. REV. 371 (1992); Robert H. Lande, *A Law & Economics Perspective on a "Traditional" Torts Case: Insights For Classroom and Courtroom*, 57 MO. L. REV. 399 (1992); Taunya L. Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443 (1992); Richard W. Bourne, *A "Traditionalist's" Approach to Teaching O'Brien and to Ideology in the Classroom*, 57 MO. L. REV. 455 (1992).

3. See, e.g., JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 48 (1988); PAGE KEETON, ROBERT E. KEETON, LEWIS D. SARGENTISH & HENRY J. STEINER, *TORT AND ACCIDENT LAW* 43 (1989).

4. See Richard W. Bourne, *A "Traditionalist's" Approach to Teaching O'Brien and to Ideology in the Classroom*, 57 MO. L. REV. 455 (1992).

5. It is interesting how long winded law professors get when they are asked to describe something. At the seminar, I took five minutes to introduce the panelists and "state" *O'Brien*, and limited each panelist to a talk of fifteen minutes' duration. I am certain none of the speakers in fact would have devoted as much time to *O'Brien* as their remarks suggested they would want to. *A fortiori* this is true for the articles which follow, which with perhaps one exception contain a lot more than what each oral address did.

I. STATING THE CASE: *O'BRIEN V. CUNARD S.S. CO.*

Mary O'Brien sued the steamship company for personal injury resulting from a small pox vaccination she received from the ship's surgeon while emigrating from Ireland to the United States. The report of the case, an opinion by Justice Knowlton, consists of two long paragraphs, each directed to disposing of one of the two counts in her complaint; the report is so sparse that it fails to tell what her injury was. O'Brien had two theories of liability, battery and negligence,⁶ and the opinion, upholding directed verdicts for the defendant, holds that she presented insufficient evidence to prevail on either theory.

With regard to the first theory, battery, the court's opinion goes off on consent. In the court's view, this question reduced itself to "whether there was any evidence that the surgeon used force against plaintiff against her will."⁷ The question of her consent was to be determined objectively in light of the surrounding circumstances, not subjectively. "If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feeling may have been. In determining whether she consented, he could be guided only by her overt acts, and the manifestations of her feelings."⁸

According to the court, the circumstances pointed overwhelmingly toward consent. Under a Boston public health ordinance, only vaccinated persons could freely land.⁹ If one failed to prove vaccination, one faced a fourteen day quarantine or inoculation by the port physician.¹⁰ The shipping company customarily had its surgeon inoculate all immigrants who had not previously been vaccinated and provide them with certificates so as to avoid quarantine.¹¹ The evidence indicated posting of notices of the quarantine and of the willingness of the surgeon to provide the vaccination to "those who bore no marks to show that they were protected;"¹² the court believed the surgeon had a right to presume her understanding of the importance and purpose of the vaccination.¹³ According to the court, on the day in question plaintiff

6. *O'Brien*, 28 N.E. at 266, reprinted at 57 MO. L. REV. 347. Actually, there was a third count, for breach of the common carrier's duty to protect its passengers from rude or wanton interference with their persons, which was stricken before the case was tried. Plaintiff's Exceptions at 1, reprinted at 57 MO. L. REV. 469.

7. *O'Brien*, 28 N.E. at 266, reprinted at 57 MO. L. REV. 347.

8. *Id.*

9. *Id.*

10. *Id.* at 266, 57 MO. L. REV. 348.

11. *Id.*

12. *Id.*

13. *Id.*

observed the surgeon assemble 200 female passengers below deck, line them up, examine each for a mark, inoculate all those who had no marks, provide each a card, and let them go back on deck.¹⁴ The court indicated that no one objected, and all indicated by their conduct a desire to take advantage of the surgeon's services.

By [her] testimony, . . . it appears that . . . when her turn came she showed him her arm; he looked at it and said there was no mark, and that she should be vaccinated; that she told him she had been vaccinated before, and it left no mark; "that he then said nothing; that he should vaccinate her again;" that she held up her arm to be vaccinated; that no one touched her; that she did not tell him she did not want to be vaccinated; and that she took the ticket which he gave her . . . and used it at quarantine.¹⁵

Having thus summarized the record, the court concluded that the physician's conduct was lawful; "there was no evidence tending to show that it was not,"¹⁶ and upheld the decision on the battery count.

The court went on to uphold the dismissal of the claim for negligently inflicted harm. Since there was no claim of primary negligence by the steamship company, the court concluded plaintiff could only prevail if the surgeon was negligent and the company was liable for his negligence.¹⁷ The court declined to rule on the surgeon's negligence, instead deciding as a matter of law that the steamship company was in no event legally responsible for the surgeon's conduct.¹⁸

The adverse decision on the second count appears to rest on principles of agency law. The court believed that vicarious liability on the basis of *respondeat superior* was inappropriate because the doctor was viewed as an independent contractor whose conduct was beyond the rightful control of the steamship company.

In the court's stated view,

[t]he work which the . . . surgeon does is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon, or some other, . . . who happens to be on board, . . . or may go without treatment if they prefer The master or owners of the ship cannot interfere in the treatment of the medical

14. *Id.*

15. *Id.* (quoting Plaintiff's Exceptions at 2, reprinted at 57 MO. L. REV. 470.).

16. *Id.*

17. *Id.*

18. *Id.* at 266-67, 57 MO. L. REV. 348.

officer when he attends a passenger. He is not their servant, engaged in their business and subject to their control as to his mode of treatment.¹⁹

Neither holding of the *O'Brien* court was inevitable. The opinion of the court openly acknowledged difficulty with the agency argument it used to destroy Ms. O'Brien's negligence count. The court's difficulty arose from the fact that Congress had, since 1882, statutorily mandated that the company employ a ship's doctor "for every steam-ship . . . bringing immigrant passengers . . . other than cabin passengers . . ." ²⁰ That statute required the shipowner to keep the doctor on board, adequately quartered and supplied, and fully prepared to "give [medical services] in any case of sickness or disease to any of the passengers . . . who may need his services."²¹ Compounding the court's problem was precedent creating a shipowner's liability for negligence of pilots in navigating ships in and out of ports, even though such persons are appointed by public authorities.²²

O'Brien dealt with the agency problem by limiting the duty imposed by the congressional statute to supplying an adequate physician. In the court's view, the piloting cases were different because "the pilot is engaged in the navigation of the ship, for which, on grounds of public policy, the owners should be held responsible. The business is theirs, and they may have certain rights of control in regard to it."²³

II. ANALYSIS OF *O'BRIEN*

There are several difficulties with the argument that Cunard was exempt from liability because the physician was an independent contractor and not a servant. First, under general agency principles it is not at all clear that the physician was an independent contractor; while his special skills and distinct profession cut in favor of such a finding, the fact that he worked exclusively for the ship owner and used instruments, supplies and offices provided by the shipowner on its premises certainly cut against it.²⁴ It is rare that doctors or

19. *Id.* at 267, 57 Mo. L. Rev. 349.

20. *Id.*

21. *Id.*

22. *See, e.g.,* *The China*, 74 U.S. (7 Wall.) 53 (1868); *Yates v. Brown*, 25 Mass. (8 Pick.) 22 (1829) (both cited in *O'Brien*, 28 N.E. at 266-67, reprinted at 57 Mo. L. Rev. 349).

23. *O'Brien*, 28 N.E. at 267, reprinted at 57 Mo. L. Rev. 349.

24. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) for a listing of factors relevant to the question whether an employee should be characterized as a servant or independent contractor. *See also* HAROLD G. REUSCHLIEN & WILLIAM A. GREGORY, *AGENCY AND PARTNERSHIP* 103 (2d ed. 1990); WARREN A. SEAVY,

other professionals are found not to be independent contractors, but the fact situation can dictate a different result.²⁵

Under the rubric of "right to control," consideration is given to the practical capacity of the employer in fact to regulate the way the doctor conducts his office and the question whether there is anyone else who could control the employee. In *O'Brien*, the steamship company knew little about practicing medicine and was primarily concerned about safe transportation. These facts led the court to believe the company should not be found in "control" of the doctor. The plaintiff argued that the doctor was on the company's business because the statute made medicine its concern, and suggested the patient should not be in control because the patient had no more ability to select who would render health care or what service than she did who would captain the ship or how he should accomplish that job.²⁶

In *O'Brien* the court's opinion conjures a picture of the patient as the doctor's master—a picture which may gain instant creditability among certain upper middle class consumers and surely would gladden the heart of the American Medical Association. The record of the case presents a clashing image. As both Professors Banks and Shalleck indicate elsewhere,²⁷ reality precludes a holding that Mary O'Brien was firmly in control of the doctor; instead a fair review of the record indicates that he was running the show, in cahoots with the steward and matron of the passengers, and that people like Mary O'Brien appear to have had little choice in the matter.²⁸

Even if one refuses to find the ship owner was the actual master of the physician in rendering the vaccination to steerage passengers, the ship owner could still be found liable, under traditional principles, if it represented, directly or indirectly, to them that the doctor was its servant and thereby caused them to rely upon his care and skill to their detriment.²⁹ The facts of *O'Brien* strongly suggest the factual predicate for application of this rule. The ship's doctor was held out to the passengers as its employee; he administered the vaccine to them with the necessary assistance of the ship's company; it is hard to believe that Ms. O'Brien did not assume that Cunard

AGENCY 142 (1964).

25. See REUSCHLIEN & GREGORY, *supra* note 25, at 106 n.28; SEAVY, *supra* note 25, at 146.

26. Plaintiff's Brief at 6-8, reprinted at 57 MO. L. REV. 487.

27. See Banks, *supra* note 2, at 449-453; Shalleck, *supra* note 2, at 378-385.

28. See Plaintiff's Exceptions at 1-5, reprinted at 57 MO. L. REV. 470-473.

29. See RESTATEMENT (SECOND) OF AGENCY § 267 (1958). Illustration 4 under comment b of this section involves a department store which contracts with a doctor to give medical attention to store patrons. If the store allows the doctor to appear as its employee and she mistakenly injects poison into a patron, the illustration suggests the store is liable. *Id.* § 267 cmt. b, illus. 4.

stood behind his competence in rendering care to her or that absent his apparent authority she would have submitted to the vaccination.

Third, there is a powerful argument that Cunard owed Ms. O'Brien a non-delegable duty of due care. This duty can be seen as arising either from the high duty a common carrier owes to provide safe carriage to its passengers,³⁰ from the statutory duty to supply medical treatment to the passengers,³¹ or from both. If the public health warrants requiring carriers like Cunard to afford their passengers medical services, then it is hard to argue such carriers should be able to shift responsibility for providing these services to independent contractors.³²

Finally, practical considerations militate against relegating tort victims like Ms. O'Brien to actions against the physician. We do not know why the physician was not joined as a defendant in *O'Brien*. Explanation might lie either in plaintiff's inability to obtain effective service of process over him under nineteenth century rules for personal jurisdiction or her special affinity for Cunard's obviously deeper pocket. If one believes people like Ms. O'Brien should have redress against someone, the likely inability to gain full compensation from ships' physicians would require holding shipping companies themselves responsible.

The court rejected Ms. O'Brien's battery count on the facts, not the law. The court upheld the trial judge's determination that there was no evidence of coercion and that, as a matter of law, Ms. O'Brien consented to the vaccination. The raising of the arm might be an act signifying consent to the inoculation, but it certainly could mean something else: an act of silent protest or signal of abject resignation in the face of overwhelming intimidation. The court's opinion manipulates the record in order to negate the inference of duress. First, the court tells us that in plaintiff's own testimony, "which is undisputed . . . she told him she had been vaccinated before, and it left no mark; 'that he then said nothing: that he should vaccinate her again . . .'"³³ The record on appeal is materially different: her words were that "he said there was no mark, and I must be vaccinated again."³⁴ Second, the court opinion omits a litany of facts which suggest that the atmosphere in

30. See *id.* § 214 cmt. e; SEAVY, *supra* note 25, at 139.

31. See RESTATEMENT (SECOND) OF AGENCY § 214 cmt. e (1958); SEAVY, *supra* note 25, at 139-40.

32. See WILLIAM L. PROSSER, TORTS 471-72 (4th ed. 1972). Plaintiff in fact made this argument in her brief. See Plaintiff's Brief at 6, reprinted at 57 MO. L. REV. 487.

33. *O'Brien*, 28 N.E. at 266 (quoting Plaintiff's Exceptions at 2), reprinted at 57 MO. L. REV. 348.

34. Plaintiff's Exceptions at 5, reprinted at 57 MO. L. REV. 472-73.

which the vaccinations were rendered was intimidating³⁵ and that Ms. O'Brien was peculiarly susceptible by age and circumstance to having her will overborne.³⁶

The directed verdict against Ms. O'Brien on the issue of consent should not have been granted or affirmed. There was simply too much in the record to hold as a matter of law that no reasonable trier of fact could have found consent.

Given the weakness of *O'Brien's* battery holding, one wonders what led the Supreme Judicial Court to rule the way it did. Certainly it is unlikely the case would come out today the way it did in 1891.³⁷ Even if one discounts the changes in legal doctrine, the *O'Brien* court seems to have gone out of its way to strike plaintiff's claims. If the court really believed its agency argument, it had no need to find consent to the alleged battery because the independent contractor status of the doctor would have led to Cunard's exoneration on the battery as well as the negligence count. The whole case could have been decided on agency and the dubious consent decision would have been avoided. Alternatively, given the weakness of her liability evidence

35. The steerage passengers were segregated by sex and then separately herded below decks, lined up, and told that they had to submit to examination and that they had to be vaccinated or they would not pass quarantine. The 200 assembled women were not allowed to return to the deck until they went through the line. Ms. O'Brien, a 17-year old woman, hung back till the end, when the only people left were herself, two stewards, and the doctor. *Id.* at 1-5, 57 MO. L. REV. 470-473.

36. Ms. O'Brien was obviously poor and a woman, though the court does not dwell on these facts. In addition to her lowly status and gender, the record indicates that she was a child who, until being separated for the vaccinations, had not been separated from her father and brother the whole voyage; that she was afraid but knew there was no way to get away; that she was Irish and Catholic and traveling on an English flag ship; and that though literate she was poorly educated. *Id.*

37. Professor Banks suggests the contrary is true on the battery issue, citing *Madrigal v. Quillian*, No. CV.75-2057 JWC slip op. (C.D. Cal. June 30, 1978). See Banks, *supra* note 2, at 453-454. There are parallels between the cases, but *Madrigal* was decided by a judge who weighed the evidence and found the facts against the plaintiffs, not on the basis that no reasonable trier of fact could find otherwise. *Madrigal*, JWC slip op. at 4-5.

Even if the battery issue came out the same way, the legal climate has changed so significantly since 1891 that Ms. O'Brien would probably win on her negligence theory. The negligence count was inherently weak in 1891, because it was hard to prove that the negligence alleged—failure to use proper sanitation—had caused her injuries, blisters over her body; such injuries were a statistically inevitable result of perfectly administered vaccinations. This weakness would not impede recovery today on the basis of lack of informed consent. See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972). Second, the emergence of non delegable duty doctrine would strengthen Ms. O'Brien's claim on the agency issue.

on the negligence theory,³⁸ the court could have shot that count down for insufficient evidence without using the agency argument. In effect, either the first or the second holding was largely gratuitous, explicable only on the theory that the court really wanted to insulate the shipping line for liability to the maximum extent possible.

38. Plaintiff's injuries consisted of blisters "almost over her whole body" and a bad ulceration on the arm where she had been inoculated. Plaintiff's Exceptions at 6, reprinted at 57 MO. L. REV. 486-87. Her theory was that she had suffered blood poisoning caused by injection of a "foreign substance" into her arm. *Id.* at 6, 57 MO. L. REV. 473. The substance was either contained in an adulterated vile of vaccine the spoilage of which should have been discovered by the doctor or brought to the wound because of unsanitary practices of the doctor. *Id.* at 6-9, 57 MO. L. REV. 474. The Superior Court directed a verdict against her in part on the ground that she had failed to prove negligent infliction of harm. Eight physicians including the ship's surgeon, testified about injury and causation. Most concluded that what she had suffered from was simply "vaccine disease," a statistically predictable side effect of the vaccination of the day; that the scar on her arm was a "true vaccine scar" indicating the serum had been pure and the vaccination had "taken;" and that the scar from a subsequent vaccination on her leg indicated it had "taken so slightly as to indicate the vaccination complained of had been effectual." *Id.* at 6-7, 57 MO. L. REV. 485.

The weight of her claim rested on two medical witnesses, her regular doctor, who administered the last vaccination, and an expert, a Dr. Clark. Both indicated in their view the last vaccination "took," suggesting that the earlier one was "spurious." *Id.* at 8, 57 MO. L. REV. 475-76. Dr. Clark examined her while she was symptomatic and provided the only direct expert testimony that the blister eruptions were not "vaccine disease" but something else, a disease he "took to be" pemphigus. *Id.* at 6, 57 MO. L. REV. 474. Dr. Clark opined the source of this disease must have come from virus the spoilage of which could have resulted from improper sealing of the capillary tube in which it was kept or perhaps simply from being kept too long. *Id.* at 6-7, 57 MO. L. REV. 474. Dr. Clark repeatedly indicated that the infection might have been "without the fault of the doctor, whom he did not undertake the blame . . . [and] that he didn't charge any fault on anybody" *Id.* at 7, 57 MO. L. REV. 474. On cross examination he conceded that her symptoms were consistent with vaccine disease except for the eruptions, which he believed were pemphigus. *Id.* He admitted that he had never heard that this disease was caused by vaccination before this case; that he had seen only three cases of it previously; that he did not know what caused it; and that the three cases he had seen simply arose spontaneously. *Id.*

The only other evidence of neglect arose from the surgeon's admitted use of only one towel during the whole procedure. There was evidence this was used both to wipe arms before each vaccination and to wipe antiseptic off the lancet before its use to vaccinate. *Id.* at 2, 9, 57 MO. L. REV. 469, 476. One of defendant's experts, the port physician, said such a procedure was unwise "as there would be some danger of conveying in that way, impurities from one person to another." *Id.* at 8, 57 MO. L. REV. 475-76. On the other hand, this doctor had no difficulty with using only one towel to wipe the lancet for two or three hundred people in a row. *Id.*

There were several reasons it should want to do that. First, one must remember that the legal landscape regarding personal injuries was considerably less plaintiff-oriented in the late nineteenth century than it has been in recent years; courts then largely subscribed to the notion that as a general matter losses should lie where they fall, only to be reallocated upon clear proof that someone other than the victim was at fault.³⁹ Second, there was a general feeling of warm solicitude toward professional classes and capital as legitimate protectors of the commonwealth and therefore as worthy of judicial protection when their activities led to occasional misfortune.⁴⁰

Finally, and most important in this case, were the public health concerns which inevitably lay in the background of the *O'Brien* litigation. Public health concerns underlay the federal statute requiring steamship companies like Cunard to employ a ship's physician and make free medical services available to emigrants and all passengers in steerage. Public health concerns also underlay the ordinance of the Boston Board of Health compelling examination of all immigrants to determine whether they were "protected from the effect of the contagion of small-pox," and forcing those without such protection either to submit to vaccination or to a fourteen day quarantine.⁴¹ The latter ordinance, doubtless considered "progressive" in its time, was made to dovetail nicely with the federal legislation; the ordinance specifically provided for examination and vaccination of all immigrants by medical officers on steamships, indicating that such persons should be excepted from portside examination and quarantine if they had obtained the requisite certificate of "protection" signed by the ship's physician. Nor was a ship's participation in this regime entirely voluntary; the ordinance required the

39. The era was, of course, the heyday of *laissez faire* capitalism. The law did not shift in favor of plaintiffs until the rise of insurance as an institution, bringing with it an enhanced awareness of the appropriate allocation of risk through enterprise liability, and the development of the corporate welfare state, which was accompanied by a feeling that state intervention to adjust the distribution of resources was not overwhelmingly and presumptively illegitimate.

40. The opinion in *O'Brien* trivializes her injuries to the point of refusing to mention them, and pictures the physician and his corporate employer as good hearted caretakers whose job was to render medical services without undue hinderance. The doctor is seen as a benign servant, "accustomed to . . . vaccinate all immigrants who desire it . . . and give them a certificate . . . as evidence of their protection. Notices of the willingness of the ship's medical officer to vaccinate . . . were posted . . ." *O'Brien*, 28 N.E. at 266, 57 Mo. L. REV. at 347. The opinion creates the image of efficiency, hustle and bustle, with 200 women "assembled below . . . vaccinated . . . without a word of objection from any of them . . . [and] . . . indicat[ing] by their conduct that they desired to avail themselves of the provisions made for their benefit." *Id.* The victim—to the extent she is pictured at all—is viewed as an ungrateful wretch.

41. Plaintiff's Exceptions at 9-10, reprinted at 57 Mo. L. REV. 476-77.

ship's medical officer to verify the number of persons considered protected and imposed, for those who wished to avoid quarantine, a small charge for vaccination by the port physician.⁴² Unless this was paid, the passengers would have to stay in quarantine or be returned to Europe, likely at the expense of the shipping line.⁴³

This regulatory regime explains why Cunard was providing medical services, including vaccinations, to its steerage passengers. The economics of the matter also explain why the process it used so closely resembles that of an assembly line and why it was not only insensitive but also coercive. The goal was to inoculate every immigrant who lacked physical evidence of previous disease or vaccination, and to do so on the cheap. To have excepted Mary O'Brien would have been to risk her delayed in inoculation, quarantine, or expulsion and return to Ireland; the most inexpensive solution to the public health problem was to ignore her protests. At the very least, according to this argument, her "submission" to authority should "be deemed to have been voluntary."⁴⁴

Plaintiff's lawyers were aware that "the public health argument" was the most powerful one defendant had; at trial plaintiff excepted most strongly to admission of evidence of the Boston public health ordinance.⁴⁵ Plaintiff's lawyers knew the argument was "dynamite" for the other side. Once the evidence is considered, it is easy to understand why the *O'Brien* case came out the way it did. The holdings of the court minimize the liability of Cunard to the extent possible; the decision immunizes Cunard for fiscal responsibility for slipshod medical practice its agents supply poor passengers,⁴⁶ and more importantly, gives the agents *carte blanche* to intimidate poor passengers into receiving the vaccination by all means just short of unabashed physical coercion. If a court wished to insulate the shipping industry from "external costs" of providing public health services, it could not have done a more thorough job.

42. *Id.* at 10, 57 MO. L. REV. 477. The charge of only twenty-five cents was small enough so that all but the destitute could pay it but probably large enough to encourage people to accept free vaccinations on board ship.

43. *See* Lande, *supra* note 2, at 428 n.109.

44. Defendant's Brief at 2, reprinted at 57 MO. L. REV. 491.

45. Plaintiff's Exceptions at 10, reprinted at 57 MO. L. REV. 477.

46. Although plaintiff's injuries do not appear to have been terribly serious, the record suggests they were "of a kind frequently associated with vaccine disease and also very frequent in newly landed steerage passengers. . . ." *Id.* at 7-8, 57 MO. L. REV. 474-75. Shipping companies like Cunard thus had a substantial reason to take a hard line and not buy off claimants like O'Brien.

III. THE PAPERS

Set out below are the papers of the four panelists who contributed papers to our seminar on how jurisprudential schools should play in teaching in the mainstream part of a law school's curriculum.⁴⁷ At the seminar Professor Ann Shalleck explained how she would teach students *O'Brien* from a feminist perspective. Professor Robert Lande demonstrated how he would use law and economics to analyze the case. Professor Taunya Banks, a critical race theorist, showed how she would attempt to explore the case from the perspective of cultural pluralism. Finally Professor Jay Feinman explored what a critical legal studies person would do with the *O'Brien* case. In addition to the papers of these modern schools' representatives, I was elected to the dubious honor of articulating how a "traditionalist" teacher would approach the task of teaching *O'Brien*, and my paper thus follows the lot.⁴⁸ In my effort, I also will try to explain whether the seminar worked as an exercise in faculty development.

47. The papers are listed *supra* note 2.

48. The "election" took place as we set about finding a publisher for the other four papers and someone suggested the group needed a "straight man." I won by default. See Bourne, *supra* note 4.