

Readings in comparative sociology of law

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READINGS IN LAW AND DEVELOPMENT

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CHAPTER X

VOCABULARIES

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Lawyers engaged in the legislative process have a professional and practical interest in sociology of law and law and development. To do their jobs effectively, they must conduct investigations efficiently to discover what constitutes the difficulty, what explains the behaviour at issue, and how to develop a legislative programme likely to resolve the difficulty.

These lawyers' concern with behaviour focusses on what people do in the face of a rule of law. Before designing a law to solve a social difficulty, they must explain how the present law contributes to the difficulty, and how their proposed law will change behaviour to help resolve the difficulty. That calls for investigations about the relationship between the social behaviour at issue, and the law that affects it.

Like all investigations, that calls for a theory, for without a theory, the investigator does not know where to look to find an answer for the research question posed. That is, the researcher needs criteria for relevance -- what information will likely help solve the question that the research aims at, and what will not push that task forward. In effect, theory creates blinders for the investigator, to exclude irrelevant material and to include relevant material. Three sets of blinders cooperate towards this end: Methodology (discussed in Chapters V and VI), general perspectives, like economic or jurisprudential theory

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(discussed in Chapters VII, VIII and IX), and the concepts (or vocabularies) we use to understand events (discussed in this Chapter and in Chapter XI). Together, they make research possible. Without them, like idiots counting the grains of sand on a beach, we cannot even conduct a meaningful investigation.

Concepts and the words we use have a close relationship. We symbolize concepts by words. To discuss concepts requires that we also discuss the words we use to symbolize those concepts, that is, our vocabulary. What set of concepts -- that is, what vocabulary seems most useful to guide investigations about what the law ought to be in conditions of development?

Vocabularies constitute agendas for research. The words that constitute a vocabulary always are relatively general. The researcher considers these general words and then examines the particular set of circumstances at issue. The general words tell him for what sort of facts to look. For example, law and economics focusses on wealth-maximizing behaviour of individuals. It instructs the researcher that, to understand behaviour, look for incentives and disincentives. That constitutes an agenda for research. Finding what constitutes the most useful agenda for research for a discipline of law and development in China constitutes the subject-matter of this Chapter.

As we suggested in the last Chapter, the concepts we use for investigations into what the law ought to be have a strong relationship with the perspectives that we adopt. For example, Law and Economics resonates easily with supply-side economics. It constitutes not only a legal philosophy, but (as we examine in

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this Chapter), a vocabulary for investigation.

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Jurisprudents have developed many vocabularies. Most of these do not bear any explicit relationship to a perspective on development or economics. Most frequently, they ~~developed~~ *evolved* without their authors considering the consequences for economic development. (John Austin, the author of one historically important vocabulary, analytical positivism, does not seem to have considered important any social consequences of law!).

In this Chapter we consider a wide variety of vocabularies. These several vocabularies may seem to overlap, but in fact they

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constitute mutually exclusive categories. A vocabulary advises the investigator to look here and not there. It must therefore assert that the categories its concepts define constitute the only ones that count. If a vocabulary holds that to understand how law affects behaviour one need look only at category a, then one need not look at other categories. Another vocabulary may advise the researcher to look at category a, but also to look at categories b and c. The vocabularies are inconsistent. The researcher cannot accept both; one must make up one's mind.

In this Chapter we examine a number of candidate vocabularies for sociology of law and law and development. We remind the reader of the statement made in Chapter I: We include contradictory theories so that readers can make up their own minds about what suits in China. As an organizing theme, for the remainder of this volume we adopt the institutionalist vocabulary, just as we adopt ^{test} the problem-solving methodology even though we discussed ends-means (Chapter V). We nevertheless urge readers to examine the other vocabularies discussed, so that they can make their own judgments about their respective advantages and disadvantages in the Chinese context.

This Chapter discusses:

- A. Introduction: The function of vocabularies in research:
- B. The Rule of Law vocabulary; Max Weber; analytical positivism.
- C. Sociological jurisprudence and legal realism.
- D. "Sociological" models.
- E. Law and Economics.
- F. Marxist legal theory.

G. Institutionalism.

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Which of these several vocabularies seems most useful to an investigator concerned with writing legislation useful for solving China's difficulties in the closing years of the twentieth century?

A. INTRODUCTION: THE FUNCTION OF VOCABULARIES IN RESEARCH
CHAMBLISS AND SEIDMAN, LAW, ORDER AND POWER (1978) pp.55-57.

Methodology, perspectives, vocabulary: these elements make up every social theory. In this chapter we discuss the various vocabularies (categories, concepts) and theoretical perspectives employed by social scientists, including lawyers, in an effort to understand and use law and the legal order. In this chapter we will also develop more fully the theoretical perspective which we believe to be the most useful and the most consistent with known facts about law and society.

The vocabulary we choose to study a phenomenon ineluctably places blinders on us. It must do this or else we see so much we cannot understand it. Like methodologies and perspectives, vocabularies guide us to relevant data. In the conventional language of theory, vocabularies in general terms identify independent variables, dependent variables, and relevant conditions correlated with the social facts we wish to describe and explain. In the language of the problem-solving methodology we earlier advanced, propositions concerning categories constitute heuristics useful in directing attention to appropriate explanation and data.

There is a fundamental paradox in this process of developing categories and perspectives. No matter how we try, we can never make our minds blank slates. To examine requires that we use a vocabulary. To be useful a vocabulary (or categories) must help in explaining the phenomena under examination. We dare not use our

existing vocabulary unexamined, or else our explanations will merely reflect our present biases. Before doing the research designed to explain the legal order, paradoxically, we must generate an explanation for it out of which to generate categories to guide the research. Accomplishing that becomes the principal task of the "ideal-type."

The ideal-type expresses what, based on present knowledge, the theorist supposes constitute the key variables, put together in a pattern whose form derives not from detailed data (for gathering the data constitutes the purpose of the research), but from logical inferences based upon preliminary excursions into the domain of study. Investigators deep in their subject create the great ideal-types, such as Hans Kelsen's model of the legal order, Max Weber's of bureaucracy, or Karl Marx's of capitalism. Such an ideal-type may, facially, prescribe a Utopia, but it may base itself explicitly or implicitly upon an explanation. That explanation, necessarily in general terms, identifies outcomes, causative factors, and conditions and specifies how these logically interact with each other. In law and society studies, ideal-types concern themselves more directly than does "grand theory" with the working of the legal order.

Consider, for example, the vocabulary suggested by H.L.A. Hart.¹ Hart divides the law into "primary" and "secondary" rules* plainly, that constitutes an ideal-type. Hart does not describe any particular state society when he discusses the character and function of primary and secondary rules. In his book, we find scant reference to any particular legal system. Hart argues, however, that to understand any particular legal order we must distinguish between "primary" and "secondary" rules. By primary rules Hart means those rules of law which are simultaneously addressed to the citizen and government officials (for example, the judge). A rule prohibiting the sale of heroin is addressed to the citizen and warns him or her that they may be punished if they engage in this act; this rule also tells the judge that if someone is found engaging in the sale of heroin the judge is to punish them. But, Hart argues, equally important for an understanding of the legal order are the secondary rules: these are rules addressed solely to the administrators of the law, a rule requiring that a judge conduct a trial in a certain fashion, for example.

By providing this language, these categories for inquiry into law, and creating this particular ideal-type Hart is structuring our vision. He provides a set of categories and implicitly a theory about how law works which excludes from our vision a multitude of other facts and focuses our attention on those facts which he believes to be crucial for an understanding of the legal order. Whether or not he is correct in choosing the vocabulary he does, creating the ideal-type he creates, and implying the theory implied, will in the end be determined by the theory's ability to explain what actually happens and by the theory's utility in providing usable propositions for changing existing conditions.

With this orientation in mind, then, let us examine a few of the most influential vocabularies and perspectives employed by social scientists in an effort to understand the legal order. It must be borne in mind, in the discussion that follows, that ideas, like all other social facts, exist within the constraints of a particular historical period. There are, of course, resources available for transcending existing knowledge. This is necessary for ideas to change. Nonetheless, the ability to manufacture new perspectives and vocabularies is itself linked to the inherited *Weltanschauung* (world view) of a particular generation. Thus, to understand today's vocabularies and perspectives it is necessary to delve into the history of these ideas and see first of all what political, economic, and social relations existed at the time of their creation. We object as much as anyone to thumbnail sketches of the lifetime works of profound and sometimes prolific scholars. We urge students to read the works of the authors discussed in the original. We recognize, however, that not everyone has time for that; so we include these condensations as a handy index to these writers and no more than that.

* Primary rules address ordinary action. Secondary rules address officials. They prescribe the criteria of valid law; how to change law; and how to adjudicate cases arising.

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B. THE RULE OF LAW VOCABULARY, MAX WEBER, AND
ANALYTICAL POSITIVISM

CHAMBLISS AND SEIDMAN, LAW, ORDER AND POWER (1978) pp. 57-62.

One of the most lasting conceptions of law and the legal order is summarized under the concept the "Rule of Law." Scholars, lawyers, politicians, and laypersons alike have employed this perspective on the legal order for centuries. The "ideal-type" assumed by this model sees the law as a set of rules, norms, and institutionalized processes which function to create predictable, comprehensible rules that limit the discretion of state officials. This perspective on the law emerged in England during those centuries when England's political economy was undergoing a transition from feudalism to capitalism.

Late eighteenth- and early nineteenth-century England saw a dramatic conflict between the older landed gentry and the newer entrepreneurial classes, ~~the~~ former struggling to maintain its hold on state power, the latter trying to dislodge it. At stake lay command over the English economy and the use of state power to bolster directly and indirectly the one class or the other.

The English common law courts developed out of the continuing struggle between the Crown and the great feudatories. Under feudal constitutional law, a feudatory had in effect his own government and his own courts; the power to govern came with the land. The Crown early tried to eat away that jurisdiction by sending the king's judges into the countryside to try cases on a winner-takes-all basis. The substantive law they applied purported to arise from custom, not from the Crown's will. For example, while primogeniture (inheritance of property by the eldest son) prevailed for distributing a dead person's estate, in those parts of England that followed the custom called *gavelkind*, courts distributed property equally to the deceased's children. The judges purported to apply not laws that they invented, but only customary norms. As a body of decisions accumulated, judges came to follow not the statements of witnesses about the content of the custom, but what the earlier, precedent cases declared it to be. Even legislation at first took its force from the claim that it only embodied custom, as the rules concerning the overseas reach of British law demonstrates.

English law declared that Englishmen colonizing overseas—for Britain, the world's greatest empire, an important occupation—carried their law with them as a

bright. That law, however, did not include all the law of England, but only part of the common law and all statutes in affirmance of the common law passed in England, antecedent to the settlement of a colony. . . .²

• • • Courts that decide cases by "applying" laws must in some cases create law. Some fact situations fall clearly either within or without a rule. Some, however, fall within the rule's gray areas, in which reasonable lawyers disagree about whether the rule properly subsumes the facts. In deciding whether the rule does or does not control the case, the court in effect must rewrite the rule, expanding it a bit to include the troublesome facts within its embrace, or contracting it to exclude them. To that extent, courts inevitably make new law.

In undertaking this task, the common-law judges wavered between two alternative theories. On the one hand, the common-law judges (at least until the middle of the eighteenth century) perceived themselves in the aristocratic tradition. The common law, they said, resided in their breasts; they announced it from time to time and usually made few bones about their creative role. On the other, they sometimes denied that they created law. Purporting to enforce custom, they readily attributed any change in law to the slow transformation of social values and standards. To warrant the title of custom, a norm must embody the custom of "all-of-us." In common-law theory, custom and law become the resultant of community determination. It assumed that a society had a common set of values, manifested in its common choice of norms. It perceived law not as the molder of society or creator of institutions, but as a newly institutionalized form of norms earlier developed in society's bosom.

The notion that courts did not create norms, but merely enforced "the custom of the realm" conformed nicely to the emerging theme of contract as the principal form of economic cooperation. In feudal England, economic cooperation rested upon custom-institutions, upheld by state power. The serf had certain obligations to the owner of manor; the vassal, to his lord. These obligations ensured that the economy would function and extract the surplus for the benefit of the feudatories. They ensured that the serfs would perform the labor upon which the whole edifice rested. Other norms give the serf rights required to ensure that the labor force would reproduce itself. For example, the serf had certain customary rights to land and the right to physical protection against marauders.

In the sixteenth century, feudalism was in rapid decline. The mercantilist theory was rapidly coming to dominate political and economic thought and practice:

• • • Mercantilists aimed at amassing in their own country the greatest possible amount of treasure. To this end Navigation Acts attempted to confine trade to English ships so that the navy could be kept strong. Bounties were paid to exporters of corn since corn exports were held to encourage agriculture and to bring in treasure and home industries were protected with tariffs. This was the theory held by the Government and the bourgeoisie in England right up to the Industrial Revolution.³

By the eighteenth century, English feudalism had long since died. Britain lay gripped by a mercantilist economy and an aristocratic constitution. State power supported and

created an economy in which merchants served the interests of the landed gentry, who governed the country as justices of the peace and controlled the tight London circles of Parliament and government.

Meanwhile, in the very heart of mercantilism, new forms of enterprise arose. British and Scotch mechanics began the spate of invention that created the Industrial Revolution. New people, both canny and daring, saw vast opportunities for profits in manufacturing and selling goods. In an unplanned economy, commodity exchange rests upon each economic actress trying to seize her chance as she perceives it. Contracts replaced feudal custom as the economy's glue. Employers hired employees; importers sold to wholesalers, wholesalers to retailers, retailers to consumers, suppliers to manufacturers. Entrepreneurs entered upon large undertakings with one another, based upon their agreement to cooperate in specified ways.

Contract became the legal form of a free-market economy. Mercantilism denied the free market. The form of law associated with mercantilism made contract law—the law of the free market—difficult. The privilege-ridden mercantilist legal order made it difficult to estimate how courts and the state would deal with investment, contracts, and property—and above all else, businesswomen must calculate what might happen to their enterprise.

New philosophies arose to express the world views of the new free-market economy entrepreneurs. In economics, Adam Smith explained the relative wealth of nations (why some nations were rich and others poor) by the free market: those nations with free-market economies encouraged invention and productivity, those with other economic forms discouraged these developments.⁴ It followed therefore that England was by rights wealthy and Asia poor, for example. In philosophy, jurisprudence, and law, Jeremy Bentham created a theoretical perspective that resonated easily with Adam Smith's daring new notions of the value of laissez-faire capitalism. Bentham argued that people were motivated by an overwhelming concern to maximize pleasure and minimize pain. In law these ideas translated into a utilitarian philosophy in which the state's responsibility was to see that undesirable behavior was swiftly, certainly, and severely punished while desirable behavior was rewarded by the acquisition of more wealth.⁵ These new social theories implied a legal order that located economic decisions in the heads of entrepreneurs. Contract law embodied its typical modality. Contracts embody the operative norms of capitalist economic life. From the law businessmen demanded the exclusive power to determine those norms and the law's subsequent aid in enforcing them. • • •

That called for a legal order whose courts served mainly to decide conflicts over the performance of bargains, in which entrepreneurs (or their lawyers for them) could predict the decision with reasonable certainty. To do that, a court had to treat those who appeared before it as formally equal, for it would not serve the cause of predictability if the well-born could expect the court's favor for no better reason than the blueness of their blood. A court had to decide pursuant to rules well known in advance, without the intrusion of the judge's personal values; it would not do to make every case depend upon what the particular judge ate for breakfast. A court had to require government officials, too, to act only pursuant to rules that made their behavior

predictable. The capitalist dreamed of a static legal world, whose courts decided cases like computers, and legislation had no role. In one of the several ideologies of the common law, the bourgeois jurists found a congenial set of norms prescribing how courts ought to behave. In laissez-faire ideologies of the law, the common-law courts became the very core of the legal order.

Nowadays we call such a legal order the "rule of law." The rule of law arose out of the demands of the new entrepreneurial classes for a form of state power commensurate with laissez-faire that would so far as possible endow them with power and that would discipline bureaucrats not to interfere with that power. All the usual attributes of the rule of law resonate with that conception, e.g., judicial independence, narrow discretion, equality before the law, due process, and judicial review of administrative action.

So stated, the ideology of the rule of law constitutes a normative model, a statement, not of how things are, but of how they ought to be. Such ideologies easily fall prey to the normative fallacy, the belief that they describe how things actually are. So with the rule of law: many people fondly believe that we have a society in which the rule of law operates, with at best minor aberrations. Whether the rule of law actually describes the legal order, or whether it in fact mystifies it and why, becomes a central issue for an adequate study of law and society.

The rule of law, moreover, readily fits a consensus model. That model argues that every society has a particular set of values, upon which practically all its members agree. If people do share basic values, then a democratic state must represent that consensus. The only legal problem becomes one of ensuring that individuals do not substitute their own deviant motivations for the values of the polity. A common variant of the consensus perspective holds that, although the polity of course contains conflict, the state itself does not take sides. No matter how antagonistic the contending classes or strata, on this much they must agree, that the peaceful settlement of conflict serves all-of-us better than violence. In this view, the state represents all-of-us, but only for the limited purpose of containing conflict. Every specific law or activity of the state carries its burden of values, but the machinery by which the state comes to the decision to create and enforce any particular law operates impartially.

The rule of law theory par excellence embodies this variant of the consensus model. Its strictures aim at ensuring the value-neutrality of the state machinery. Under the value-neutral state's benign aegis, people (read entrepreneurs) can work out their own destiny, permitting the invisible hand of the market to determine the best allocation of goods and services, made possible by the perfect predictability ensured by the value-neutral state and the rule of law.

In jurisprudence, the dominant school in this tradition became that of analytical positivism; in sociology, that of Max Weber. Here we discuss Weber's theory of law.

Universalistic Rules, Autonomous Legal System, and Legalistic Reasoning

Max Weber wanted to explain why industrial capitalism arose in the West, but not elsewhere. He sought to relate his concept of the unique characteristics of western

European law to the rise of nineteenth-century capitalism.⁶ A system where profit maximization makes each the other's enemy seems opposed to technological demands for cooperation. Exchange through markets resolves this tension. Every bargain accommodates these two disparate forces. From the actor's point of view the exchange brings control over resources. If a party withdraws from a bargain it loses its purpose. Custom loses power and cannot ensure the calculability demanded by modern entrepreneurs. A legal order becomes necessary to enforce agreed-upon bargains. That legal order rests upon three pillars: an autonomous legal system, universalistic rules, and legalistic reasoning. The very notion of a market economy, open to every person, requires sanctions pursuant to universalistic rules that apply to all similar transactions. Market bargains define the norms of economic interchange, within the framework of the general rules of property, tort, and criminal law. Courts sanction violations of these rules. Calculability requires a system where each actor can discover what law will apply in a particular situation. He can discover such rules only under publicly known procedures for determining the law, adhered to by judges who exercise little discretion. That condition presupposes that judges (and lawyers) can find the rules by logical processes—that is, that the law exists as a "seamless web" and that if gaps seem to exist, sources within the legal order can fill them. This system of law-finding we call "legalistic." Its great expression in the English jurisprudence became analytical positivism.

Weber thus defined the ideal-type of capitalistic law. In Weber's view, "legalism supported the development of capitalism by providing a stable and predictable atmosphere; capitalism encouraged legalism because the bourgeoisie were aware of their own need for this type of governmental structure."⁷ How well do its categories serve to study law and society in our century?

... [T]he concept of universalistic rules requires that we ignore most of the law of social administration in favor of lawyers' law. That entails a value-judgment in favor of those solutions which lawyers' law serves—i.e., solutions consistent with an extreme version of laissez-faire. No government in the real world accepts so narrow a limitation upon its powers. If we want to study what governments in fact do, we must adopt categories adapted to studying not only lawyers' law, but also the law of social administration. As a category, universalistic rules read too narrowly.

Legalistic reasoning as a category of study too cannot serve, but for another reason: it does not exist any place except in some jurists' heaven. Judges cannot decide "trouble" cases solely with materials drawn from the universe of norms. The law is not a gapless web.⁸

NOTES AND QUESTIONS

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1. On the Weberian Vocabulary. Weber stands as a giant in the development of sociology of law. More than any other individual, he began systematic theorizing about the relationships between law and society. The categories he developed, however, arose primarily out of his study of the great transition from pre-capitalist to capitalist Europe. How useful are they to help investigations into problems of law and development in 20th Century China?

For example, in 1979 China enacted an anti-pollution law. Anyone who has walked through the streets of Beijing in midwinter knows that the law has not accomplished spectacular successes in removing pollutants from Beijing's atmosphere (by some measures, Beijing has the most polluted atmosphere of any major city in the world).

How would Weber's categories guide an investigation to explain the relative failure of China's anti-pollution law? That law constitutes a law of social administration. Weber's model suggests that a law's failure to induce conforming behaviour results from insufficient autonomy of the legal system, or a rule insufficiently universalistic, or legal reasoning insufficiently legalistic. He argued that legal rationality worked best when both monopoly power and social interests were weak. Rational legality was undermined by particularistic demands characteristic of democratic governments or governments in societies where one class possessed a virtual monopoly of power. A rule permitting its addressees great discretion in deciding how to obey does not

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fit the model of universalistic rules, because it in fact does not consist of a clear prescription for action applicable to everyone equally, but a delegation of power to the authority holder to act with little regard for the rule. Because of the weak enforcement mechanisms for China's anti-pollution rule, in fact everyone has discretion, to obey or not to obey. A system that permits great discretion fails because it does not meet the criterion of universalistic rules.

Weber's theory does not lack interest, but it does not go very far. The solution ^(his theory suggests) for China's anti-pollution laws -- that they should be strictly enforced so as to reduce de facto discretion to obey -- only restates the problem to be solved, that is, how to enforce China's anti-pollution laws. In any event, a multitude of factors, not merely the rules, autonomy, and legalistic reasoning affect behaviour in the face of a rule of law. The explanation for the legal order's behaviour cannot lie merely in the rules themselves, but must lie in the interweaving of rules and those other factors. Because Weber's categories point us away from behaviour to the texts of positive laws, they cannot serve to solve existential problems in law and society. That domain requires us to consider constantly the tension between the law-in-the-books and the law-in-action. With their emphasis on legalism, Weber's categories point us away from the law-in-action.

Like the rule of law model generally, Weber's categories impose a strong ideological bias upon law and society investigations. Those categories impose a pre-cut pattern upon

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the range of potential explanations and hence of potential solutions. They require us to ask only the narrow question: what will serve to develop or strengthen a legal order appropriate to a market-oriented, privately-controlled, laissez-faire economy? For that Law and Economics does a far more sophisticated job. At any rate, Weber's categories have too narrow a focus to study the law in the context of today's world of monopoly capitalism, multinational corporations, state corporations and social administration.

2. On Analytical Positivism. The Rule of Law vocabulary resonates easily with analytical jurisprudence. That philosophy had as its principal founder John Austin, who worked in the fourth and fifth decade of the nineteenth century. (See above, Chapter I). He stated the essence of analytical positivism in its central dictum: law is the command of the sovereign. That tells the lawyer to go to the library and read the law-in-the-books, because those laws embody the sovereign's command.

Sociology of law and law and development stand in flat contradiction to that viewpoint. To understand how law works in the world outside of libraries, one must leave the library to examine the world "out there". Does the Rule of Law vocabulary and analytical positivism have any meaning for the lawyer engaged in legislation?

Analytical positivism shouts at us its central teaching: Only the words of the rules have any importance. The lawyer, the policeman, the bureaucrat and the judge must conform their behaviour to the commands of the sovereign, and that they learn from the words, that is, from the law-in-the-books. If an official or a judge cannot learn the command from the words alone (as construed by a legal technique that looks exclusively at the law-in-the-books) then too easily the official will enforce not the sovereign's commands, but the personal dictates of the official or judge -- or so analytical positivism implies. That hardly helps the drafter, who must himself compose the "command of the sovereign" when he writes the laws. It does, however,

contain an important message: The particular words used in a written law (including subsidiary legislation, regulations and so forth) have deep significance. They constitute the means by which the law-maker conveys to others in the state structure and to individuals the desired norms of behaviour. Unless the laws' addressees understand the words and try to obey them, the enterprise of governance through rules -- that is, the enterprise of government itself -- must fail. (Compare Professor Singer's legal nihilism, Chapter II).

Words surely do not constitute little crystals, with a hard surface separating the matters covered by the words from all others. At the edges, all words <1> become fuzzy and unclear.<2> Nevertheless, the enterprise of law requires that in the first instance we respect the words of the laws. All laws delegate power to implementing officials for a purpose defined by the legislature. In a democratic society, the rule by the people has significance only if the officials carry out the will of the legislature. In the first instance, the legislature expresses its will in the words it uses. Before construing a statute in terms of policy, therefore, we must try to construe it in terms of words. Only if that enterprise proves impossible ought we consider extraneous matters. Before writing a statute, therefore, of course we must understand its policy and purposes. We must always remember, however, that our task lies in conveying the

1 Except proper names.

2 As we have seen, the legal nihilists argue from this that therefore no law has any ascertainable meaning. See above, Chapter II (concerning Professor Singer's claims).

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law's intention to its addressees in words that they can understand. The only "intention of the legislature" that counts is the intention that finds expression in words. For drafters, that constitutes the great teaching of analytical positivism.

C. SOCIOLOGICAL JURISPRUDENCE AND LEGAL REALISM

More clearly than any other preceding legal philosophy, legal realism stood in sharp contradiction to analytical positivism. Legal realism asserted the need to study the difference between the rules and the behaviour they prescribed, and the behaviour that actually occurred in the face of the rules, what the Realists called the law-in-the-books and the law-in-action. A number of legal philosophies, some (like Marxism) arising much earlier than legal realism, most (like Law and Economics) arising much later, agreed with that central thesis. They all agreed (in effect) with the proposition that emerges from our study of the Law of Non-Transferability of Law and the Law of Reproduction of Institutions (Chapter IV): In deciding how to behave in the face of a rule of law, people determine their behaviour in light not only of the rule and the threat of sanction, but all the other constraints and resources in their social and physical environment. In this section, we examine sociological jurisprudence and legal realism. We then examine various theories that accept the central legal realist proposition, but differ about the variables that a theory must consider to examine behaviour in the face of a rule of law: In Section D, theories that focus on subjective factors (the

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Volksgeist; custom; the legal culture); in Section E, law and economics; in Section F, Marxist legal theory; and in Section G, institutionalism.

CHAMBLISS AND SEIDMAN, LAW, ORDER AND POWER (Supra)

3.2 THE FAILURE OF THE RULE OF LAW THEORY

Eighteenth-century thinkers "worked on a series of assumptions: that a society such as the American and its form of government by the state were bound together inseparably; that both could be made more perfect—and hence that the progress of society and progress of the state were one and the same. Eighteenth century optimism was based on legislative reform, conscious political judgement and action. Revolution was the servant of the legislature and the legislature was the servant of the people."⁹

The nineteenth and twentieth centuries overwhelmed that sanguine temper. The world created by the rise of capitalism and the Industrial Revolution defied control. The government promised to be structured in the interests of the people but developed instead large-scale organization, bureaucracy, and bases of decision-making that contradicted and undermined the lofty ideals and theories that justified their existence. The early nineteenth century found people revolting against the prevailing order, demanding political rights, and struggling to expand liberal democracy. The "Rule of Law" theory was shaken by the onslaught of people's actions expressing and illuminating the contradictions that existed between the ideal of law and society and the reality of most people's experiences.

A variety of theories of law and society arose to explain the failure.

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Eugene Ehrlich (1862-1922) lived in the Duchy of Bukovina, which was then part of the Austro-Hungarian Empire. Bukovina was the home of at least nine distinct ethnic and religious groups. Each had its own informal rules: for marriage and divorce, descent and distribution, landlord and tenant. They followed these norms, not the formal Civil Code. Ehrlich called these informal norms the "living law" in contrast to the formal legal order. He argued that the living law should rank the priorities of payment of the various claims and demands different people and groups made upon the law:

When the jurist is asked to draw the line between the conflicting interests independently, he is asked by implication, to do it according to justice. . . . The catch phrase about balancing of interests that is so successful at the present time is not an answer to this question, for the very question is: What is it that gives weight to the interests that are to be balanced? Manifestly it is not the balancing jurist, writer or teacher, Judge or legislator, but society itself. . . . Justice therefore does not proceed from the individual, but arises in society."³³

In short the legislator or jurist should adjust the formal law to match the living law.

The sociological school, in the wing represented by Ehrlich, ultimately asserted not merely that formal law reinstitutionalized custom, but that it ought to do so. It contributed to studying law as social engineering by distinguishing the living law from the formal law—a lead that the legal realists, coming from a different, positivist tradition, would follow.

While the sociological school began to explore the tensions between formal law and living law, the realists in the United States moved rapidly in the same direction. As

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noted earlier, Oliver Wendell Holmes fired the opening gun in the long engagement between the realists and the analytical positivists in a lecture at Harvard in 1881. "The life of the law," he said, "is not logic, the life of the law is experience."³⁴ He accepted the positivist view of law as a human affair, decided by human beings. He added the pragmatic notion that one ought to base the decision on what the law ought to be upon considerations of community expediency.

The realists began, as did the positivists, by considering primarily what happened in courts. They learned that one could not explain the decision of courts in "difficult" cases, that is, those of first impression, by the elegant rationalizations that the judges, following analytical positivism, gave in their opinions. They explained what judges did and ought to do: to formulate new rules in light of how they thought the rule would operate in society. That is to say, they invoked the categories they called the law-in-the-books and the law-in-action.

These categories, formal and living law, law-in-the-books and law-in-action, plainly become the basic building blocks for any science of law as social engineering. Law as social engineering supposes the use of law to influence behavior directly. The lawmaker can only change the formal rules. Lawmakers cannot, however, punch and pinch people and society like balls of clay. Unless they are quite mad, they will try to shape a legal order that effectively induces desired behavior. The way formal law in fact affects social behavior embodies the influence of the formal law on a society. The way social behavior constrains the choice of lawmakers expresses the influence of the living law on the formal law. The study of formal law and living law, of law-in-the-books and law-in-action, embodies the study of the interaction—the dialectic, if you please—between law and society.

The gap between the formal and the living law only opens up the problem. The study and explanation of that gap can lead to reliable knowledge about why some laws work and others do not. Without that knowledge, society can never purposively solve its troubles.

The realist perspective poses problems; it does not help much with solutions.

It marks the beginning of wisdom about the problem, for it asks the right questions. It tells us nothing about how to go about answering the questions posed.

The study of the gap between the law-in-the-books and the law-in-action too easily leads to research that serves merely as a handmaiden to power. If research explains only why people disobey, its findings will more likely teach how to induce obedience and not question policy itself. The study of the gap between the law-in-the-books and the law-in-action sometimes seduces the researcher into studying threats to power, not poverty and oppression. Students of law and society ought not become hired guns, ready to travel on demand.

The perception of the gap between the law-in-the-books and the law-in-action, however, initiates the generation of reliable knowledge about the limits of law. But, it is only a first step. That study requires a methodology which lends itself to studying ends as well as means, the morality as well as the practicality of the legal order.

QUESTION

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How useful is the realist vocabulary as a guide to what the law ought to be? How might a drafter use it to rewrite and improve the anti-pollution law?

D. "SOCIOLOGICAL" MODELS: THE VOLKGEIST; CUSTOM AND LAW: THE LEGAL CULTURE.

CHAMBLISS- AND SEIDMAN, LAW, ORDER AND POWER (Supra)

A variety of theories hold that society itself determines law. These mainly rest upon notions of value-consensus. Here we discuss the historical school, the notion that law merely institutionalizes custom, and the concept of the legal culture.

Carl von Savigny developed a jurisprudence that applied mystical Hegelian notions to the problem of law. He held that "in the general consciousness of the people lives positive law. . . . It is by no means to be thought that it was the particular members of the people by whose arbitrary will law was brought forth. . . . Rather it is the spirit of a people living and working in common in all the individuals, which gave birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same."¹⁰

Some sociologists took over a central notion of historical jurisprudence. William Graham Sumner put it in an extreme form: stateways cannot change folkways.¹¹ Law reflects custom, or it remains immured in the books. Paul Bohannon stated the claim in a sophisticated form:

Customs are norms or rules . . . about the ways in which people must behave if social institutions are to perform their tasks and society is to endure. . . . Some customs in some societies are reinstitutionalized at another level; they are restated for the more precise purposes of legal institutions. . . .

A legal right (and, with it, a law) is the restatement for the purpose of maintaining peaceful and just operation of the institutions of society, of some, but never all, of the recognized claims of the persons within those institutions. . . .

Law is never a mere reflection of custom, however. Rather law is always out of phase with society, specifically because of the duality of the statement and restatement and of rights.¹²

Lawrence Friedman proposed that the legal system comprises three elements: structural, substantive, and cultural.¹³ Structure includes "the number and types of courts, presence or absence of a constitution, presence or absence of federalism or pluralism, division of powers between Judges, legislators, Governors, Kings, juries, administrative officers; modes of procedure in various institutions and the like."¹⁴

The substantive component embodies the output side of the legal system: "the 'laws' themselves—the rules, doctrines, statutes and decrees, *to the extent that they are actually used by the rulers and the ruled*, and in addition, all other rules which govern, whatever their formal status" (emphasis added). "The legal culture"—the cultural element—consists of "the values and attitudes which bind the system together, and

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which determine the place of the legal system in the culture as a whole . . . [It is] the term we apply to those values and attitudes which *determine* what structures are used and why: which rules work and which do not and why" (emphasis added).¹⁵

In sum, Friedman translated the term "legal system" into the concept of society itself, consisting of the state, the society's normative structure, and its values and attitudes. But he built into his definition an *explanation* of how the legal system affects behavior: "values and attitudes" determine behavior.

Despite minor variations, these three theories explain behavior with respect to the legal order by dark, irrational, subjective attitudes of mind—the *Volksgeist*, custom, or the "legal culture." All would explain the failure of law to have the effect anticipated in similar ways. Laws that fail "run against the grain."

NOTES AND QUESTIONS

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1. How would von Savigny, Sumner, Bohannan and Friedman each explain the relative failure of China's anti-pollution law?

2. How valid is the proposition that values and attitudes control behaviour? Or does behaviour in time determine values and attitudes? Or is the relationship more complex? E.A. Hoebel argued (in The Law of Primitive Man 19..) that we make choices among constraints and resources thrown up by our social and physical environment in light of our values and attitudes as they then exist. As we behave according to that choice, our values and attitudes change, so that in time our values and attitudes conform to our behaviour....and so on, indefinitely.

2. In any event, does the statement, "an actor's values and attitudes explains the actor's behaviour", have any real content? Usually, how do we know that the actor has particular values and attitudes? We cannot believe merely what the actor says -- we all know that severe contradictions appear between one's statement of one's values, and how one actually behaves. ("Do not trust what they say, but only what they do," or "Even criminals sometimes go to church"). Even for those who believe that values determine behaviour, the only reliable data upon which to base a decision about a person's values become the behaviour itself. That becomes circular, however, for the difficulty to be explained is that very behaviour. One could not "explain" the continued pollution in China's cities by a cultural "value" attached to either the pollution or the behaviour that causes it, for the best evidence of that so-called "value" consists of the

very behaviour that requires explanation.

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Nor does the circularity disappear when we choose to phrase the problem as using values to predict how a person will behave in the future -- for example, in response to a new rule of law. From past behaviour we infer values and attitudes; from values and attitudes we make a prediction of how the actor will behave in the future. That amounts to no more than an extrapolation from past behaviour: Because the actor behaved this way in the past, likely the actor will continue to behave that way in future. The inference to values and attitudes, and then using those inferred values and attitudes to predict future behaviour adds no additional weight of probability to the extrapolation. Extrapolation from past behaviour to predict future behaviour is a risky business. (A chicken may extrapolate from the past that whenever the sun rises, the farmer will come and feed it as surely as the sun rises. The chicken does not have an opportunity to rethink that extrapolation when one day the farmer wrings its neck). Applied to the Chinese anti-pollution law, a prediction that the Chinese "values and attitudes" would prevent them from observing the anti-pollution law amounted only to a prediction that because in the past urban Chinese had acted in ways that polluted the air, they would continue to do so in the face of the law -- i.e., a simple extrapolation from past behaviour.

4. Many writers attribute Chinese behaviour in the face of a rule to "values and attitudes" -- in the hands of scholars, this tends to become "the legal culture". For example, in 1988, a

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farmer in Cangna County in Zhejiang Province sued a local magistrate in a case arising when the local government demolished his house because, they claimed, it had been built illegally on an embankment that protected a wide area from flooding. The newspaper article (China Daily, September 2, 1988, p. 4) wrote that "The emergence of the case is a challenge to the feudalistic way of life, because under the old way common people never sued government officials. . . ." It quoted the sued magistrate: "'It is a good phenomenon that, with the development of a commodity economy, farmers have begun to discard their old ideas and protect their legal rights and interests through the law instead of unreasonable ways like violent fighting between family clans.'" Query: Is that an adequate explanation of why in the past farmers did not sue officials? Are there other reasons that might explain the Chinese reluctance to sue officials -- for example, an expectation that officials will retaliate against ordinary citizens who dare to sue them? Or an understanding that the court system in the past has been biased against the citizen in favour of the official? Or ignorance of the rights granted by the law? Or an expectation that because of the excessive costs of litigation, a formal court victory still leaves the plaintiff impoverished? What other possible explanations can you suggest besides "values and attitudes"?

E LAW AND ECONOMICS

RICHARD A. POSNER, THE ECONOMICS OF JUSTICE
(CAMBRIDGE: HARV. U.P., 1981) pp. 1-2.

This book takes an economic approach to issues—including the meaning of justice, the origin of the state, primitive law, retribution, the right of privacy, defamation, racial discrimination, and affirmative action—that are not generally considered economic. Is not economics the study of the economic system, the study of markets? None of the concepts or activities in my list are market concepts or activities.

Although the traditional subject of economics is indeed the behavior of individuals and organizations in markets, a moment's reflection on the economist's basic analytical tool for studying markets will suggest the possibility of using economics more broadly. That tool is the assumption that people are rational maximizers of their satisfactions. The principles of economics are deductions from this assumption—for example, the principle that a change in price will affect the quantity of a good by affecting the attractiveness of substitute goods, or that resources will gravitate to their most remunerative uses, or that the individual will allocate his budget among available goods and services so that the marginal (last) dollar spent on each good and service yields the same satisfaction to him; if it did not, he could increase his aggregate utility or welfare by a reallocation.

Is it plausible to suppose that people are rational only or mainly when they are transacting in markets, and not when they are engaged in other activities of life, such as marriage and litigation and crime and discrimination and concealment of personal information? Or that only the inhabitants of modern

Western (or Westernized) societies are rational? If rationality is not confined to explicit market transactions but is a general and dominant characteristic of social behavior, then the conceptual apparatus constructed by generations of economists to explain market behavior can be used to explain nonmarket behavior as well.

The Intellectual Foundations of ^X(23) "Law and Economics"

Edmund-W. Kitch

33 J. Legal Educ. (1983)

pp. 184-96

The principal intellectual foundation of "law and economics" has been its relative success in illuminating two fundamental questions: First, what effects do legal rules have upon society? And second, how do social forces shape and determine the law? Law and economics has enjoyed relatively greater success in addressing these questions in a provocative and illuminating manner than have other approaches to the study of the phenomenon of law.

I. Analytic Methods

The major analytic methods associated with law and economics are:

1. The subject to be studied is to be conceived of as a system of constraints and rewards interacting with individuals. A central objective of law-and-economics scholarship has been to analyze the interaction between a system of rules and the behavior of individuals in order to determine the effects of the rules. This conception of the agenda of legal scholarship was at the heart of legal realism, but economics, with its developed methods for thinking about the interaction between costs, returns, and individual profit-maximizing, provided an elegant analytic framework adaptable to this inquiry.¹
2. The purpose of scientific analysis is to identify the systematic component of phenomena and separate that component from the random phenomena. A generalization is useful and worthwhile even if it can explain only a portion of the behavior examined. This insight is derived from social science generally and regression methodology specifically. It was a liberating

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insight for legal scholarship, because it freed scholars from the burden of explaining every case and problem and directed their attention to the identification of general tendencies. Many of the most interesting and provocative ideas about law advanced in recent years—ideas about the tendency of common law to further efficiency,² regularities in contractual relationships,³ and the interrelationship between criminal behavior and the criminal law⁴—could not have been advanced and investigated without this underlying intellectual conception.

3. A strong regularity of human social behavior is behavior which serves the interests of the actor. This premise is drawn from the behavioral predicates of price theory, where its predictions have proven powerful and useful. It can be used to analyze responses to laws because it leads to the prediction that individuals will alter their behavior to avoid the costs of laws and to obtain their benefits. This prediction is a prolific generator of hypotheses for investigation—for instance, that laws that freeze rents will reduce the supply and increase the demand for rental housing;⁵ that laws that restrict entry into an industry will reduce its output;⁶ and that laws that tax or punish an activity will reduce its frequency.⁷

The emphasis on this premise in law-and-economics work has led to criticism of the work on the ground that it inculcates amoral habits of thought. But the premise that self-interest is a strong regularity of human behavior does not logically require the hypothesis that people will behave in antisocial ways. Rather, self-interest can explain precisely why people do conform to the moral and legal norms of the social community. The gains from trade can only exist if each individual is prepared to cooperate with others, and the moral and legal norms of society can be understood as the framework which makes such trade possible.

2. Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 *J. Legal Stud.* 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. Legal Stud.* 65 (1977).
3. Anthony T. Kronman & Richard A. Posner, *The Economics of Contract Law* (Boston: Little, Brown, 1979); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. Legal Stud.* 83 (1977); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 *Va. L. Rev.* 1089 (1981); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *Yale L. J.* 1261 (1980); Charles J. Goetz & Robert E. Scott, *Measuring Sellers Damages: The Lost Profits Puzzle*, 31 *Stan. L. Rev.* 323 (1979); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *Colum. L. Rev.* 554 (1977).
4. Gary S. Becker & William M. Landes, eds., *Essays on the Economics of Crime and Punishment* (New York: National Bureau of Economic Research, 1974).
5. Edgar O. Olsen, *An Economist's Analysis of Rent Control*, 80 *J. Pol. Econ.* 1081 (1972).
6. Because the restriction on entry reduces the potential competition. This point only holds if the restriction on entry effectively limits the entry of additional economic resources, rather than simply firms, or when the regulation restrains efficient methods of competition by those firms in the industry. The first effect was, for instance, documented in the taxicab industry. Edmund W. Kitch, Marc Isaacson & Daniel Kasper, *The Regulation of Taxicabs in Chicago*, 14 *J. L. & Econ.* 285 (1971). The second effect was documented in the airline industry. See the summary of the literature in Stephen G. Breyer, *Regulation and Its Reform* (Cambridge, Mass.: Harvard Univ. Press, 1982).
7. William M. Landes, *An Economic Study of U.S. Aircraft Hijacking, 1961-1976*, 21 *J. L. & Econ.* 1 (1978).

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4. Marginal rather than gross or average effects are the important effects to analyze in understanding human response to law. This insight is also derived from price theory where it is used, for example, to prove the counterintuitive proposition that a business that loses money will continue to operate.⁸ Past costs are sunk costs and have no bearing on decisions in the present. The cows-and-corn example in Coase's social-cost article is a notable example of the use of this insight:⁹ once the liability system has been established, it is a nonmarginal cost which does not affect production decisions. Marginal analysis is critical to understanding the output effects of price discrimination and thus the effect of antitrust laws that proscribe price discrimination.¹⁰ It is important for analyzing the effect of various transfer and tax programs, whose effect must be gauged in terms of how they affect marginal incentives.¹¹

5. Observed stable behavior is an indicia of an equilibrium that serves the objectives of those who sustain it. There are many versions of this idea but it is presented here in the form that has been most important for legal scholarship: as a guide to inquiry. It is a useful counter to complex predictive models including those generated from price theory, for it guards against the theorist's tendency to disregard, as either aberrational or antisocial, behavior that does not fit his predictions. The richness of the best law-and-economics scholarship reflects the tension between the predictions of rigorous price-theory models and careful investigation and analysis of actual behavior by firms, courts, or legislatures. This guide was pioneered in the antitrust area, where business phenomena such as tie-in sales, restrictive distribution agreements, and long-term contracts that did not fit the predictions of simple spot-market-price theory had been explained as monopolistic. It turned out that by analysis of the actual practices reported in the cases in light of the question "how could the business benefit from this practice?" many of these practices could be understood in light of a multiperiod competitive model.¹² Similarly, phenomena such as the failure universally and uniformly to enforce criminal laws can be better understood if they are studied and analyzed in terms of the costs and benefits of criminal law enforcement rather than simply deplored as a failure of the system.¹³

6. Goods and services are multidimensional, and regulation of one dimension will affect the other dimensions of the good or service. This principle is important because laws frequently affect only one aspect of a complex set of interactions. For example, economic regulation often regulates only the price at which a good or service can be sold without regulating the quality and conditions under which it is sold. Sellers will

8. Because these losses are accounting losses on fixed capital that has no better use.

9. Ronald H. Coase, *The Problem of Social Cost*, 3 *J. L. & Econ.* 1, 2-6 (1960).

10. Richard A. Posner & Frank H. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials*, 2d ed., 98, 144, 988-89 (St. Paul, Minn.: West Publishing Co., 1981).

11. See, e.g., Richard A. Musgrave & Peggy B. Musgrave, *Public Finance in Theory and Practice*, 3d ed., 301-23 (New York: McGraw-Hill, 1980).

12. See the discussion and literature cited in Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 280-309 (New York: Basic Books, 1978).

13. George J. Stigler, *The Optimum Enforcement of Law*, 78 *J. Pol. Econ.* 526 (1970).

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respond to a constraint on price by changing one of the quality parameters. Only if all parameters within the control of the seller are regulated, can these effects be controlled. When this principle is used in conjunction with the earlier principles, it can yield subtle hypotheses. For instance, safety regulation will not increase safety, because the existing amount of "safety" reflects a preexisting equilibrium and if one input to safety is increased by law, the participants will increase other inputs to risk in order to return toward the previous equilibrium.¹⁴ In utility regulation, where many parameters of the service are regulated but price is based on a formula related to investment, this insight leads to predictions about the interaction between output regulation and investment decisions in the form of the Averch-Johnson-Wellisz hypothesis.¹⁵ This insight also helps to explain why particular anticrime measures may have little impact on crime rates.

7. In evaluating the effects of laws, the multiparty, private transactional response is important. It is important to look beyond the reactions of a single individual to a rule of law and look at the systematic responses open to groups of individuals. If zero transaction costs are assumed, the Coase theorem comes into play and generates the corollary that law will not matter.¹⁶ Although the zero-transaction-cost assumption is unrealistic, the theorem suggests that one should be wary of concluding that laws have large effects where the parties affected are in continuing and regular bargaining relationships with each other. Since they have already incurred the costs of bargaining, the marginal cost of adding a new topic—the new law—to their agenda is low, and it is plausible to expect complex multiparty arrangements to offset its effects. For example, one should expect that in response to a tax the parties involved in the taxed transaction will attempt to rearrange the transaction so as to reduce the amount of the tax. Workers and employers will respond to an income tax by converting what would otherwise be income into an expense. Or affected parties may cooperate in the operation of black markets or leave the jurisdiction.

8. In evaluating any market or regulatory arrangements, it is important to compare the arrangement being evaluated against other viable institutional alternatives. It is a simple intellectual matter to demonstrate the imperfections of markets and administration, but it is an intellectual exercise of little interest. Since perfection is not attainable, one should search for the best available.

14. Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 *J. Pol. Econ.* 677 (1975).
15. The effect is the response of the firm to a constraint on its prices based upon rate of return where the firm responds by increasing its capital base. Harvey Averch & Leland L. Johnson, *Behavior of the Firm under Regulatory Constraint*, 52 *Amer. Econ. Rev.* 1052 (1962); Stanislaw H. Wellisz, *Regulation of Natural Gas Pipeline Companies: An Economic Analysis*, 71 *J. Pol. Econ.* 30 (1963).
16. Since the effects law has will be costlessly overcome by agreements among the affected parties, returning the arrangements to those they preferred in the first place. From the point of view of a legal scholar, it is unfortunate that most of the literature on the Coase theorem has focused on the hypothetical, tractable world where law does not matter rather than the actual world with which the law struggles.

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0. The study of legal history and comparative law is important, because significant differences in the structure of legal institutions will probably only appear where there are significant differences in the cost conditions facing the society. Thus fifty-state American studies may only identify differences that are so small that they do not matter—they are essentially the random component of the process output—while obscuring the dominant and important part of the process. If Massachusetts and Montana are alike in the things that matter, then we would expect them to disagree only on things that do not matter. To understand the really important aspects of our own legal system, we may need the comparative mirror of law generated by a very different culture. This leads to an agenda of study and analysis of institutions as diverse as the medieval commons,¹⁸ property rights in primitive societies,¹⁹ and the organization of socialist economics.²⁰

Legal scholars have, of course, long realized the importance of historical and comparative studies. But these studies have been largely descriptive. Law and economics provides an analytic framework that can provide unifying direction to comparative and historical work. For instance: (a) Contractual relations have had varying scope within societies. What social variables account for the varying scope accorded to social ordering through contract? (b) What effects have different forms of economic ordering had on the productivity of societies? (c) Do legal institutions operate systematically to enhance human welfare; do they operate to protect and maintain the position of those in political power; do they have no effect; or should they be understood in some entirely different framework? If these questions should be answered differently in different societies, or at different times, what accounts for these differences?

II. Factual Insights

Law and economics has also been associated with a series of factual insights that have been important to contemporary American legal scholarship.

1. Markets have strong efficiency properties. Using only price theory it is possible to argue that markets are efficient, or, conversely, that they are beset by fatal imperfections. How well markets operate in practice is a question of fact. Are the theoretical imperfections important in practice or are they

17. John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 *J. L. & Econ.* 137 (1958); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 *Yale L. J.* 1717 (1981).

18. Donald N. McCloskey, *The Persistence of English Common Fields, in European Peasants and Their Markets*, ed. William N. Parker & Eric L. Jones (Princeton, N.J.: Princeton Univ. Press, 1975); Donald N. McCloskey, *The Economics of Enclosure, in id.*; Carl J. Dahlman, *The Open Field System and Beyond* (Cambridge: Cambridge Univ. Press, 1980).

19. Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 *J. L. & Econ.* 1 (1980).

20. John H. Moore, *Agency Costs, Technological Change, and Soviet Central Planning*, 24 *J. L. & Econ.* 189 (1981).

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relatively unimportant? The rise of law and economics has been correlated with a change in the intellectual climate, which has become more receptive to the view that markets are an effective form of social organization in many situations. This change in the general intellectual climate has made academic lawyers more interested in the private-law structures that support the operation of markets and more receptive to policy approaches that use private-market institutions. This has in turn made economics more relevant to law.

Law and economics has itself made only a small contribution to this change. The scholars of the 1930s who viewed markets as producing a situation in which millions were idle and hungry could hardly have been expected to have faith in the inevitable ordering properties of the "invisible hand." Nor did their background include any extensive experience with large-scale government economic management. The Interstate Commerce Commission, which was their most ambitious domestic precedent, was timid by modern standards of economic intervention. No wonder they said to themselves, "There must be a better way."

By contrast, the current generation of scholars has seen the power of markets to generate private production in the post-World War world and experienced first-hand the imperfections of bureaucratic management. On an intellectual level, it has been possible to place the Depression in historical perspective and to come to understand the role of the Federal Reserve Board in sustaining and extending the long downward economic spiral of the early '30s.²¹

Law and economics has played a role in this large and important transformation of perceptions in one respect. The antitrust-industrial-organization work has shown that many of the market failures attributed to barriers to entry, predatory practices, and monopoly extension are not in practice significant problems.²²

It is this element of law and economics that probably accounts for the view of some that it is an intellectual movement hopelessly tainted by ideology. An appreciation of the power of markets to release human energies for public ends inevitably leads to nonsocialist prescriptions. The interesting thing is that the efficiency properties of markets are now so widely appreciated that this finding is seldom challenged. In the days of classic socialist theory, it was possible to argue that the emerging scale of production was so large that all markets would be dominated by monopolies. Ironically, the very technological progress that made large-scale production efficient also led to means of transportation and communication that vastly expanded the geographic scope of markets. This has forced socialist political theorists to abandon price theory to the liberals.

2. Much social behavior can be illuminated through rigorous use of self-

21. Milton Friedman & Anna Jacobson Schwartz, *A Monetary History of the United States: 1867-1960*, 299-419 (Princeton, N.J.: Princeton Univ. Press, 1963).

22. Phillip Areeda & Donald F. Turner, *3 Antitrust Law*, passim and sec. 711b, at 152 (Boston: Little, Brown, 1978).

interest-maximization models, including such areas of noncommercial behavior as political behavior,²³ family behavior,²⁴ and criminal behavior.²⁵

3. Private-law rules matter and involve policy issues as fundamental and important as public-law rules. One of the reasons that law and economics has been so well received in law schools is that it has addressed in an interesting way the concerns of the private-law lawyer—the rules of contracts, torts, and property.²⁶ For the preceding thirty years public law had been on the rise in American law schools and had attracted the most ambitious minds. In contrast, private law came to be viewed as narrow and technical. Law and economics placed private law in a larger policy context and generated vigorous literatures on liability rules and the nature and structure of contracting and property systems. Since private law does in fact matter, this more rigorous and systematic method of approaching issues of the significance of private-law rules was a useful corrective.

4. Economic regulation often has effects which are adverse to social welfare and is often imposed and maintained for the purpose of protecting the interest of the firms regulated. Law and economics, and particularly the industrial-organization literature associated with law and economics, documented a stunning series of failures in the structure of the economic regulation that lay at the heart of the New Deal's faith in economic management. These demonstrations focused on agencies that restricted entry (airlines, trucks, communications common carriers), restricted pricing freedom (railroad, utility regulation, Robinson-Patman Act), or prevented the creation of private property rights (broadcast regulation).²⁷ In case after case it was possible to show, on the basis of rather elementary price theory and economic data, that these supposedly "scientific" regulatory regimes resulted in a social loss, protected politically powerful groups, and did not have the efficiency effects claimed for them.

- 23. Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957).
- 24. Gary S. Becker, *A Treatise on the Family* (Cambridge, Mass.: Harvard Univ. Press, 1982).
- 25. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968).
- 26. See Henry G. Manne, ed., *The Economics of Legal Relationships: Readings in the Theory of Property Rights* (St. Paul, Minn.: West Publishing Co., 1975); Kronman & Posner, *supra* note 3; Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L. J.* 499 (1961); John Prather Brown, *Toward an Economic Theory of Liability*, 2 *J. Legal Stud.* 323 (1973); Neil K. Komisar, *Toward a General Theory of Personal Injury Law*, 3 *J. Legal Stud.* 457 (1974); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1975).
- 27. Much of this literature is to be found summarized in Breyer, *supra* note 6, and Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (New York: John Wiley & Sons, 1970). Seminal studies include Richard E. Caves, *Air Transport and its Regulators: An Industry Study* (Cambridge, Mass.: Harvard Univ. Press, 1962); Paul W. MacAvoy, *The Economic Effects of Regulation: The Trunkline Railroad Cartels and the Interstate Commerce Commission before 1900* (Cambridge, Mass.: M.I.T. Press, 1965); Paul W. MacAvoy, *Price Formation in Natural Gas Fields* (New Haven, Conn.: Yale Univ. Press, 1962); George I. Stigler, *Public Regulation of the Securities Markets*, 37 *J. Bus.* 117 (1964); Ronald H. Coase, *The Federal Communications Commission*, 2 *J. L. & Econ.* 1 (1959).

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Reflections on Professional Education, Legal Scholarship, and the Law-and-Economics Movement

Frank I. Michelman

33 J. Legal Educ. 197 (1983).

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I offer my thoughts about some of the precepts of analytical method that Kitch has approvingly ascribed to law and economics.

I. Checking the Foundations

1. The subject to be studied is to be conceived of as a system of constraints and rewards interacting with individuals. A central objective of law-and-economics scholarship has been to analyze the interaction between a system of rules and the behavior of individuals in order to determine the effects of the rules.²

I have no quarrel with this formulation of an objective for law-and-economics scholarship, with its value, or with the commitment to it of much

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2. Edmund W. Kitch, Intellectual Foundations of Law and Economics, 33 J. Legal Educ. 184 (1983).

of the relevant scholarship with which I am acquainted. I pause only to note that the objective will be attainable only insofar as the analyst can rigorously hold apart the supposedly independent behavioral regularities and the observed "effects of the [legal] rules." There is constant danger of the analysis collapsing into tautology through reading of the observed outcome back into the behavioral suppositions. For example, the prevailing legal rule is that you are not required to put in an appearance at the polls on election day. Still, substantial numbers do so, despite the apparent futility of this expenditure of time and energy from the standpoint of the economizing individual. It would be both tautological and obscurantist to infer from this state of affairs that people have a "taste" for the act of voting as such.

It would be very neat if the central thesis of economic analysis were that its axiomatic presupposition of individualistically "rational" behavior were sufficient, by itself or in combination with extra-behavioral facts about resource scarcity, technology, etc., to determine the effects of a given legal event. Were that the thesis, empirical inspection of actual results could certainly provide a rigorous, pragmatic test. (For example, the voting phenomenon apparently would defeat the thesis). Conversely, firm predictions of legal impact would be available for as long as the thesis held up.

However, as just about everyone is by now aware, the "rational"-behavior axioms do not pretend by themselves to determine predicted results. Conversely, they are strictly nonfalsifiable. They are formal propositions only, which can cut no empirical ice without additional concrete input about the actual, particular motivations of those subject to the investigation. (In the voting case, everything depends on our imputations to people of "tastes" for voting.) And that means trouble.

3. A strong regularity of human social behavior is behavior which serves the interest of the actor. This premise . . . can be used to analyze responses to laws because it leads to the prediction that individuals will alter their behavior to avoid the costs of laws and to obtain their benefits. This prediction is a prolific generator of hypotheses for investigation.

5. Observed stable behavior is an indicia of an equilibrium that serves the objectives of those who sustain it. . . . [This idea] . . . guards against the theorist's tendency to disregard either as aberrational or antisocial behavior that does not fit his predictions. The richness of the best law-and-economics scholarship reflects the tension between the predictions of rigorous price theory models and careful investigation and analysis of actual behavior.

Precept 3 does not help much to avert the trouble. It would, if "interest" were used in the sense of the identifiable *objective* good of an actor which may or may not accord with the latter's current desires or conduct.³ A thesis that persons regularly act, willy-nilly, in accordance with objectively identifiable "interest" would certainly be falsifiable. But that does not seem to be the one Kitch has in mind. He means, rather, that people regularly act

3. "Rational" for present purposes means optimizing on one's alternatives, thus maximizing one's satisfactions, by continuously trading off at the margin. See discussion, below, of Kitch's Precepts 4, 6, and 7. Since this is, in my view, a peculiar and constricted notion of rationality, I shall continue to enclose the word in scare-quotes when I use it thus.

4. Kitch, *supra* note 2, at 188-89.

5. As it is sometimes used in explanations of paternalism as action in a person's interest, regardless of that person's current wishes.

in pursuit of their interests as currently experienced by themselves. And *that* theorem is nonfalsifiable, i.e., tautological, except insofar as investigators have some way, independent of the behavior that the thesis means to predict, of ascertaining the concurrent motivational experience of their subjects.

That this is indeed possible, to some worthwhile extent, is the implication of Kitch's formulation of the thesis in terms of "the costs" and "the benefits" of alternative responses to laws. What that language seems to intimate is that various consequences may be identifiable by investigators as serving or dis-serving the subjective interests of the members of a population simply on the basis of common sense, shared experience, and accumulating positive knowledge derived from prior, common-sense-based hypotheses. The thesis, then, is that a population will respond to a legal event by "rationally" moving to minimize costs or maximize benefits *as those would be typically evaluated in the common culture shared by the population and the investigators*. What really, ultimately "generates . . . hypotheses for investigation" is nothing more or less than the investigator's common-sense suppositions about what people generally want and do not want.

Modest as that position may be, it does move us back from the brink of tautology. Things *can* turn out detectably different from what was predicted in a specific case, and if they do, we will know the analyst was wrong about something: either the particular attribution of concrete subjective interests to the population, or the general theorem that people behave "rationally" so as to serve their interests.

However, it is just this inexpugnable possibility of equivocation on *which* guess was wrong—that concerning the content of the interests or that concerning the "rationality" of the behavior—which leaves the economic perspective on human events finally lacking substantive content, as a hard look at Precept 5 will certainly show. The analyst may sometimes be proved wrong about something, but it will not ever be the "rational"-behavior axiom any more than it will be the attributions of contingent motive. The "rational"-behavior premise, and its sophisticated transformations into the analytic apparatus of microeconomics, are just a way—often, to be sure, a powerfully clarifying way—of organizing thought and experience about where the sundry ends and motivations of interacting, culturally conditioned humans will carry them if subjected to this or that set of institutional constraints.

The point is not that one does not sometimes, even often, obtain a useful purchase on the world by thus shuttling between "rigorous price theory models" and "careful investigation and analysis of actual behavior." Rather, it is that the "tensions" in the picture exist, not between "rigorous . . . models" on the one hand and refractory behavioral material on the other, but between potentially conflicting bodies of particular behavioral/motivational material: those inserted into the model at moments of prediction, and those read out of it at moments of observation. The imaginative entities behind the predictions and the tensions are all—depending on point of view—either (objective) behaviors or (subjective) interests. The model is an interpretive apparatus for organizing and editing experience so as to make intelligible and comparable the phenomena—behaviors or interests—we

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predict and those we observe. As such, the model is optional, especially inasmuch as there is plenty of plainly significant experience that it quite fails to capture or explain.⁶

The essence of the model can be found embedded in Kitch's fourth, sixth, and seventh analytical precepts.

4. Marginal rather than gross or average effects are the important effects to analyze in understanding human response to law. . . . [For example,] past costs are sunk costs and have no bearing on decisions in the present.

6. Goods and services are multidimensional and regulation of one dimension will affect the other dimensions of the good or service. . . . For instance, safety regulation will not increase safety because the existing amount of "safety" reflects a preexisting equilibrium, and if one input to safety is increased by law, the participants will increase other inputs to risk in order to return toward the previous equilibrium.

7. In evaluating the effects of law, the multiparty private transactional response is important. . . . If zero transaction costs are assumed, the Coase theorem comes into play and generates the corollary that the law will not matter. . . . [O]ne should be wary of concluding that laws have large effects where the parties affected are in continuing and regular bargaining relationships with each other.⁷

These precepts strike me as much alike in both content and merit. All are descriptive of the same mode of "rationally" calculative behavior—in which the key ideas are the closely interrelated ones of optimization by marginal choice ("trade-off" governed by a "rate of substitution") and competitive equilibrium—which law-and-economics practitioners suppose will govern individual and societal responses to legal events, and which, as they have well taught, will often lead to counterintuitive results.

Taking these as standing, strong reminders of things "one should be wary" of overlooking in instrumental appraisals of law actual or prospective, I consider these precepts to be true and valuable contributions of law-and-economics work to the fund of critical understanding that should guide the efforts of reform-minded lawyers and law professors. The kinds of responses they describe are assuredly common, and the effects of those responses on legal impacts are liable to be overlooked without prompting from the analytical habits and methods that these precepts represent.

Still, issues of no slight importance are suppressed by the categorical tone in which the precepts are offered. Among mistakes one ought to be wary of, after all, are such suppositions as that "past costs [categorically] . . . have no bearing on decisions in the present"; that "if one input to safety is increased by law, the participants [categorically] will increase other inputs to risk"; and that, by virtue of the Coase theorem, "if . . . transaction costs are assumed [to be negligible], . . . the law will not matter." Understood as

6. Warren J. Samuels, an economist, puts the matter this way:

Any behavior or area of life that can be specified in terms of a maximization problem will evidence "economic" characteristics. But the maximizing conclusions will be due to the paradigm with which the phenomenon is interpreted and not to the "nature" of the phenomenon itself. Alternatively, the phenomenon may be intelligible in terms of several different paradigms, and there are no criteria dictating choice among paradigms.

Warren J. Samuels, *Maximization of Wealth as Justice*, 60 *Texas L. Rev.* 147, 164 (1981).

7. Kitch, *supra* note 2, at 189-90.

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depictions of or derivations from a special *normative* standard of rational conduct, such categorical statements are incontestable. Understood as characterizations of what we *actually* are like and how we *actually* behave, they are half-truths sure to mislead. Which gets us to Precept 2.

2. The purpose of scientific analysis is to identify the systematic component of phenomena and separate that component from the random phenomena. A generalization is useful and worthwhile even if it can explain only a portion of the behavior examined.⁸

If an elegant theory appears to explain, in the correlational sense, a respectable amount of the variance in a set of observations, there will be some tendency to picture the variance remaining unexplained by that theory as unsystematic, random, impenetrable muck lacking significance—what statisticians call “the residuals.” Thus may one be led to think that the distinctive behavioral theorems of economic analysis (see the preceding discussion of Kitch’s Precepts 4, 6, and 7) are the only ones capable of making comprehensible the legal phenomena that interest us.

Critics of law and economics (myself included) believe the opposite is true: that is, that the marginally trading-off (some critics would call it the “commodity”) form of consciousness and behavior posited by law and economics is only one side of the story of what people—us—are and can be like; that the story has other sides, no less coherent or authentic to whoever is in a frame of mind to receive them; and that we, especially as we act through our conversations with each other, are very much the agents of our own conditioning and the authors of our own story.

In other words, which is the “systematic” component and which the “random” is very much in the eye of the beholder. There are perspectives—not so unfamiliar, after all—in which mercantile behavior on the part of a parent apparently ready to sell his child for a good profit over what he would have paid for it, or even something as prosaic as the sale of votes or offices, would definitely fall into the random fraction.

No one, so far as I know, questions that “a generalization is useful and worthwhile even if it can explain only a portion of the behavior examined.” To trumpet this point is, as Mark Kelman has had occasion to observe,⁹ to miss what critics are driving at when they point to empirical deviations from the asserted behavioral regularities of price theory. Explanations—schemata that serve to organize some significant fraction of experience—are useful, to put it mildly, and that includes law and economics. The critical point is to avoid mistaking an organizing construct for a structural reality that, by defining the possible, limits vision and deadens will.

That, indeed, would seem to be the message of Kitch’s own Precept 10:

10. The study of legal history and comparative law is important because significant differences in the structure of legal institutions will probably only appear where there are significant differences in the cost conditions facing society. . . . To understand the really important aspects of our own legal system, we may need the comparative mirror of law generated by a very different culture.¹⁰

8. *Id.* at 190.

9. See Mark C. Kelman, Spitzer and Hoffman on Course: A Brief Rejoinder, 53 *Su. Cal. L. Rev.* 1215, 1219–21 (1980).

10. Kitch, *supra* note 2, at 191.

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This precept I regard as exhibiting both a truth of surpassing importance and a paradox. Its truth is that one comes to define and perceive, and thus to understand, one's own culture—one's own intellectual situation—only by imagining alternative possibilities. It is by simultaneously providing us with the means of imaginative escape, and suggesting to us what our own consciousness is not, that the sympathetic study of quite other cultures may allow us to form some self-observant sense of what our own consciousness is.

One does not escape one's fetters, though, by dragging them along; and one will not ever get much of a look at one's own intellectual predicament if one always starts by projecting that predicament onto the foreign ground from which one hopes to catch a true glimpse of home. If all you think to search for in other cultures is correlation between variations in "cost conditions" and "the structure of legal institutions," you foreclose the possibility of recognizing a culture in which one of the controlling "conditions" is that crucial promptings and motivations do not take the "commodity" form of marginally interchangeable "costs" at all. And so you may fail to see that one of the distinguishing and contingent features of our own thought process is its relentless urge to reduce every motivation to a cost.

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NOTES AND QUESTIONS

1. What does Kitch assert is the subject-matter of law and economics (his Precept 1)? What caution does Michelman make about that?

2. What does Kitch assert is the major factor ("a strong regularity") in human social behaviour (Precept 3)? (Posner makes the same assertion). Of that, Michelman says that Kitch really holds that

"a population will respond to a legal event by 'rationally' moving to minimize benefits as those would be typically evaluated in the common culture shared by the population and the investigators. What really ultimately 'generates . . . hypotheses for investigation' is nothing more or less than the investigators's common-sense supposition about what the people generally want and do not want."

How would Kitch respond to that criticism?

4. Speaking of three of Kitch's propositions concerning how people behave in a calculating fashion (Precepts 4, 6 and 7), Michelman states that "understood as characterization of what we actually are like and how we actually behave", the propositions "are half-truths likely to mislead". Why does he say that? How would Kitch and Posner likely respond?

5. Speaking of Kitch's Precept 2, Michelman states that "which is the 'systematic' component and which is the 'random' [component of behaviour] is very much in the eye of the beholder." What does he mean by that? He says also that "the critical point is to avoid mistaking an organizing construct for a structural reality that, by defining the possible, limits vision and deadens will." How would Kitch respond? Do not all

vocabularies limit vision?

6. Consider Kitch's discussion of the need to study legal history and comparative law (precept 10) (it is important "because significant differences in the structure of legal institutions will probably only appear where there are significant differences in the cost conditions facing society"). How does Michelman respond to this? In Michelman's view, what considerations in deciding what the law ought to be does Law and Economics compel its p^eractitioner to adopt? Does Michelman believe that those considerations ("cost conditions" as the independent variable, and "the structure of legal institutions" as the dependent variable) constitute the appropriate considerations to take into account when studying every society? What considerations would Michelman take into account? Does Kitch believe that "cost conditions" constitute the universal explanation for all human action, everyplace and in every culture?

7. In your view, who has the better of the argument: Posner and Kitch, or Michelman and Samuels? Why?

2. How useful is law and economics for determining policy in the Third World? Consider the following excerpt.

MAKGETLA AND SEIDMAN "THE APPLICABILITY OF LAW AND ECONOMICS TO POLICY-MAKING IN THE THIRD WORLD", J. Ec. Issues, March, 1989

CONCLUSION

In order to test the applicability of law and economics in the Third World context, we examined it as theory, considering its methodology, concepts and perspective. To examine its central tenets, we recast its argument in a problem-solving format. That format requires that we ask, first, what difficulties it aims to solve (that is, what is its perspective); second, what explanations it offers for those difficulties; and third, what solutions it derives from that analysis. We conclude that, despite its claims to universal applicability, as a theory law and economics has questionable utility in solving Third World economic problems.

I. **Methodology.** The methodology of law and economics does not seem suitable for policymakers in the Third World. They need a methodology that will cope with their idiosyncratic problems. That calls for an analytical approach that involves explicit specification of a difficulty; the elaboration of alternative explanations and a choice between them based on research; alternative proposals for solution (and a choice between them as well); and implementation and monitoring. Such a methodology encourages policymakers to draw hypotheses, not from a single source, but from the entire range of general theories. At every stage, too, it invites - indeed, requires - research into the specific conditions of the problem addressed. It forces policy makers to engage the peculiarities of their own situation while drawing on their own and other's experience to guide their research.

90 Cf. Leff, *supra* n.18, at . . . ("Politics may . . . be a method of cementing social solidarity through even distributive justice, and the purpose of the political process may indeed be anti-efficient and distributively absurd. But . . . 'we' may be getting, overall, what we want.")

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By contrast, law and economics employs an ends-means methodology that requires decisionmakers to commit themselves to a general solution before undertaking empirical research. Governments must seek to recreate in their countries the neo-classical ideal; research may consider only the most cost-effective means to that end. The extraordinary level of abstraction and the positivist organisation of the theory discourage policymakers from using experience to test its relevance to their conditions. In the end, this aspect also prevents law and economics from itself developing to meet the needs of the Third World.

2. Perspectives. Law and economics claims that its proposals will help ensure efficiency and freedom. Both goals, it asserts, lie in everyone's interest. By implication, law and economics addresses the twin difficulties of low productivity and governmental constraints on freedom.

Neither problem adequately reflects the social ills of the Third World. There, for the vast majority, poverty and economic powerlessness constrained freedom of choice at least as much as government control. Moreover, inefficiency in the existing modern-sector enterprises does not prove the central cause of low output *per capita*. That problem reflects, rather, the high levels of underemployment and unemployment, which coexist with high productivity in the modern sector. In these circumstances, seeking to maximise the efficiency on employed resources alone equates to maintaining economic disarticulation and external dependency. Given the weakness of domestic linkages, a trickle-down effect to benefit the majority seems unlikely to emerge in the foreseeable future.

The difficulties of inefficiency and inappropriate government intervention in the market thus reflected, ultimately, the concerns of the (often foreign) modern-sector entrepreneur. To respond to the claims and demands of the majority, Third World policymakers ought rather to focus on ameliorating poverty and powerlessness. An appropriate theory must then adopt a perspective that looks to the empowerment, not of those who already enjoy power and privilege, but of the mass.

3. Explanations. Law and economics explains inefficiency and limited freedom principally by government distortion of the market. Government either fail to establish appropriate ground rules, to ensure an efficient market; or, in attempting to overcome externalities, fail to mimic market outcomes adequately. That conclusion derives from neo-classical models.

Yet neo-classical models suggest that government intervention ensures inefficiency only if the other conditions of perfect competition prevail. In the Third World, market forces tend to generate factor immobility and monopolisation of the modern sector and,

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with it, extreme income disparities. Moreover, the all-knowing, dispassionate economism of the perfectly competitive entrepreneur is most distinguished by its absence. In the logic of neo-classical economics, therefore, government intervention need not prove the principle, or even, major, cause of inefficiency.

4. Solutions. In the problem-solving agenda, the final task becomes to propose solutions for the causes for the problem that the explanations identify. Based on its notion that Third World market inefficiency and lack of freedom flows from inappropriate government interventions, advisors in the law and economics tendency advocate that government cease and desist obvious interventions. In the Third World, like the IMF, they must condemn control over foreign exchange, government investment in productive enterprises, tax or other incentives, wage or price fixing, and the like. If at all, government should seek to achieve the same ends only through the manipulation of property rights and liabilities to modify externalities.

Solutions that rest on inadequate explanations must fail. Ultimately, either law and economics proposes the impossible solution of using the state to create perfect competition, or it focuses on a single causal factor - the inappropriate provision of inalienable rights and other government interventions in the market - without providing an adequate theoretical justification. That is one definition of an ideology. The resulting measures tend to permit transnational corporations and banks to act with local elites to continue to siphon off most of the Third World's income without bringing about development.

While not ensuring efficiency, law and economics solutions neither address nor appear likely to ameliorate the economic and political powerlessness of the majority of the Third World's population. Given vast disparities in income and wealth, extending free markets to areas previously covered by inalienable rights effectively enhances the power of the already-powerful. Ultimately, it requires the weakening or dissolution of institutions, such as legislatures and cooperatives, that could bring about greater popular participation in political and economic decisionmaking. Proposals derived from law and economics thus constitute not part of the solution of poverty and powerlessness, but part of their causes. Applied in the Third World, law and economics becomes not a theory for development in favour of the mass of the population, but an ideology for the preservation of the *status quo*.

Neo-classical economics does not provide the only body of economic or policy theory that lawmakers can draw upon. Its formality, which gives the impression of accuracy, and claim to present general and inescapable truths may make it appear attractive. But other bodies of economic thought foster more systematic attention to the

NOTES AND QUESTIONS

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1. Recall Ellickson's account of how ranchers and farmers in Shasta County, California dealt with stray cattle. How would Kitch account for that behaviour? Can he account for it without falling into tautology? (That is, they follow the "good neighbour" set of informal norms instead of the law because they prefer those norms to those prescribed by the law). Compare Michelman's example of voting behaviour.
2. Warren Samuels concludes a devastating review of Posner's principal work (Samuels, Book Review of Posner, The Economics of Justice (1981), 60 Tex. L. Rev. 147):

It is my interpretation, offered here as a hypothesis, that Posner's economic approach to law can be described as any or all of the follow-

ing: a manifestation and expression of a culturally determined perspective; a subtle expression and legitimation of social power on behalf of the judiciary; an attempt to escape from the freedom and pain of moral judgment; and a technician's effort to reach determinate solutions rather than be satisfied with understanding what is going on. Posner's vehicle for all this is, of course, the principle of wealth maximization.

To explain this interpretation, we must first clarify the existential nature of economic phenomena. It has been said of economists that we know the price of everything but the value of nothing. On the contrary, economists, particularly insofar as we are neoclassicist in character, deny that there is, with regard to the exchange value of commodities, anything approaching "value" as an absolute or metaphysical category that transcends price. There is only a network of prices derived from the interaction of demand and supply functions that operate within and give effect to a changing system of rights, law, preferences, technology, population, and so on. For all its emphasis on positivistic, deterministic solutions, such an economics is relativist and existentialist. Prices are only temporary resting places, only coefficients of choice in continual flux.



Consider, for example, equilibrium, or optimal, prices. A change in physical resource availability, in tastes, in relative entitlements, will lead to a change in relative prices and, more importantly, to a change in resource allocation. Such prices are made through the market or through planning rather than found. There is no unique configuration of prices and therefore no unique set of costs or resource allocation, and no unique optimal solution. More generally, all variables, even their episodic equilibrium magnitudes, are interdependent; none is absolute. Even scarcity is a relativist condition.

But the economy is a normative process and is so in at least two respects: normative choice is exercised as to the allocation of resources, in part through tastes, and normative choice is exercised with regard to the structure of decisionmaking itself—the structure of rights or of power. All this is true of lawmaking as well.

One of the characteristics of human choice is the quest for absolute, if not neutral, principles of choice. The purpose of this quest is somehow to escape the terrible frustration of choice as well as to mask or to legitimize the choices actually made. This is a quest pursued by individuals as they seek to satisfy personal choices and by individuals and groups contributing to social choices. It is one from which Posner is not free.

Posner has his own activism, his own agenda for law, for philosophy, and for judges. His principle of wealth maximization is derivative of the culture of a society that maximizes wealth in Calvinist terms.¹⁴⁹ That the principle is not uniquely dispositive by itself of the questions to which it is addressed does not negate its force: it does not hamper its ideological function in further legitimizing and reinforcing wealth maximization as a principle of systemic interpretation and value. Posner's is an attempt to identify and establish a propaganda for one version of economic freedom, a ground for certain economic liberties¹⁵⁰ understood in historical terms comprehensible to a business and wealth-oriented civilization.

Posner seems to believe that he has found in economics an apparent base for legal decisionmaking. That his base in economics is itself derivative from the parent culture and that the principle is no more in economics than in law capable of providing uniquely dispositive results are here, too, beside the point.

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F. MARXIST LEGAL THEORY

CHAMBLISS AND SEIDMAN, LAW, ORDER AND POWER (supra)

All the jurisprudence theories we have thus far examined, except the "sociological jurisprudence" of Eugene Ehrlich, assume (usually without explicitly so stating) a consensus society. Marxism, like many other theories, arose to explain why the Enlightenment's dream failed. Unlike those other theories, however, it postulated a conflict society. In that society, the haves generally had both privilege and power. They exercised their power to maintain their position and to exploit the masses. In that view, the rule of law model did not work the way some dreamed it might, to alleviate mass misery.

Until recently Marxist theories of law were virtually ignored in capitalist countries, despite the fact that the writings of Marx and Engels contain some fertile observations on law.³⁵ Furthermore Marxist theory generated a large number of researches, policies, and treatises on law,³⁶ and it influenced the legal orders of nations from the Soviet Union and Eastern Europe to Cuba and China.

As a result of the bias against seriously considering Marxism in studies of law and society, most references to Marxist theory grossly distort it. Dennis Lloyd, for example, although recognizing Marxist theory as worthy of inclusion in the sociology of law, nonetheless distorts its perspective and claims. He asserts that for Marx the law was merely an epiphenomenon reflecting the economic relations of capitalism.³⁷ More recent works give a more sensitive and sophisticated rendering of Marxist contributions to law.³⁸ It rests upon two pillars. Piers Beirne clearly articulated the first: "In the analysis of any phenomenon Marx always looked for the basic internal contradiction which determined the movement of the whole; ideological forms such as State, law, religion and so on are explained by reference to the contradictions of the capitalist mode of production."³⁹

The basic contradiction in capitalist societies rests upon the production of commodities as a public event. Production requires everyone's labor. And we might add, socialist law (as in the Soviet Union, China, and Cuba) reflects contradictions of the socialist mode of production (see Brady and Bahro). Only the capitalist, however, owns the product. Only he decides how to dispose of the product. The legal order develops in response to the conflicts and inconsistencies of that system of production: calling slaves inhuman but relying on their human qualities; stigmatizing women as inferior but depending on them for survival and the maintenance of essential social relations; defining the talents of workers as less valuable than the talents of administrators but being unable to produce a nail without the workers' labor. To legitimize the inconsistencies and irrationalities born of the contradictions of the economy the legal order constitutes myths, creates institutions of repression, and tries to harmonize exploitation with freedom, expropriation with choice, inherently unequal contractual agreements with an ideology of free will. Socialist economic systems must harmonize the inefficiency of decentralized productive systems with a commitment to rapidly improving the standard of living of "everyone" and industrializing in competition with already industrialized capitalist countries.

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The second pillar of Marxist sociology of law consists of the dialectical relationship between scientific explanation and social praxis, the essence of Marxist methodology. Ideas do not change by the force of their logic. New discoveries in social relationships and understanding society do not emerge merely from people's heads. Reliable knowledge arises and can only arise in the course of people's efforts to change their world. Scientific socialism and reliable scientific knowledge about the processes and forces of history, then, come from our efforts to change the world in accordance with the implications of our understanding (our theories) about that world.

Thus Marxism diverged from consensus models both theoretically and methodologically. It diverged in its perception of both the appropriate vocabulary and the appropriate methodology of social inquiry. The vocabulary employs *contradictions* as the central analytical concept. The methodology rests upon the dialectical unity of theory and practice, thought and action, ends and means. To generate theory, engage in social practice; to produce good social practice, generate good theory.

Marxism stresses that society constantly changes in a dialectical process. It holds that the "ruling class" is neither unified nor omnipotent. Laws change as a consequence of the unending struggle between social classes and within social classes. The legal gains of the women's movement in the last hundred years, however slow, Marxism explains as process. The history of the struggle for equal rights for women disproves both the consensus model and the Weberian theory that the law changes according to its own logic and ideological commitments. As Sachs and Wilson put it:

A study of sexism in the legal systems . . . explodes the notion that legal systems evolve according to inherent principles of logic and procedure. The great changes in gender status have come about not through the harmonious unfolding from within of legal concepts, but through vigorous attacks against the legal system from outside . . . forced to a more egalitarian position by the challenge . . . the record shows each step forward has had to be strenuously campaigned for.⁴⁰

So also of improvements in workers' wages, work conditions, and child labor, of legally institutionalized racism, poverty, discrimination, and colonialism: they changed as the result not of the internal logic of the law, but of class conflict.

Marxist theory posits the salient role of struggle, contradiction, and conflict in the historical process as determinants of social and legal change. Other theories ignore or give little credence to the importance of this characteristic of human societies. Marx and Engels explained why legal forms took the shape they did. Marx wrote that "my investigation led to the result that legal relations as well as forms of state are to be grasped neither from the so-called general development of the human mind, but rather have their roots in the material conditions of life, the sum total of which Hegel . . . combines under the name of 'civil society.'"⁴¹

This reflected Marx's explanation for what later sociologists called "culture." The economic system constitutes the base; the culture—law, political forms, ideologies, art—the superstructure. Engels wrote that "according to the materialist conception of

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history, the *ultimately* determining element in history is the production and reproduction of real life."⁴²

At first blush, Marxism seems only a special form of the sociological school. Law reinstitutionalizes the forms of society itself with economic affairs as the key variable. Some Marxists so construed their doctrine.⁴³



Engels himself denied so mechanical an interpretation of the base-superstructure metaphor. He wrote:

If somebody twists [the notion of the primacy of the base] into saying that the economic element is the *only* determining one, he transforms that proposition into a meaningless, senseless phrase. The economic system is the basis, but the various elements of the superstructure—political forms of the class struggle and its results, to wit: constitutions established by the victorious class after a successful battle, etc., juridical forms, and even reflexes of all these actual struggles in the brains of the participants, political, juristic philosophical theories, religious views and their further development into systems of dogmas—also exercise their influence upon the course of the historical struggles and in many cases predominate in determining their form.⁴⁵

The principle of the dialectic saved Marxist legal theory from economic determinism. Opposites interpenetrate each other. So do the base and the superstructure and even the different elements of the superstructure itself. Law interacts not only with economic base, but with religion, philosophy, custom, tradition, and ideology. Law simultaneously affects and is affected by each of these.

Law can affect both the base and the superstructure because each of these inevitably contains contradictions and multifarious purposes and tendencies—in short, a potential for change. The law and the state can as it were nudge society along one or another of these alternative courses, although they cannot alone determine society's shape.

These contradictory tendencies ultimately stem from the relationships of production.⁴⁶ Classes arise in every society based upon private ownership of the means of production. The owners of property require workers to produce goods and profits. Capitalists ineluctably exploit their workers; their profits arise out of that exploitation. Capitalist society therefore inevitably produced classes with antagonistic interests.

Since the base and its class struggle in a sense "cause" the superstructure, the culture reflects the class struggle itself. Law, as part of the superstructure, cannot avoid taking sides in the class struggle. It cannot become a neutral consensus of all-of-us, for a society of antagonistic classes knows no consensus. The state becomes a weapon of a

particular class. Law emanates from the state. Law in a society of classes must therefore represent and advance the interests of one class or the other.

"The nature of law is determined by economic relationships *via* the political demands of the dominant class."⁴⁷ Our legal order embodies not the rule of law, but the rule of class struggle. In this respect, Marxism opposed most other schools of jurisprudence. Marxism perceived societies everywhere in struggle and conflict. The state and law serve as weapons in that struggle. Most other schools and writers assumed a consensus—the common consciousness, the legal culture, custom, and so forth. Marx was right. As we argued in Chapter 2, all contemporary polities embody conflict. Law and the state inevitably represent one or another class in that conflict. The opposite proposition is simply false. Since many in the nonsocialist world regard these as highly controversial statements, however, any theory of law and society must take them as problematic, not primitive propositions.

The perception of the dialectical relationship between base and superstructure, between economy and law, pointed toward the notion of law as a means of social engineering. "The legal superstructure ensures organization in social life, facilitates the conscious solution of the problems which confront it and enables members of the public to assimilate the principles and ideals of the future socialist community."⁴⁸ The existence of modern forces of production creates the possibility of a socialist and ultimately a communist order of society. "But the transformation of possibility into reality is not automatic. A decisive role is played by . . . the state."⁴⁹

The Marxist notion of the state and law therefore falls between the positivist and the sociological schools. For Hans Kelsen, a notable positivist, the state serves as "an immanent intelligence, directing social change, rather than as a social agency."⁵⁰ The sociological school—or at least one branch of it—understands the state and law merely "as reflecting the customs and demands of 'society.'" Marxism understands it as both simultaneously. Law reflects social organization, but at the same time and to a degree affirmatively directs its change. The dialectic embodies this perspective.

NOTES AND QUESTIONS

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1. What advantages can you discern in the base-superstructure metaphor that has dominated Marxist thinking about the law? It plainly arose as part of the struggle against capitalist governments, to explain why the law represented mainly the claims and demands of capitalists, not of workers. It told workers that they need not regard the law, so long preached as neutral, unbiassed and beyond reproach, as sacrosanct, even divinely ordained. Instead, it taught that the law itself served as a tool of the ruling class in its efforts to oppress workers. What uses does a theory like that serve a socialist government in deciding what law to enact? In "Law and Poverty", in Essays on Third World Perspectives in Jurisprudence, (Marasinghe and Conklin, eds., 1984, pp. 229-253), Seidman suggested three advantages but a number of drawbacks:

I. The teachings of the metaphor: (a). The base-superstructure metaphor teaches that the base -- the mode of production -- sets limits on the choices that lawmakers can make. China today cannot create a communist society; the level of development of the means of production does not yet permit that choice. (b) Unless a contradiction exists between the base and the superstructure change in either will occur only incrementally. A capitalist state structure with a capitalist mode of production and a ruling capitalist class will not likely consciously and purposely introduce institutional or other changes apt to create a socialist economy. (c) A contradiction

X (42)

between base and superstructure cannot long endure. Either the base will change the superstructure, or the superstructure will change the basis.

II. Drawbacks of the metaphor. (a) The metaphor's language is misleading. It leads an unwary reader to believe that the base determines the superstructure -- a formulation that Engels expressly denied. (b) The propositions that the metaphor might generate -- its three teachings -- appear on so general a level as to lack any practical use. A theory that a practitioner cannot put to practical use cannot serve as a theory to guide action.

G. AN INSTITUTIONALIST VOCABULARY

CHAMBLISS AND SEIDMAN, LAW, ORDER AND POWER (SUPRA)

We have considered a wide variety of variables that scholars have urged determine the ways that the legal order and society interact. Some of these turn out to serve normative rather than analytical purposes, e.g., universalistic rules, autonomous legal system, and legislative reasoning. Some seem quite nonfalsifiable, such as the *Volksgeist*, custom as determining law, and the legal culture. Others—the Marxist categories, calling attention to the importance of power, contradiction and the dialectic, and the law-in-books/law-in-action dichotomy urged by the legal realists—have greater utility in analysis. Alone, none of these theories seems completely adequate for the domain of study we have staked out.

There is, however, a corpus of categories, methodologies, and perspectives which can be culled from the theories that we take as a starting point for any adequate study.

X (52)

All theories recognize that members of a group, collectivity, society, or nation inherit patterns of social relations from their past. Furthermore it is generally acknowledged that those features of the past which are of paramount importance in shaping the present include the economic structure (e.g., capitalism, feudalism, socialism), political organization (e.g., democratic, authoritarian, popular justice), and culture (e.g., norms, values, roles). In other words, all social theory recognizes that historically rooted institutions are fundamentally important influences over present-day events. It is also generally recognized as analytically useful to study both the *material* (economic) and the *ideological* (cultural) conditions inherited from the past, an important quality of which are the extant contributions within and between material and ideological structures.

Other concepts employed by practically everyone who has studied the relationships between law and society incorporate a sociological vocabulary: role, position, norm, institutions, power, conflict, interaction. We will discuss those various concepts in turn.

Sociological inquiry often begins by describing people in terms of the *positions* they hold in society: Father, Mother, Sister, Judge, Professor, Derelict, Thief, Lath-operator, Carpenter, Churchmember, Atheist, Political Activist, etc. The observed regularities of the position, i.e., its content, arise because the persons who occupy it fulfill a complex of obligations and exercise a complex of rights associated with the position. These "rights" and "obligations" may differ from the rights and obligations that lawyers customarily associate with the terms "right" and "duty," for most of them do not derive from the state's edict. One may have an "obligation" to surrender his seat in a ~~bus~~^{bus} to an elderly person, but in most places the state will not punish you if you do not. Hence, this "obligation" does not comprise a *legal* duty. The complex of obligations that define a social position we denote collectively as its *role* and the equivalent complex of rights, its *status*.

These obligations and rights find their definition in prescriptive rules called *norms*. These have varying degrees of articulation. Relatively little precision defines the position of Father, although children may let their Father know unmistakably when he acts in a way that to them seems to violate his role. (Act your age, Daddy!) Other norms, such as some embodied in law, have highly explicit contents.

Human societies exhibit a high degree of regularity of behaviors. We denote any regular behavior by people in various positions as an *institution*. A university in this view constitutes an institution because it consists of many people—administrators, students, teaching staff, clerks, secretaries, and many others—all behaving in particular, repetitive patterns.

Animal and insect societies, too, exhibit a high degree of regularity of behavior. The human condition, however, differs from that of the lower orders. People have consciousness, with which they can create and shape their institutions, their material conditions, and their ~~ology~~ ^{ology}. The intricate interactions of an ant colony or a beehive, like those of a prairie dog village, rest mainly on the instinctive reactions of natural and social stimuli. To understand the structure of human societies, however, to explain

human behavior, we must deal with the symbolic conscious forces that accompany human action. "Consciousness" and "ideology," then, are concepts (categories) essential for our analysis. (5)

One can ask a wide range of questions about norms and social structure: what constitutes the content of the norms and how relevant do they seem to the tasks which people perform? To what extent are the norms institutionalized, that is, to what extent do the persons in the system accept the norms, treat them seriously, and expect the norms to guide the behavior of others? How are norms sanctioned? To what extent are they articulated? How closely does one's actions match the expectations of those concerned? To what extent do the consequences of compliance with the norm match the anticipations of the persons affected?

As one consequence of the normative system, action manifests consciousness and consciousness manifests action. Norms reflect the subjective, internal conceptions that human beings hold, about how people occupying certain positions ought to act. They state the *role-expectation* for the position. *Role-performance* refers to how people in fact act, either in pursuit of the norms defining the position or, deviantly, in defiance of the norms.

The rules of law constitute a particular order of norms. Like all norms, they define how people or collectivities ought to act. Some, like the laws against murder, address everyone. Some, like traffic laws, address only a particular category of persons (automobile drivers). Others apply to very specific positions (such as the laws that define the role of the [Prime Minister of China]). Still others address collectivities (corporation law). The commands of [the anti-pollution law address individual house holders, businessmen, public enterprises, private share corporations]. All constitute norms.

They also constitute laws. All the rules that laymen call "law"—statutes, case law, administrative regulations—constitute norms. To understand how these function, we must understand three central "law-jobs": law creation, sanctions, and dispute-settlement. In a centralized state, the state or its agencies create these norms. Every society has as one of its law-jobs the creation of rules of law, the principal task of legislatures, appellate courts, and administrative agencies.

Second, besides understanding the creation of the norms and the determination of their content, we must also understand the enforcement of the norms—their accompanying sanctions. In a centralized state, state authority enforces most (but not necessarily all) rules of law. If one violates a criminal law, the initiative of a state official (the policeman or the prosecutor) sets the sanctioning system into motion and other state officials (the jailer) actually inflict the punishment. If one violates other sorts of law—e.g., one forbidding negligent automobile driving—one may become liable for damages at the behest of the injured party, who can enlist state power to enforce the judgment.

* * * *

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Thirdly, disputes arise concerning a variety of issues in connection with the normative system: the content of a norm or whether the person in question actually violated it. To resolve these conflicts, a dispute-settling machine emerges. All these various "law-jobs" constitute a set of processes: the processes of creating law, defining the content of the norms, administering the rules, settling disputes, sanctioning breach. For us, these processes constitute the legal order. Thus viewed, the legal order in a centralized state becomes more than a mere body of rules. Rather, it becomes a dynamic process involving every aspect of state action, for state action will involve at some point creation of a norm, adjudication about its content, administration, adjudication of violation, or sanctioning breach.

The Legal Order and its Components

Like every social subsystem, the legal order performs a myriad of functions; it resolves disputes, creates official norms, educates the people in certain value-sets, provides employment for a professional class, etc. In studying so complex a system comprising so many functions, to what sorts of data ought one direct attention? What categories should we use? Here we put forward a bare-bones outline of a model that we find useful.

We start from the observable fact that people make certain demands upon the bureaucratic organization that constitutes the state. They demand that the state settle disputes, perform certain services, redistribute resources, and make certain kinds of decisions. These demands lead either to the creation of new norms or to a change in the application of existing rules. Every norm, whether legal or nonlegal, aims at the activity of a role-occupant. With most norms, the sanction takes place through direct interaction between the person aggrieved by the breach of the norm in question and the role-occupant. If my children disobey me, my parental role authorizes me directly to punish them; if my employee displeases me, I can rebuke him or her or (in the absence of a union) discharge the said employee.

A relatively small group of norms, rather formal in character, have separate sanctioning institutions. Law constitutes the outstanding example. Other, law-like norms exist sanctioned by separate, although non-state bodies. As Hans Kelsen pointed out, practically every norm of law that addresses a role-occupant simultaneously commands that if the prosecutor proves to a judge that someone has committed murder, the judge shall apply a sanction. Thus the same demand by people that a rule-creating institution formulate a new norm of conduct for a citizen simultaneously demands a new norm for the rule-sanctioning agencies, instructing them to impose a sanction if someone breaches the primary norm. Thus the safety at work laws which command employers to maintain safety standards simultaneously command judges in a proper case to order the employer to remedy unsafe conditions, subject to sanctions for contempt of court if the employer disobeys.

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(53)

We can, therefore, very tentatively and very abstractly diagram the flow of demands into the legal system, their conversion by rule-making and rule-sanctioning institutions into norms, addressed both to role-occupants and to the rule-sanctioning agencies, and into sanctioning activity (see Fig. 3.1).

Every normative system induces or coerces activity. The normative system we have defined as the "legal order" uses state power to this end. Our model, therefore, suggests that demands come from various segments of the population and that the state through the legal order exercises its power to induce or coerce certain desired behavior by some set of role-occupants. In the nature of things, demands of this sort respond to the interest of those making the demands. They call for the exercise of state power to induce or coerce the desired activity because the law's addressees do not necessarily want so to act. The legal order, thus defined, becomes a system by which one part of the population uses state power to coerce another segment. It becomes a system for the exercise of state power.

The diagram in Fig. 3.1 does not purport to provide a guide for investigations into the real world. It only traces the flow of demands: demands put to the state by segments of the population, demands that rule-making institutions make upon role-occupants and upon rule-sanctioning institutions. The sanctioning activity it refers to concerns the sanctioning activity the appropriate institution ought to apply. It tells us nothing about how in fact any of these various actors behave. It says nothing, for example, about who has the *power* to influence the state.

Law cannot succeed in its ostensible purposes of affecting the behavior of its addressees unless lawmakers can predict accurately the actual behavior of a law's addressees in the face of the rule. The law-in-action concerns behavior, what in fact takes place, not what ought to take place. How can we in general understand why people do or do not obey a rule of law? To answer that question, what general categories of data ought we to examine?

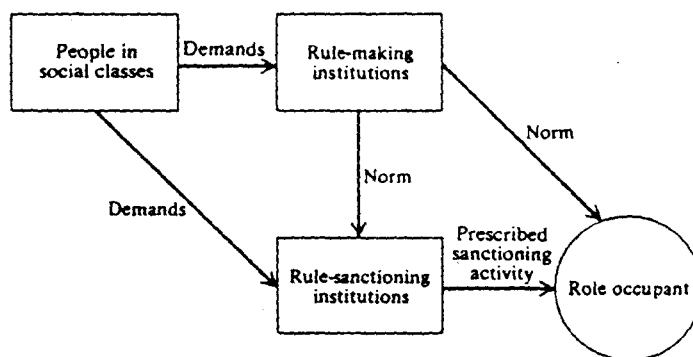


Figure 3.1

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We take as our most general model of society people and collectivities making choices among all the myriad forces of their social environment, in the light of what goes on inside their heads—i.e., in the face of the ideological and material forces that make up their milieu. Every role-occupant makes an analogous choice when he obeys or disobeys a norm. Where the legal order defines the role, however, special forces exist that the law's addressee must take into account. First, the role-occupant must take into account the general respect or disrespect that other citizens may accord obedience or disobedience to the law

People who violate a law may lose respect and esteem from people who believe that a moral imperative requires obedience to law. More importantly, perhaps, where the law addresses a role, officials exist to adjudicate and enforce it. The role-occupant's arena of choice now includes among the forces that compose it the activity of officials.

[A factory manager who permits his factory to pollute the air must now take into account the possibility of administrative or judicial action.]

We might diagram the relationships thus presented as shown in Fig. 3.2. The critical factors that a role-occupant must take into account in deciding how to behave consist of the norm addressed to him, the expected activities of law-implementing agencies and officials, and all the material and ideological factors that constitute his

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arena of choice. But, the lawmaking and the law-sanctioning agencies do not operate in a vacuum. They, too, consist of people—role-occupants—making choices within a milieu of material and ideological forces, including rules of law defining their positions and the activities of others.

People do not remain passive in the face of undesirable material and ideological or legal conditions. They protest, they resist, they complain, they threaten, they rebel, they revolt. Throughout history, revolution, rebellion, and opposition to the extant legal order occur everywhere. United States history is a catalog of constant rebellion, riot, revolution, and civil disorder.⁵² Even our most heavily oppressed class, slaves in the antebellum South, revolted; more than four hundred black slave revolts took place before the Civil War.⁵³ As a result, the law changed, sometimes slowly, as people won small gains from those in power, sometimes radically, as they succeeded in changing not only the people who operate the levers of state power, but the very structure of the state itself. The legal basis for a contract, for crime, for land ownership changes radically in every country over the years. In our time, following revolutions, they changed radically in Algeria, Cuba, China, and the Soviet Union. Laws have no immortal existence. People make them, people change them. The operative mode by which the people bring this about we subsume under the word "feedback." This category, in turn, contains the idea of the dialectic.

In what sense can we denote Fig. 3.2 a "model"? We earlier argued that no single, autonomous legal system exists discontinuous with society. A vast number of specific systems, involving particular laws, bureaucracies, and feedbacks, do exist. How do the model and its existential referents relate?

Models organize thought. No matter how detailed, a physical model of an airplane only *represents* the airplane. It is not the airplane itself. A diagrammatic representation of the legal system affecting agriculture only represents that system. The model put forward here only represents the form of a variety of legal systems. It directs attention to particular categories of data for investigation, that is, it constitutes a heuristic, a perspective to guide discretionary choice in social inquiry. It is an agenda for research. In principle, one can test it, however, by seeing if there are instances in which significant variables not subsumed by the model do affect behavior in response to a rule of law. Testing will be facilitated, however, after closing the vague boxes labeled "arenas of choice."

This model implies a definition of law that addresses law's function in channeling behavior. *Law is a process by which government structures choice.* Law as a device to structure choice expresses at once law's usual marginality in influencing behavior and its importance as the principal instrument that government has to influence behavior. Since a people's history itself determines the arena of choice in most respects, that history determines the limits on law. We can understand law only by understanding it as part of a people's history and present conditions.

The model assumes that society does not have a consensus. The arenas of choice of lawmakers, of law enforcers, and of the addressees of law do not necessarily have the same content. Lawmakers and some law enforcers come from or have close

X (10)

alliances with the upper ranks of society. Some laws address their equals; most address members of society with very different backgrounds. Mainly white male Congressmen wrote Title VII and in 1972 stretched it to cover women academics. Mainly white male judges enforce the law against mainly white male university administrators, at the behest of mainly white female claimants. The women claimants and the other actors plainly do not all have the same arenas of choice—i.e., the same material, social and ideological environments within which they choose and therefore act.

3.6 CONCLUSION

Analytical positivism asserted the independence of law from society. In response, sociological jurisprudence and some crude versions of Marxist jurisprudence claimed that law was merely an epiphenomenon. Neither proposition matched reality. The legal order structures society simultaneously with society's structuring of the legal order. The model we have advanced purports to explicate this complex relationship, by examining how the various actions in the system behave and analyzing that behavior in terms of constrained choice. The constraints that limit choice represent the influence of society on the legal order; the fact of choice represents the legal order's potential for influencing society.

The model depicts a deeply authoritarian legal order, where lawmakers promulgate law, enforcers implement it, and the rest of us respond to it. It assumes that the governors remain distinct from the masses of the people. That authoritarian structure, with its sharp dichotomization between we and they, between the mass and the governors, lies at the heart of the felt deficiencies of the legal order.

The model is admittedly ambiguous. The arrows that represent the arenas of choice of the several actors are no more than signposts. So open a set of residual categories must render a model nonfalsifiable. All we hope to accomplish with the model is to provide a rudimentary vocabulary and the beginnings of a theory for studying and understanding law and society.

The remainder of this book is an attempt to elaborate and complete the suggestions contained in this model. In the next chapter we look at the laws of contract and property. We intend to demonstrate with this example how our historical-sociological model helps us to understand law and the legal order. In particular we intend to open up that part of our perspective which stresses the important role of power in social and legal relationships.

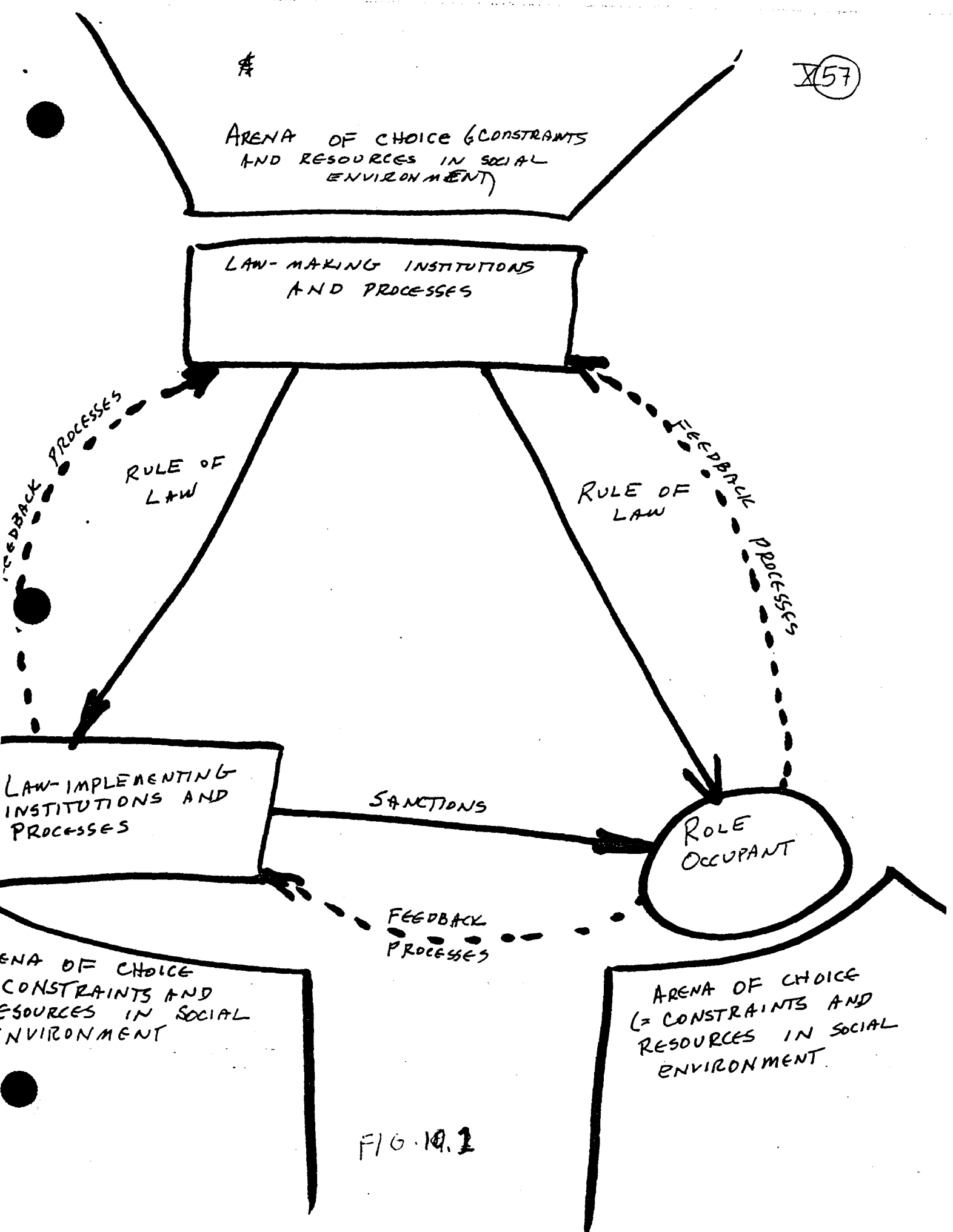


FIG. 19.1

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NOTES AND QUESTIONS

1. Recall the Laws of Non-Transferability of Law and of the Reproduction of Institutions (Chapter IV). As their principal teaching, those tell us that to understand how law affects behaviour, we cannot look merely at the law. To look only at the rules of law encourages what some have called the "normative fallacy", the notion the behaviour that the law says ought to take place in fact takes place. Rather than that, we must understand that when people behave as they do in the face of a law, they may take the law into account, but they also take into account all the other constraints and resources of their environment.

Except for analytical positivism, all the vocabularies that we have considered accept this central proposition. They differ about what aspects of that non-legal environment affect behaviour sufficiently strongly to warrant examination. (That is, all these vocabularies serve only to guide research; they do not give answers to particular problems). "Legal culture" theorists focus mainly on values and attitudes with respect to the legal order itself. Others in what we have (rather indiscriminately) gathered under the title of the "sociological school" look more broadly at the values and attitudes of the law's addressees -- that is, they focus on what goes on inside the addressees' heads. Law and Economics focuses on people's propensity to maximize their material wealth. Marxists focus on class interest. On what broad categories does institutionalist theory focus?

2. Professor Marasinghe wrote of Seidman's Institutional theory that it appears to rely on law alone to implement the policies of development. "For the equation of development contains a heavy social element for which the law does not provide a complete answer. This appears a glaring weakness in Seidman's theory of law in development." "Towards a Third World Perspective of Jurisprudence, in Marasinghe and Conklin, supra, p. 397. Do you agree with Marasinghe's criticism? Does the Institutional theory take into account the "heavy social element" that Marasinghe mentions? Where does that "heavy social element" appear in the diagram of the legal order that states the essence of the Institutional vocabulary (figure 10. above)?

3. D. V. Williams criticized institutionalist theory on the ground that it suggested that Third World policy-makers had a choice in determining their country's futures. In fact, he says, they had no choice. Their countries came into existence with colonial-capitalist modes of production. That mode of production demanded a neo-colonialist superstructure, and the Third World's rulers had no choice except to conform to the dictates of the world capitalist order. "The Authoritarianism of African Legal Orders: A Review and Critique of Robert B. Seidman's The State, Law and Development, 5 Contemporary Crises 255 (1980). Do you agree? Does China's experience refute Williams's argument? How would Seidman answer Williams's critique?

4. Is the institutionalist vocabulary consistent with Marxism?

5. Consider the different vocabularies discussed in this

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Chapter. Compare and contrast them. Which do you think will most likely produce research useful for China in its quest for law suitable for its further economic, social and political development? Why?

6. The institutionalist model identifies three broad categories for investigation into questions of behaviour in the face of a law: (1) the rule itself; (2) the actual sanctions imposed, itself a function of the behaviour of the implementing agencies in the face of a law; and (3) the "arena of choice" of the role occupant -- that is, the constraints and resources of the role-occupant's social environment. In effect, the model tells us: Understand these three elements, and you can explain why role occupants behave as they do in the face of a particular law. If the issue between the various schools (sociological, law and economics, etc.) turns on what elements within the residuary category institutionalism calls "the arena of choice", does institutionalism as defined thus far help the researcher very much in determining where to focus research? The next Chapter purports to try to give some particular content to the category, "arena of choice".