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Law, Legitimacy and Coercion: One View from Law and Economics

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LAW, LEGITIMACY AND COERCION: ONE VIEW FROM LAW AND ECONOMICS

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Coercion[1] and legitimacy[2] are pivotal and problematic concepts, which too

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1. Philosophers and theologians properly draw distinctions between violence and a broader coercion. But much in the social sciences suggests that such a distinction is problematic and often irrelevant. For example, Liaszos asks sociologists and decisionmakers to take account of the forms of a "covert institutional violence": poverty, war, racism, sexism, and some corporate outcomes - tax breaks, pollution, bored workers in dead-end jobs, and shoddy goods at fixed prices. A. Liaszos, *The Poverty of the Sociology of Deviance: Nuts, Sluts and 'Preverts'*, in THEORIES OF DEVIANCE 330, 339-40 (2d ed., S. Traub & C. Little, eds. 1980). According to Unger, market institutions combine coercive and consensual elements, which enable some to shape the activities of others. R. UNGER, SOCIAL THEORY: ITS SITUATION AND TASK 60 (1987). Cassese suggests that international law authorizes those uses of coercion which it cannot restrain. This exceedingly imperfect channeling of coercion is one result of revulsion over Nazi concentration camps and the atom bombs dropped on Japan. A. CASSESE, VIOLENCE AND LAW IN THE MODERN AGE 3, 6, 30, 46 (1988).

This is not to say that coercion is the only or even the major resource in use: "No government has the resources to compel citizens to do what, on a large scale, they are determined not to do.... A university campus garrisoned by police is incapable of carrying on its normal educational functions." W. CHAMBLISS & R. SEIDMAN, LAW, ORDER AND POWER 351 (1971). Governmental coercion is less effective than most theorists assume, given the relatively small share of production that even the most authoritarian of regimes can harness for coercive purposes. Coercion is expensive to organize, chokes the energies of those using it, and stems the supply of information essential to a rational decisionmaking. Nevertheless, there is a strong case for using coercion strategically and in small doses to overcome major development bottlenecks (in the Third World and elsewhere), to raise levels of social discipline, and to strengthen the State. *See infra* notes 35-46 and accompanying text. This may shock some jurists and philosophers, but a reluctance to use coercion when necessary helps to perpetuate the "functioning anarchy" of a political underdevelopment and the legal fiction that states of emergency are temporary measures taken under extraordinary circumstances. *See* D. APTER, POLITICAL CHANGE 116 (1973); B. MOORE, SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY 7, 21 (1973); and E. SCHUR, LAW AND SOCIETY 59 (1968). Nonet and Selznick add that the legal order is not repressive if coercion is restrained: if it is used with discrimination where viable alternatives are not available, if it is tailored to the harm at issue, and if the subject has an opportunity to protect his interests. P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 31 (1978).

A law and economics of coercion has not yet been developed in any rigorous way. But Robert Lee Hale addressed the subject long ago: "coercive restrictions are bound to affect the distribution of income and the direction of economic activities...." Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 470, 474, 478 (1923). There is a reluctance among lawyers to address coercion because "some of the grosser forms of private coercion are illegal, and the undoubtedly

often serve as *deus ex machinae* in sociolegal analysis. Law and economics has some, perhaps many, interesting things to say about these concepts. A "praxiology," law and economics is a formal theory that claims to explain all of purposive activity. It passes the threshold test of a good "fit" between theoretical principles and actual outcomes.[3] Unfortunately, economists

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coercive character of the pressure exerted by the property-owner is disguised. ...Income is the price paid for not using one's coercive weapons...[, such as] the power to withhold one's labor." *Id.* Hale also addressed the doctrine of duress, a basis for a court refusing to enforce a contract. He quotes from an English case, R. v. Denyer (1926) 2 K.B. 258, which describes the crime of blackmail: "A person has no right to demand money ... as a price of abstaining from inflicting unpleasant consequences upon a man." This standard would, Hale argues, make a felony out of every sale of property or acceptance of a salary. Hale goes on to develop an explicit conflict model of contracts and of law and economics generally. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. 470 (1943). *See infra* note 16 and accompanying text. Consent to a bargain involves yielding to the threats of others, and freedom of contract - and other freedoms as well - are really power relationships. The holder of a contract, property, or other similar right, gets to exert a power delegated by the sovereign.

2. "Legitimacy" connotes a faith or trust in individuals, procedures, and/or organizations. It denotes the ability to make people think that a claim to obedience is self-evident, and it is frequently produced by processes of justification and excuse. *See infra* note 5. The need for legitimacy reflects the fact that all organizations are vulnerable in varying degrees. Legitimacy is a resource in its own right; to the extent that it exists, fewer of the other types of resources used to secure compliance with public and private decisions need be deployed. As Barnes notes, sophisticated instruments lubricate elaborate transactions; great "amounts of symbolic power may be underpinned with but a small quantity of coercive resources." B. BARNES, THE NATURE OF POWER 15 (1988). But just as a decreased public confidence forces recourse to payments in gold, so too does it force the use of direct coercion and violence. *Id.* at 16.

In the West, legitimacy often rests on consent: the majority's acquiescence in major policies and the constitution. Consent has the compelling quality of authority; trust is built up bit by bit, thereby strengthening bonds between government and the governed. Such a legitimacy rests on shared (but often very general) values and understandings. Allegiance to these (at least among elites) makes life within society or an organization possible, and it precedes more specific choices. American notions of legitimacy seem to rest on a popular sovereignty, impartiality, equal opportunity and social mobility, and/or economic growth. But crises and conflicts, such as the one between modernist culture and the discipline required by capitalist production, constantly call obligation and obedience into question. *See infra* notes 36-46 and accompanying text. Other sources of legitimacy include charisma (e.g., Mao's), tradition (e.g., for Saudi princes), and the wise exercise of a discretion unfettered by law (e.g., Plato's philosopher-king). Even a crude legitimation raises key questions: *Quo warranto?*, Who monitors the monitors? *See* R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY 200 (1959); S. FINER, THE MAN ON HORSEBACK 175 (1975); J. HABERMAS, LEGITIMATION CRISIS XIV, 7-8 (1976); R. JACKSON & M. STEIN, ISSUES IN COMPARATIVE POLITICS 206 (1971); G. LENSKI, POWER AND PRIVILEGE 57 (1966); P. NONET & P. SELZNICK, *supra* note 1; Raz, *Government by Consent*, in AUTHORITY REVISITED 76, 90, 106 (1987) [hereinafter, *Government by Consent*]; E. SCHUR, *supra* note 1, at 85; R. UNGER, LAW IN MODERN SOCIETY 30-31 (1976); Hettne, *Transcending the European Model of Peace and Development*, 10 ALTERNATIVES 453, 467 (1985). *See infra* notes 13-14 and accompanying text.

3. R. DWORKIN, LAW'S EMPIRE 284-86 (1986); M. GODELIER, RATIONALITY AND IRRATIONALITY IN ECONOMICS 12-13 (1972). *See generally* Brietzke, *Another Law and Economics*, 9 RES. IN ECON. 57 (1986); Posner, *Law and the Theory of Finance*, 54 GEO. L.J. 159 (1986) (general discussion of law and economics). Some may prefer Dworkin's more critical and

sometimes use bellicose language and overdrawn analyses, perhaps to provoke legal philosophers and sociologists into abandoning their citadels and starting afresh from different first principles. When jurisprudes and sociologists reply in kind, debates grow inefficient; they generate more heat than light. My purpose is to seek out a common ground, or at least a more neutral territory, for the pursuit of interdisciplinary insights.

I. A BASIC "MODEL"

One definition of their craft has economists studying *choice* in the allocation and aggregation of scarce *resources*, so as to produce and distribute *outcomes*: goods, services, and other resources, which are then subject to *tradeoffs*.[4] *Choice* is seen to be governed by the availability of the various resources and by the cost-benefit analyses carried out by the rational-by-definition[5] individuals

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philosophical treatment: R. DWORKIN, LAW'S EMPIRE (1986). Economists do not always agree among themselves, of course. Calabresi and Melamid argue: "The thief not only harms the victim, he undermines rules and distinctions (between, e.g., property rules and liability rules) of significance beyond the specific case." Posner, on the other hand, argues that "the criminal sanction is simply a method of pricing conduct" which "imposes additional costs ... to limit that conduct to the efficient level." Klevorick, *On the Economic Theory of Crime, quoting* Posner in CRIMINAL JUSTICE 289 (J. Pennock & J. Chapman eds. 1985). Economists seldom make their assumptions explicit, yet those of one analyst frequently conflict with those of another. Analytical outcomes also differ, and I thus call my article "*One* View ... " rather than "*The* View ... ". A strict Chicago School approach might be better titled "The Coercion of Law and Economics".

Law and economics is a species of positivism which is surprisingly incongruous with a legal positivism, and which is vulnerable to many of the criticisms of a philosophical positivism. Despite (or perhaps because of) its ostensible positivism, much law and economics scholarship exists to produce *political* abstractions: analyses which systematically prefer economic freedoms defined in particular ways. Gunnar Myrdal argues that economic "liberals" set "out to isolate an 'economic' factor in political life" in order to give "a scientific appearance to an individualist, anti-interventionist prejudice." Myrdal, *Implicit Values in Economics,* in THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THOUGHT 250 (D. Hausman ed. 1954). Reder adds some criticisms: Chicago School economics assumptions and concepts form a rather murky and tautologous epistemology, they describe rather than explain events, they tempt analysts to be dogmatic, and they do not consistently account for the invisible hand of power that lies underneath the Invisible Hand of market processes. Reder, *Chicago Economics*, 20 J. ECON. LITERATURE 1 (1982). I will seek to minimize such defects, but I cannot pretend to eliminate them or to avoid introducing some other defects into my analyses. *But see* Brietzke, *Another Law and Economics*, 9 RES. L. & ECON. 57 (1986), for some justifications of my approach.

4. *See* P. SAMUELSON, ECONOMICS 5 (6th ed. 1964); Posner, *supra* note 3.

5. Maurice Allais, the 1988 Nobel laureate in economics, defines economic rationality as the pursuit of mutually coherent ends by appropriate means. M. GODELIER, RATIONALITY AND IRRATIONALITY IN ECONOMICS 12 (1972) (*citing* Allais). But this often becomes a tautology; rationality turns out to consist of what people actually do - such as smoking cigarettes. Individuals' profit maximization is the economic rationality characteristic of capitalism. This rationality also leads to "a particular way of functioning of the family, the state, etc." *Id.* at 268. In other societies or at other times, economic rationality is quite different: e.g., the prodigality of potlatch contests, which produce prestige and security for the giver. *Id. See* Staniskis, *Martial Law in Poland*, 54

and (the focus of this article) organizations making the choices. If we want to reduce the level of violence in society, many economists would have us working to increase the perceived costs or decrease the perceived benefits of using violence, to delegitimate organizations advocating violence, and/or to deprive such organizations of some other key resource. A study of the phenomena of choice fosters a "policy" orientation, a desire to evaluate actual and potential choices and constraints on choice. This desire is captured in Holmes'[6] Realist view of law as influenced by the "felt necessities of the time."

Some economists restrict their analyses to the five conventional *resources*: land, labor, capital, technology, and entrepreneurship. But richer analyses, particularly of political behavior, result when we incorporate five more resources: coercion, law, legitimacy, ideology,[7] and bureaucratic capacity.[8]

TELOS 87, 90-91 (1982-83) (discussed *infra* at note 11 and accompanying text). The law and economics literature thus sees criminals as displaying a "bounded rationality", as choosing rationally in the face of uncertain costs and benefits. Klevorick, *supra* note 3.

Cost-benefit analyses often clarify policy problems and solutions. *See* E.J. MISHAN, COST-BENEFIT ANALYSIS (1976). But such analyses are sometimes not feasible or moral: "You can't really trade off an Indian child's education with the future of the whooping crane." A. MELTSNER, POLICY ANALYSTS IN THE BUREAUCRACY 276 (1976) *quoting* former U.S. Secretary of the Interior Udall.

6. W. CHAMBLISS AND R. SEIDMAN, *supra* note 1, at 49.

7. *See, e.g.*, P. MCAUSLAN, LAND, LAW AND PLANNING (1975); Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1054 (1984) (tacit ideological presuppositions construct legal reality); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984). In comparison, ostensibly positivist economists are not as active in analyzing the ideological nature of their craft. *But see* H. KATOUZIAN, IDEOLOGY AND METHOD IN ECONOMICS (1980); SUTTON, THE AMERICAN BUSINESS CREED (1956); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGT. SCI. 3 (1971). "Ideology" has no specific referent, and it thus combines so readily with other resources that its effect on the production and distribution of outcomes is often difficult to detect. During the 1950s and 1960s, the "end of ideology" was confidently proclaimed for Americans; these analyses later became part of the ideology called neo-conservativism. Academic interest in ideology was revived after its blatant use over Vietnam, over dividing up a slowly-growing economic pie, and in a racial, ethnic, and sexual politics. Blatantly monocausal explanations are still (properly) frowned upon however, and many persist in regarding an ideology as unsavory: *I* have a political philosophy, *you* have opinions, and *they* have ideologies.

Ideology is present every time a policy problem is solved or sidetracked, especially when the complexity of a problem forces recourse to an intuition which must then be rationalized. Ideology becomes a systematic way of seeing - and not seeing - problems. As Murphy and Tanenhaus put it, "wants - usually expressed as needs - do shape power, if not authority." *See* W. MURPHY & J. TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 643 (1977). The best example is: "What is good for General Motors is good for the country." Edelman traces one relationship between ideology and coercion: "The employment of language to sanctify action is exactly what makes politics different from other methods of allocating values.... Force signals weakness in politics, as rape does in sex." M. EDELMAN, THE SYMBOLIC USES OF POLITICS 114 (1964). Fanon's ideology of the "cleansing" effect of violence is the counter-example. F. FANON, THE WRETCHED OF THE EARTH (C. Farmington trans. 1965).

Law and ideology are difficult to distinguish because they interpenetrate at so many crucial

Some or all of these ten resources are regularly assembled in various combinations called production and distribution functions.[9] An examination of why some resources happen to be available to particular organizations, and of why the resources are allocated and aggregated in some ways rather than others, helps to answer Harold Lasswell's "political questions": Who gets what, when, where, and, above all, why?[10]

Within limits, the ten resources can be made to substitute for each other. Just as capital can substitute for labor (more machines mean fewer employees), an order regarded as legitimate needs less coercion to make it effective. Israeli jets attack Palestinian positions in Lebanon on Israel's election day, apparently in a blatant attempt to legitimate the Likud Party's militance that benefits the military. For Staniszkis, violence became a means of production in a Poland under martial law.[11] A ritualized neo-Stalinist ideology was produced in futile attempts to conceal violations of a sacred Marxist canon: the military must be kept out of politics. An entrepreneur, Henry Ford or Franklin Roosevelt, creates organizations that reinvest in a life and power (a bureaucratic capacity) of their own, so that they continue to produce and distribute outcomes long after the death of their creator. Similarly, most Third World governments invest heavily in the "penetration" of bureaucratic capacity into a vast rural outback and satrapies of urban opposition. The aims are to extend the reach of state law

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junctures. Both treat the way power is exercised; both screen information for, and offer security to, those who are affected; both provide the means to polarize arguments, dazzle and divide opponents, and cloak shabby actions; and both facilitate a tighter organization around common interests - often enhancing a bureaucratic capacity in the process. Law and ideology alike influence and are influenced by values. Both attempt to bridge Hume's "is" and "ought" with what "can" be done, a possibility ignored by legal and economic positivists. In economics, values are often analyzed as private and subjective utilities. Weisskopf describes the ideological imperative of economic growth, which favors big business, labor, and government and which is bolstered by a no-longer-accurate free enterprise ideology; the visible hand of these bureaucracies has replaced the Invisible Hand. Weisskopf, *The Moral Predicament of the Market Economy*, in G. DWORKIN, G. BERMONT, & P. BROWN, MARKETS AND MORALS 33, 39-40 (1977).

8. Brietzke, *The "Seamy Underside" of Constitutional Law*, 8 LOY. L.A. INT'L & COMP. L. J. 1, 22 n.63, 25-26 (1985) [hereinafter Brietzke, *The Seamy Underside*].

9. While economic resources are typically seen as factors of production and political resources as factors of distribution or redistribution, these processes so interpenetrate as to become indistinguishable. Most individuals and organizations take part in both production and distribution, having at their disposal both incomes (including incomes imputed to those living at a subsistence) and an (often limited) capacity to grant or withhold political participation and loyalty. Production and distribution procure the sum total of the means of existence and enjoyment. The key to economic rationality is the freedom to recombine and renew in pursuit of these means. *See* M. GODELIER, *supra* note 3, at 263; P. MERKL, MODERN COMPARATIVE POLITICS 306 (1970); Tangri, *Economics System and Economic Efficiency*, in G. NESS, THE SOCIOLOGY OF ECONOMIC DEVELOPMENT 423, 430 (1970); R. UNGER, *supra* note 1, at 59.

10. H. LASWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1936).

11. Staniskis, *supra* note 5, at 89-91, 97-98.

and order and, through more plausible claims to obedience, to lay the foundations for governmental legitimacy. But as penetration grows apace, the public perceives the need for legal protections against, for example, the ruthless Swedish tax collector. She perhaps embodies Max Weber's "legal-rational legitimacy," an Idealist combination of coercion, law, legitimacy, ideology, and bureaucratic capacity if ever there was one. These and other examples illustrate Black's first dictum that law varies inversely with other social controls.[12]

Like law, economics tries to focus our attention on *outcomes*, on what actually happens rather than on what leaders or the social scientists studying them say should happen.[13] Behavior is constantly channelled away from randomness and toward particular expected outcomes, through complex systems of rewards (for conformity) and punishments (for deviance).[14] These rewards and punishments are factored into the cost-benefit calculus of the actors, but the influence of these sanctions is often marginal in comparison with other costs and benefits.

Ford produces cars, of course, but it also produces dividends and capital gains for shareholders, the wealth and power of senior managers, and many other things as well. Similarly, the Palestinian Liberation Organization seeks to produce a future Palestinian homeland, increased power and security for Yassar Arafat and other top leaders, quasi-legitimate opportunities to act out violent impulses, etc. Careful study of such outcomes would show that the economists' assumption of a scarcity of resources is extremely plausible; no organization can produce and distribute as many diverse outcomes as it would like. Organizations are thus forced to make *tradeoffs*. The ways tradeoffs are made under conditions of scarcity provide important clues about the nature of an organization's goals and cost-benefit analyses, and about how these might be influenced by legal and other policies.

Within limits, Ford will trade off cars and shareholder interests to attain management interests, since top management makes the decisions within a tight hierarchy and subject to little real accountability. Likewise, we can predict that the advent of a Palestinian homeland would not cause the PLO to disband. It

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12. D. BLACK, THE BEHAVIOR OF LAW 6 (1976).

13. *See* Brietzke, *The Seamy Underside*, *supra* note 8, at 5-6. According to Karl Llewellyn: "Before rules, were facts; in the beginning was not a Word, but a doing", and beyond rules *may* lie effects. W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 50, *quoting* Llewellyn. Talk is (relatively) cheap, even when it takes the resource-form of ideology. The actual production and distribution of outcomes is very different from merely thinking and talking about them. As Portia observed: "If to do were as easy as to know what were good to do, chapels had been churches and poor men's cottages prince's palaces." Shakespeare, *Merchant of Venice*, I, ii, 13.

14. *See* Dahrendorf, *Norms and Inequality*, in LAW AND SOCIETY 298 (C. Campbell & P. Wiles eds. 1979).

would likely switch to producing an expanded governance and perhaps an expanded territory, possibly in a violent way. Ideology frequently plays an important role in selecting organizational goals (dictated by images of a desired future), in the means for producing these goals (means constrained by past outcomes), and in social science evaluations of means and ends.[15] In a Poland under martial law, the elite owned the means of production. But instead of using them for purposes of an "accumulation," the goal was to produce a "totalitarian Utopia": "the subjugation of individuals to the 'community', i.e., to the State." Where this rationality conflicted with an "economic rationality," the latter was shoved aside "through the elimination of self-regulating mechanisms and the substitutions of economic categories invented by some administrators."[16] Solidarity's tactics may thus have had little effect on the new Polish elite, which is less competent in executing tradeoffs, that is, at exchanging social welfare benefits for revenue and loyalty from the public.[17]

II. THE ORGANIZATIONAL DIMENSION

The Polish example reminds us that rationality frequently undergoes a sea-change when individuals act together in a group. Gustav Le Bon found that people lost their critical and moral standards when they joined "mobs" during the French Revolution.[18] They engaged in violence and other illegal acts, something that allegedly happened to top Ford executives as well. Deciding not to redesign the Pinto, which was known to explode when struck hard from behind, Ford executives apparently chose to kill numbers of people, something they would presumably not choose to do in their private capacities. (Sending these executives to jail would offer a stronger deterrent than does punishing the corporation. Such a punishment is usually visited on shareholders and consumers, and it is easily rationalized under a managerial ideology about the inability to "get government off our backs.")

Clearly, an organizational rationality, saving money by paying off on lawsuits rather than redesigning the Pinto, need not be the simple sum of its members' or leaders' rationalities. Yet many economists see only the cool calculations of an individual self-interest, based on copious and reliable information, on risk aversion, and on a severely limited altruism devoid of a true believership. If this were the case, few or none would ever voluntarily die for cause or country. By way of contrast, Max Weber's organizational rationality has each person applying specialized means instrumentally, within a

15. M. GODELIER, *supra* note 3, at 9, 236.
16. *See* Staniskis, *supra* note 5, at 89-90.
17. *See* J. HABERMAS, *supra* note 2, at 5, 8.
18. G. LE BON, THE CROWD (1969).

hierarchy devoted to the continuous pursuit of goals bounded by rules.[19] But in the real world, finding optimal production and distribution functions involves a great deal of experimentation; information and competence are scarce and expectations are uncertain. (These variables can be manipulated through legal and other policies to influence organizational behavior.) A *raison de groupe*, a rough midpoint between a private morality and Machiavelli's political morality of *raison d'état*, is often calibrated carefully to elicit organization-favoring outcomes from "insiders." These insiders can take refuge in their anonymity and, often, in their *de facto* immunity.

Anonymity and immunity are indeed some of the advantages in forming an organization. As Liaszos puts it: "Everyone has somebody over him, so there is no one at the top."[20] Criminal law does not cope well with organizational crime, in part because criminal law doctrines remain oriented toward an intense nineteenth-century individualism.[21] It is thought that an organization cannot be imprisoned, although an organizational death penalty (dissolution), or the divestiture that is analogous to cutting off the thief's hand, is sometimes available. The more organized the offender, the more immunity is enjoyed; prosecution or conviction is less likely, and the offense is less serious and tends to fall under the jurisdiction of a more lenient administrative agency.[22]

Bureaucracy may well be a more important discovery than the wheel for a complex society with an extensive division of labor.[23] As a scholar remarked to China's first Han emperor: "You conquered this country in a chariot - can you rule it from a chariot?"[24] Law seeks to augment and maximize the value of bureaucratic capacity (e.g., Ford's, the Environmental Protection Agency's) by treating the organization as a "person," as the equal of a biological person, despite the bureaucracy's demonstrably superior power and access to such resources as information. (In international law, on the other hand, the "person" is the nation-state; the PLO, *et al.* thus obtain a less than full recognition and bureaucratic capacity.) Black's second dictum is thus that law varies directly with organization.[25] Organizations are more litigious than individuals. Organizations demand, produce, and distribute more law and other resources, and powerful organizations are able to "penetrate" more deeply into society to make their desires felt.

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19. W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 354-55.

20. Liaszos, *supra* note 1, at 345.

21. *See* Thompson, *Criminal Responsibility in Government*, in CRIMINAL JUSTICE 202, 210 (J. Pennock & J. Chapman eds. 1985).

22. D. BLACK, *supra* note 12, at 93-95.

23. W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 357.

24. J. ROBINSON, FREEDOM AND NECESSITY 52 (1970).

25. D. BLACK, *supra* note 12, at 86, 96.

Urbanization made organizational innovation more or less inevitable, given the increased capacity and need for collective action.[26] Unger sees a kind of countervailing power at work: "As the state reaches into society, society itself generates institutions that rival the State in their power and take on many attributes (and problems) formerly associated with public bodies."[27] Governments are special kinds of organizations, since they and their agents claim various formal (sovereign) immunities from law. Government agents manage the means of criminal punishment, and it is unlikely that they will use these means effectively against their own kind. The capacity, but not always the reality, of using a legitimate violence is another defining characteristic of the state.[28] Yet the image of this Leviathan does not answer the questions: What is it? or Who controls it? Hobbes himself called corporations "lesser Commonwealths," distinguished from Leviathan by their less absolute dominion.

Economics can be made to prove out the notion that bureaucracy is bureaucracy, that private and public bureaucratic capacities are similarly mixed blessings. The Reagan Administration may have obscured these similarities by attempting to legitimate corporate bureaucrats and to delegitimate civil servants. Both groups economize on some transaction costs, taking advantage of specialization and a division of labor by the giving of orders within the organization. But there is no free lunch, and an enhanced organizational power and discretion must be paid for somehow. Individual (employee, consumer, citizen) rights may be eroded and, what largely amounts to the same thing in economics, the costs of monitoring the relevant organization may increase. Economists assume that bureaucratized employees will shirk and otherwise substitute their own goals for organizational goals unless costly systems for monitoring, and for monitoring the monitors, are used effectively.[29] It is costly

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26. B. BARNES, *supra* note 2, at 149.

27. R. UNGER, *supra* note 2, at 201.

28. *See* McCoy, *The Cop World: Modern Policing and the Difficulty of Legitimating the Use of Force*, 8 HUM. RTS. Q. 270, 271-72 (1986); Thompson, *supra* note 21, at 214.

29. *See* Brietzke, *supra* note 3, at 69, 72. Private and public bureaucrats alike bid for similar resources (e.g., colleagues), often in the same markets. Both seek power, wealth, and a security of tenure, with a minimum of effort and visibility, through organizational growth and by pleasing similar superiors in similar ways. Both kinds of bureaucracy tend to prefer precision, stability, the coercion of would-be "free riders", and a formal equality, rather than an individualized justice, competition, and opportunities for individual expression.

Rosenblum finds that the "chief business" of government "is negotiating and bargaining, informing and inducing, planning and promising." Rosenblum, *Studying Authority: Keeping Pluralism in Mind*, in AUTHORITY REVISITED 102, 103 (J. Pennock & J. Chapman eds. 1987). True enough, but these functions are also essential to production and distribution by most other organizations. Government and many other organizations establish "transaction structures": the terms of particular exchanges under different circumstances, terms which structure outcomes by displacing markets. *See* Klevorick, *supra* note 3, at 301. Thus, E. Adamson Hobel's definition of law as "the legitimate use of physical coercion by a socially organized agent" errs by selecting out

for us to hold accountable a Congress that is in turn seeking to hold a Watergate President accountable, costly for a shareholder to hold a Ford executive to account, and costly for the executive to make the lowliest employee do his job.

Perhaps the most interesting facet of organizations is that their production and distribution functions, and thus their growth and development, respond to perceptions of an almost continuous crisis. Jurgen Habermas introduced this insight when he generalized four interrelated crises:

> The economic system does not produce [and distribute] the requisite quantity of consumable values, or; the administrative system [bureaucratic capacity] does not produce the requisite quantity of rational decisions, or; the legitimation system does not provide the requisite quantity of generalized motivation, or; the socio-cultural system [or ideology] does not generate the requisite quantity of action-motivating meaning.[30]

While Habermas uses these crises to analyze adroitly the problems of "advanced capitalist countries," the crises also precisely describe constraints and failures in communist party-states and in the Third World. Indeed, most organizations everywhere (Ford and the PLO, for example) are constantly reacting to such perceived crises. Large American corporations and administrative agencies see the emergence of new crises every few years. For "business" to go on as usual, new theoretical explanations, ideological justifications, and legal and other cures must be produced.[31] In Poland, for example, a "regulation through crisis" fell apart under the pressures that led to the declaration of martial law.[32] As Black's third dictum[33] has it, law varies directly with crisis.

So much for organizational means, but what of organizational ends? Economics helps us to generalize these as well, as the acquisition of a "market power," even a monopoly, over the key resources an organization needs for production and distribution. Power is a tricky thing to measure, for real power consists in not having to use it in public and in making your definition of the

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coercion from among many resource-combinations with law. W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 6. In so doing, Hobel implies that the state has a monopoly over lawmaking, an implication refuted by an extensive private lawmaking in the areas of property, contract, corporations, etc. Legal theory tends to treat private lawmaking as delegations of an indivisible sovereignty, but it is more like a shared sovereignty in the real world.

30. J. HABERMAS, *supra* note 2, at 49.

31. J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATION PROCESS AND AMERICAN GOVERNMENT 7-9 (1978).

32. *See* Staniskis, *supra* note 5.

33. D. BLACK, *supra* note 12, at 87.

problem "stick." We admire the power to do things while frowning upon a closely-related power over others. United States Steel dominated its industry, early in the twentieth century and with disastrous long-term consequences, less through efficiency than by controlling 90% of iron ore, of coking coal, and of the relevant rail transport.[34] So, too, do governments often succeed in monopolizing a legitimate violence and other key resources. Such market power is also a means to the twin and sometimes contradictory goals of an organizational stability (usually the security of tenure and orderly succession of leaders) and its strength.

III. GOVERNMENT AND STATE AS ORGANIZATIONS

Attempts to increase the stability of governments and the strength of states play out in interesting ways. Government and state are not mystical entities, "but an enormous, sprawling bureaucratic structure" encompassing many different kinds of norms and people. A monopoly over violence "is supposed to be wielded for [public]... goals rather than the private goals of the individuals who occupy positions within its structure, or even the organizational goals of the subsystems within it."[35] But such goal-substitution is a regular feature of politics. The Chicago School of law and economics goes further to argue that implementation of the goals of organized special interest groups, rather than some "public interest," is an almost invariable feature of politics. The distinction between private and public organizational activity, a distinction vital to much of legal, other social science, and philosophical analysis, is usually blurred beyond all recognition.

Many resources are dissipated through inconclusive competitions for power, between pro-choice versus right to life groups or the PLO versus Israel. Indeed, such dissipations are frequently the main assurance the powerless have of retaining a measure of autonomy. Competitions are usually fierce; there is always too little wealth and power to satisfy what all elite groups regard as their minimum demands. Under conditions of an acute resource scarcity, as when stockpiles of legitimacy and coercion run low in a Third World country, production and distribution (or the politics of underdevelopment) tend to a paternalistic despotism, frequently petty and sometimes benevolent. The Zambia of President Kaunda is a good illustration of rather benevolent responses to continuous crises.[36] Laws and organizations do not merely act *in loco parentis*;

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34. D. Parsons & E. Ray, *The United States Steel Consolidation: The Creation of Market Control*, 18 J. L. & ECON. 181 (1975).

35. W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 271.

36. An old newspaper article introduces the topic:

> In his somber "We are at war" speech... President [Kaunda] was responding to no single overriding threat to his personal position. As he pointed out, Zambia has been

they are direct manifestations of the parent's will. The "children," the relatively poor and powerless "masses," consumers, or "silent majority," are regarded as objects of exploitation for benevolent or other purposes. The reactions of the poor and powerless range from bemused apathy to open rebellion. Such reactions are displayed by peasants around the world during attempts to produce from meager resources such outcomes as the "right" to be let alone.[37]

The paternal despot is a monarch, however called (*e.g.*, the Chairman of the ... Council), who presides over a regime too unstable to become a dynasty. She (but for assassinations, Indira Gandhi may have founded a dynasty) would like to be a modern-day Machiavellian Prince, directing a complex organization to respond quickly and forcefully to perceived crises. But she also realizes that monarchy is an anachronism in most countries, given the twentieth-century collapse of the traditional sources of legitimacy that supported kingship. (Why can we not apply the lessons of Iran and Ethiopia to Saudi Arabia, Morocco, and Zaire; when the end comes, it comes quickly and usually while America's pants are down.)

The most important political stability tradeoff a leader faces is between survival in office (and often physical survival as well) in the short run and in the long run. This is a tradeoff between quickly placating or eliminating enemies by fair means or foul, and painstakingly creating new power bases to counter insurgents, winning general support for good government, and ultimately winning a place in history. (Too many of our "staunchest allies" are incompetent at executing this tradeoff; their excessive emphasis on short-term outcomes may be the reason why they are our allies in the first place.) In the short run, competition for wealth and power seems to be a zero-sum game; winners are seen to profit only at the expense of losers. But as resources are produced and redeployed in new production and distribution functions, a far from zero-sum game ensues. Those who are able to use resources can, *ceteris*

> in a technical state of emergency since Rhodesia's Unilateral Declaration of Independence in 1965. But a combination of economic and diplomatic difficulties aggravated by the Angolan civil war has left... Kaunda feeling angry, beleaguered and certain that this is the time to turn and fight what he sees as the enemies of his country.

MacManus, *Zambia's Peace Plan*, Guardian (London), Jan. 30, 1976, at 13.

Since Macmanus' article appeared, Rhodesia became Zimbabwe but matters have otherwise gone from bad to worse; the Angolan civil war has been joined by one in Mozambique and by troubles with South Africa over Zambia's sheltering of ANC officials. World copper (Zambia's main resource) prices have tumbled, agricultural production has stagnated, and foreign debt has mounted. Bureaucrats have grown more venal, arrogant, and inactive. Alcoholism, robbery, and burglary have become serious national problems. Several "constitutional" crises and serious local rebellions have nearly toppled Kaunda. Ask not, then, why he is so despotic; ask, rather, why he remains so benevolent and why he was not worn out long ago.

37. *See* Brietzke, *The Seamy Underside*, *supra* note 8, at 27-28.

paribus, expect to acquire new ones through a process of political development. But a rapid growth in resources usually means more controllers, and the relative positions of the wealthy and powerful are eroded. If elites are satisfied with their positions, they may use their resources to staunch the growth of others' resources. A nascent push towards equality is then stifled, as happened during America's Populist and Progressive eras.[38]

With meager stockpiles of resources, a leader has relatively little long-term bargaining power to bring to any social contract. Kenneth Boulding[39] argues that the "individual gives up a good deal in terms of being taxed, conscripted, killed or injured in wars, and burdened with the guilt of murder and conscription; in return the state seems to give him little, except perhaps a bit of security and a larger identity." The range of services demanded by increasingly urbanized and sophisticated publics is greater than most regimes can manage under crisis conditions. The remedy, usually credited to the French and the Prussians, is that political leaders become more remote coordinators of increasingly autonomous military/bureaucratic structures called "the state." Such structures gradually augment their bureaucratic capacities by responding to crises more or less effectively, by distributing privileges (rather than rights) to individuals and organizations. This is how the New Deal produced our longest-running political stability out of a manifest instability. The danger is one of sliding into a public sector "imperialism," which some see in the Great Society that eventually succeeded the New Deal. In the Third World, many bureaucracies become parasitic, they consume (in the form of idleness, corruption, etc.) more than they produce, and bureaucratic capacities never get a chance to grow.

The emergence of a state (bureaucratic capacity) which is somewhat independent of the life and power of political leaders sets up another interesting tradeoff between the stability of the government and the strength of the state. For lawyers, this tradeoff gets reflected in the constitutional and administrative law analogues of property laws (who controls which resources), contracts law (bargaining for access to resources), and corporations law (how resources are aggregated, combined into production and distribution functions, and then used to control others). Stability can be measured by the permanence and effectiveness of constitutional rules about succession to high office, and strength can be measured by the extent to which bureaucratic capacities are exercised free of legal, politicians' and citizens', controls.

Historically, this tradeoff was first resolved in favor of the state and in the

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38. *Id.* at 22-24.

39. A. BRETON, THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT 54 (1974) (*quoting* Boulding).

form of authoritarianism, which was a Machiavellism partly misunderstood. State strength was purchased at the expense of an acute instability, of constant shifts among increasingly powerful military, bureaucratic, and political factions kept under control only by the patronage or the crude terror wielded by a charismatic or otherwise unusual leader. We hope that Hitler's Germany and Stalin's Soviet Union are the high-water marks of authoritarianism. The egotistical paternalism of such leaders cannot find satisfaction in a regime coextensive with their heartbeats and attention spans. But this seems to be a lesson lost on some Third World leaders.[40]

Liberalism was the next tradeoff attempted, to curb the vices of authoritarianism by entrenching the authority to challenge authority. Tolerance of divergences in *elite* demands caused elites to fragment into smaller interest groups ("incumbents") able to compete with each other without destroying overall political arrangements.[41] Under the "rules of the game," such as English "gentlemen" learn at public (private) schools and in their clubs, leaders and parties relinquish office because they know their opponents will do the same when another turn of the wheel ousts them from power.

In the United States, stability was deemed so essential yet so difficult to achieve at the founding of the Republic that it was purchased at the price of an extremely weak federal state. This amounted to a storing up of trouble for the future. A weak state made judicial review both possible and essential for resolving disputes, so long as the Supreme Court stayed well away from a

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40. Brietzke, *The Seamy Underside*, *supra* note 8, at 22, 42. Three imperatives, the strong state, militarization, and industrialization, are all deeply interrelated rationalizations of production and distribution processes. But each imperative impinges on the other during fierce competitions for scarce resources, competitions which promote instability. Hettne, *supra* note 2, at 457-59. Authoritarianism's tendency to self-destruction, neglected by Plato, has been recognized since at least Shakespeare's time:

> [E]very thing includes itself in power,
> Power into will, will into appetite;
> And appetite, an universal wolf,
> (So doubly seconded with will and power,)
> Must make perforce an universal prey,
> And last eat up himself.

Troilus and Cressida, I: iii, 119-24 (Ulysses speaking).

In a similar vein, Rousseau, usually depicted as a fellow-traveler of authoritarianism, wrote:

> [I]f force creates right, the effect changes with the cause. Every force that is greater than the first succeeds to its right. As soon as it is possible to disobey with impunity, disobedience is legitimate; and the strongest being always in the right, the only thing that matters is to act so as to become most strong... . The strongest is never strong enough unless he succeeds in turning might into right and obedience into duty.

S. FINER, THE MAN ON HORSEBACK 29, 31 (1975) (*quoting* Rousseau).

41. *See* THE FEDERALIST NO. 51 (J. Madison); Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE (R. Wolff ed. 1969).

politically-bargained stability (a single departure, *Dred Scott*, proved to be a disaster), and so long as there was no entrenched bureaucracy to challenge judicial power. Until the 1937 "switch in time" enabled the judiciary to give limited support to "welfare state" programs, the Court acted as the need arose to keep the state underdeveloped and to allow special interests to repress the pushes toward equality that led to the evolution of social democracy, under a stronger state, in other countries. Since 1937, Americans have seen a *limited* judicial power-sharing with public bureaucracies and a tortuous but necessary reinterpretation of our eighteenth-century constitutionalism.[42]

Why characterize one of the strongest of military powers as a weak state? The point is that almost all of the crises to which the American bureaucracy responded have been military or related to the Cold War. These outcomes have resulted in a massive but very narrow strengthening of the state. Policymaking and implementation have thus been skewed in particular directions by the exercise of narrowly-focused, unchecked state power. Yet many Americans continue to believe in a comforting ideology about their life in a liberal democracy.

In other Western countries, it became apparent by the end of World War II that liberal democracy had reached a dead end from the standpoint of political and constitutional development. The "working class" in these countries found little comfort in the formalism and proceduralism of constitutions creating a negative (or nightwatchman) state. Administrative functions had to be mass-produced from scratch and immunized from judicial negation. The *Rechtsstaat* becomes the *Sozialrechtsstaat* when the bureaucracy barters welfare programs for public loyalty, to the state if not to the government of the day. Modern-day variants of the Prussian *Polezeistaat* seek to fill legitimacy deficits up with bureaucratic capacities, eroding the privatism of a liberal individualism while implementing more communitarian ideals. Legally and as in contemporary Britain, this process represents a rough mid-point between a liberal separation/limitation of powers and their authoritarian concentration or fusion.[43]

At length, Robert Heilbroner makes a point[44] made more briefly by

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42. Brietzke, *The Seamy Underside, supra* note 8, at 42-44.

43. *Id.* at 45-47.

44. As Robert Heilbroner points out:

> [P]roblems are at least as much rooted in the nature of industrial society as they are rooted in capitalism proper. For it is not only capitalist societies but socialist ones that must cope with the problem of marshalling a labor force under conditions of growing affluence (including in that term, let us emphasize, the assured provision of basic needs). It is certainly not capitalism alone that will be marked by the growth of bureaucracies organized to oversee the steady flow of production. Scientific and technical elites have already appeared in the power structures of socialism as they have

Dahrendorf:[45] a worldwide search continues for an interchangeable law-and-order socialism and a conservatism with a human face. Authoritarian regimes are busy trading some state strength to gain a measure of political stability, while liberal democratic regimes trade some political stability for a measure of state strength. Each regime is becoming less like itself, in ways that overlap (as social democracy/welfare statism) but do not converge. There is no need for Third World regimes facing a "double" underdevelopment (political instability in a weak state) to replicate wasteful lurches towards liberal democracy or authoritarianism,[46] despite the advice given by an American or Soviet ally. But the constraints on further development are enormous, in the Soviet Union and the United States no less than in Europe and the Third World.

IV. COPING WITH AND THROUGH LAW, LEGITIMACY, AND COERCION

A delicate balance among resources is obviously required for successful tradeoffs between organizational stability and strength. There must be enough legitimacy, not too much coercion, and enough but not too much ideology, bureaucratic capacity, law, etc. In the 1970s and perhaps as fallout from the Great Society, American confidence began to wane in the efficacy of throwing

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in those of capitalism.

. . .

This is not to say that capitalist and socialist nations will not have their general differences in coping with common problems. The capitalist group brings with it the obsolete privileges of inherited wealth, of acquisitiveness as a dubious source of social morale, of the clash between a "business" outlook of decreasing relevance and a technical-planning outlook of uncertain strength. On the other hand, these nations generally enjoy parliamentary forms of government that, if they withstand the transition through planning, may provide useful channels for social adaptation.

On the socialist side we find the advantage of economic systems stripped of the mystique of "private ownership" and the presumed legitimacy and superiority of the workings of the market which is staging a comeback. On the negative side is the cumbersomeness of their present planning machinery, their failure to develop incentives superior to capitalism, and above all, their still restrictive political attitudes.

. . .

The hope, of course, is that we can combine the two - welding the best of socialist economic practice with the best of liberal capitalist political practice. I have no hesitation in setting such a goal as that for which we should strive in the coming middle period. Whether it will be attainable cannot be predicted.

R. HEILBRONER, BUSINESS CIVILIZATION IN DECLINE 58-59 (1976).

45. R. DAHRENDORF, THE NEW LIBERTY 26-27 (1975).

46. As one commentator pointed out:

The drift toward a one-party state has less to do with Marxism than with Africanization. The pattern can be seen in African states of varying ideological persuasions. A sort of African hybrid of social democracy is taking shape that may not square with European models, but it is more apt to resemble social and political structures in Sweden (perhaps with a touch of Yugoslavia thrown in) than in the Soviet Union or China.

Manning, *So Far, So Fair in Zimbabwe*, NEW REPUBLIC, April 4, 1981, at 20.

law, money, and/or a bureaucracy at a problem.[47] In communist party-states, it is similarly becoming apparent that throwing ideology, bureaucracy, or coercion at a problem does not work either.

Much more research is needed, but it seems that Habermas and others are right: legitimacy is the scarcest resource and is often the bottleneck to assembling effective production and distribution functions.[48] The organization proposes, but some wider group ultimately disposes, such as employees, consumers, citizens, and the international community. Just as Soviets greet *glasnost* with a cautious warmth, so too have Americans persisted in denying the ultimate accolade of legitimacy to large corporations or to administrative agencies.[49] Some outcomes these organizations produce and distribute are greeted warmly -- but not pollution or incompetent attempts to regulate its reduction -- while a distrust of their (market) power remains. Government, the state, and their paucity of resources relative to needs spawned by perceived crises, are properly seen as part of the problem as well as part of the solution.

To produce *Roe v. Wade* or a school prayer decision successfully, the Supreme Court must produce many other decisions that serve to rebuild

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47. P. NONET & P. SELZNICK, *supra* note 1, at 4.

48. *See* M. FREEMAN, THE LEGAL STRUCTURE 54 (1974); Friedman, *Law, Order and History*, 16 S.D.L. REV. 242 (1971); HABERMAS, *supra* note 2, at 98; J. KAUTSKY, COMMUNISM AND THE POLITICS OF DEVELOPMENT 181-82 (1968); G. KENNEDY, THE MILITARY IN THE THIRD WORLD 6, 19-22 (1974); MCCARTHY, INTRODUCTION TO HABERMAS, *supra* note 2, at xiv-xvi; B. MOORE, *supra* note 1, at 52-53; B. NWABUEZE, CONSTITUTIONALISM IN EMERGENT STATES 25 (1973); *See* generally, sources cited *supra* note 2; *See supra* note 32 and accompanying text. Kennedy adds that:

> The legitimacy crisis in the developing world rests on the inability of any of the competing elites to sustain a political leadership for a long enough time for its concepts of public good to be supported by other elites and by the masses. The conflict situation is a permanent feature of the political system; it is pluralistic, involving conflicts within the governing elite . . . and between the traditional and modernizing, between village and city, peasant and worker, landlords and tenants, collective and individual, Europeans and nationals, administrators and subjects, and the rising and falling groups.

G. KENNEDY, *supra*, at 55.

49. J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAWS OF THE UNITED STATES, 1780-1970 (1970); J. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 49-273 (1977). See *supra* note 2 and *infra* note 32 and accompanying text. J. FREEDMAN, *supra* note 31, at 262, places these attitudes within a larger loss of faith in traditional sources of American public and social authority. The argument assumes (without proof) that these sources existed at some time in the past. Conniff, *Any Business that Has to Do with Food, You Got to Keep Rolling*, SMITHSONIAN, Nov. 1988, at 47, offers an instructive contemporary illustration: half of the employees on duty at a Giant food store are being treated to soda, donuts, and "a pep talk about the Giant way of life, 'People Who Care'." With a flip chart, the "motivator" is encouraging each employee to treat customers as "company" in my "clean, organized, living room" of a supermarket. But some employees doze, and one "works on a hangnail with the razor tip of her case-cutting knife." The rest of Conniff's article shows that Giant cares greatly about profits and very little about customers or employees as people.

stockpiles of legitimacy. America's police have never legitimated their use of violence, which is probably a good thing. Particular police officers supposedly use violence under license from the government, but the scope of this license (the major premise) is under more or less constant renegotiation. Factual inferences (minor premises) are also constantly being drawn in cases involving the police, leading to the conclusion that particular uses of force are legitimate or illegitimate. Such conclusions build up or draw down legitimacy stockpiles, indirectly affect such other resources as the size of the police budget voted by a city council, and thus keep the police playing the game more or less by the rules.

The ways in which insurgent and incumbent organizations deal with law, legitimacy, and coercion are fascinating in their variety and complexity. Without pretending to exhaust the subject, I will discuss three progressively higher levels of sophistication in such dealings: the labeling of "deviants," the "processing" of disputes, and the search for effective substantive constraints on undesirable outcomes.

V. LABELING THE DEVIANTS

As Sir John Harington noted: "Treason doth never prosper. What's the reason? For if it prosper, none dare call it treason."[50] "Treason" is a label affixed to insurgents by incumbents, provided the incumbents can make it stick and retain their incumbent status. In Lebanon, no label sticks for long because no group is a plausible incumbent. A mere label can have enormous consequences, in calling down state-sanctioned (or incumbents') violence and many other resources. If the Contras can plausibly be made into "freedom fighters" rather than "terrorists," or a "Strategic Defense Initiative" can become "Star Wars," the flow of resources and thus of outcomes is affected significantly. But no matter how effective it is, and even if it is embodied in a hundred-page statute, labeling is still vulnerable to attack as an unsophisticated form of name-calling.

The conceptual framework for labeling is said to be a sociology of deviance, where "deviant" is sometimes little more than a basis for dismissing behavior we do not like or understand. This framework is presumably no worse or better than an economics perspective. Economists might find that some sociologists overstate the power of an abstractly-defined "society" and understate the rationality and the success with which insurgent and even incumbent

50. HARINGTON, OXFORD BOOK OF QUOTATIONS 53 (3d ed. 1979).

organizations pursue unofficial goals.[51] Such goals are as good as any others in economics, since preferences are assumed to be subjective and "interpersonal comparisons of utility" are prohibited. In any event, there is no guarantee that enhancing the stability and strength of a particular government and state will also be the goals of a "society" composed of many types of people and organizations.

This is not the place to rehearse fully the perennial sociologists' dichotomy between conflict and consensus. Suffice it to say that the consensus model developed by Talcott Parsons[52] and others has so captured the imagination of American social scientists that most lawyers, economists, etc. adopt it in a more or less unthinking way. Their assumption is that law, legitimacy, and coercion produce an equilibrium in fairly automatic ways. Deviance becomes a relatively rare and isolated phenomenon (*e.g.*, motorcycle gangs), which shows the need for a bit of "social engineering" here and there: "treatment" or "rehabilitation," for example. This positivist view is rather static; as in the old Charles Atlas ads, "before" and "after" pictures do not account for the sometimes-painful changes in between. But where more than a few insurgent organizations demonstrate the will and the resources to produce and distribute significant outcomes (those disturbing to incumbents), the conflict model begins

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51. A. Liaszos, *supra* note 1, at 346-48. Liaszos finds a great deal of "*schlock* sociology" associated with deviance theory. I do not wish to add to *schlock* economics - of which there is plenty already - but a brief critique of deviance theory from what can be loosely termed an economics perspective seems in order. The most striking thing is that deviance theory tends to deal with "nuts, sluts, and 'preverts'", rather than with Nobel laureates or sophisticated organizations. *Id.* at 330. When organizations are treated, lower-level functionaries - beat cops, mental hospital nurses - are usually the focus of study. Presumably this is because, like psychiatrists, some sociologists have a particular definition of "normality" in mind, a definition which justifies a particular "treatment." Nobel laureates or a corporation whose top executives know their products kill consumers are manifestly abnormal, but they either do not need treatment or cannot be made to submit to it. *Id.* at 336, 345.

To an economist, a "deviant" sounds suspiciously like an "irrational" person. The economist begins with the assumption of rationality (which also has its flaws) instead, and then counts the outcomes. "Inadequate socialization" or behavior under the "strain of disorganization from rapid social change" becomes less a deviance than a rational attempt to adapt as well as one can - with limited resources for doing so. "Alienation" and "anomie" get produced and distributed as outcomes because they are desirable to someone - if only to the sociologist-observer. A "deviant subculture" becomes a source of resources for producing rival outcomes. The common sociologists' observation that labeling often evokes the very outcomes complained of suggests that the label has been incorporated into the deviant's production function; greater efficiency rather than shame or the "looking-glass self" may be the result. Whether these outcomes are "good" or "bad" depends on which criteria of evaluation are chosen - on what the chooser is trying to produce and distribute by way of ideology. *But see* A. COHEN, DEVIANCE AND CONTROL 112 (1966); A. LISKA, PERSPECTIVES ON DEVIANCE 30-33 (1987); S. TRAUB & C. LITTLE, THEORIES OF DEVIANCE iv, 2, 94, 241-42 (1980).

52. T. PARSONS, THE SOCIAL SYSTEM (1970).

to offer more realistic descriptions and prescriptions in some areas.[53] "Homosexuals" may be deviants-by-definition, but "gays" become dissidents when they organize to produce rival outcomes.

Marketplace imagery is obviously congenial to theories of a consensus equilibrium, but economics also yields images of society as a cynically-negotiated compromise among antagonistic interests. This social contract is kept only so long as, and as far as, the benefits of doing so exceed the costs. The notion of "commonly accepted rules" against which a deviance is judged dissolves around the edges, especially when rational insurgents feel free to adopt the rules they like and reject the rest.[54] Both order and change become problematic yet "normal" when crises are faced under conditions of uncertainty and incompetence.

Economics focuses on outcomes and on the constraints on producing and distributing them. The label of conformist or deviant can be only one of many things entering into a cost-benefit analysis of outcomes. Unless the label serves to grant or withhold a crucial resource, legitimacy perhaps, the effect of the label is likely to be marginal. It may, indeed, cause the incumbents more harm than good. Government's extravagant claims to authority over all aspects of life -- education, childrearing, sex, etc. -- may increasingly be called into question and then circumvented (produced around) by deviants active in a particular area. Stigmatizing Solidarity or Right to Life helps to keep it busy exploiting each of many vulnerabilities. Attitudes of "us" and "them" grow more rigid, and questions about who gets to make and enforce law are thus more likely to be reopened.

Insurgents may go further to attempt fundamental changes in the choices on offer from incumbents, choices that a consensus and the labeling of deviants are said to protect. If the "owners" persist in refusing to sell or give up something vital on any terms -- homes for the homeless or a Palestinian homeland -- insurgents will seek to cure this "market failure" by changing the market's "transaction structure" into something like an eminent domain. Some form of alternative society may spring up as a potentially dangerous reproach to the incumbent society: brief and superficial "communes" in the U.S. or, in Eritrea,

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53. *See* W. CHAMBLISS & R. SEIDMAN, *supra* note 1, at 117-18; A. LISKA, *supra* note 51, at 175-78, 205; E. SCHUR, *supra* note 1, at 85; R. UNGER, *supra* note 2, at 31-32; R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 34 (1986). Hettne, *supra* note 2, at 455, adds that: "Because of conflicts with other emerging states and internal unrest, the process of state formation was often quite violent. People therefore learned to conceive of their 'own' state as a protector and the rest of the world as 'anarchical' and a threat to their security." Perhaps these attitudes of "us" and "them" are then generalized in experiences with other organizations.

54. S. TRAUB & C. LITTLE, *supra* note 51, at xi.

a guerilla society that literally went underground to escape airstrikes.

In communist party-states, a "second legality" or "underground law" is growing up with the "second economy," alongside the older socialist legality and in reaction to the overregulation of economic and social life. This "second legality" emphasizes concepts akin to due process, juristic precision, and (a limited tolerance for) individual bargaining and autonomy.[55] There is some evidence that these underground legal concepts are beginning to affect socialist legality itself. But if an integration does not occur soon, two parallel systems of production and distribution will harden into the dissensus that a labeling of deviants is supposed to prevent. In 1968, the Kerner Commission saw the nation rapidly moving toward two separate Americas, yet little has been done in the meantime.[56] The Commission's diagnosis may have been faulty, or perhaps the "other" America has been repressed or manipulated into a quietude because it lacked sufficient entrepreneurial and other resources to organize for rival outcomes.

VI. PROCESSING "DISPUTES"

Rioters and guerrillas can be dealt with by the military or the police, but they cannot otherwise be regulated. Such coercive dealings are frequently ineffective, always prodigal in the use of scarce resources, and usually blunt instruments incapable of producing delicately-adjusted outcomes. Incumbents may thus seek to co-opt insurgents instead. Insurgents will then be given just enough of a stake in the "system" to keep them playing the legal process "game," without much affecting overall outcomes, or so the incumbents hope. Would-be rival outcomes get labeled as disputes or claims, and these are then processed into forms more acceptable to incumbents. Abandoning this process, through recourse to a violent opposition for example, will mean forfeiting gains made through prior claim adjustments. Like the monetary economy, the legal process frequently succeeds in turning divergent objectives into motivations for routine, conforming behavior.[57] This technique amounts to a more sophisticated labeling theory in reverse: giving a dog a good rather than a bad name in the hope that it will behave accordingly. Conflict should then decrease, to the extent that differences between incumbent and insurgent outcomes are reduced and insurgents' cost-benefit analyses are altered. But incumbents will be reluctant to change much, and insurgents have gained at least a minimal

55. Markowits, *Law or Order - Constitutionalism in Eastern Europe*, 34 STAN. L. REV. 513, 606-07 (1982).

56. KERNER COMMISSION, REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS 401 (1968).

57. *See* B. BARNES, *supra* note 2, at 129.

access to such resources as law-making and enforcement.[58]

The success of this technique depends on insurgents' belief in the existence of a system yielding desired outcomes. The architects, perhaps the leading ideologists, of the American Legal Process School confidently assert: "A legal system *is* a system - a coordinated, functioning whole made up of a set of interrelated, interacting parts." The goals of this system are "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man."[59] Elaborate efforts are made to convince insurgents that "community" and "complete development" include insurgents, and what amounts to the same thing, efforts are made to legitimate the legal system and thus its governmental sponsors.

Crude forms of this Legal Process justification can be found in the older formalism and positivism of John Austin, Christopher C. Langdell, and others.[60] But their justifications do not benefit incumbents much when insurgents (Critical Legal Studies scholars, for example) inevitably begin to probe the many weaknesses of incumbent processes. The Legal Realists thus began the search for more sophisticated justifications that continues today. Order and justice cannot depend solely on the legal community's professional understandings, on what philosophers might term a conventionalism.[61] But we must also recognize that the consensus over ends like order and justice, and over much else, is rather limited. Hart and Sacks thus postulate a general understanding about the terms of cooperation; a continuous and inescapable interdependence usually transcends differences, even while organizations seek

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58. *See* A. LISKA, *supra* note 51, at 202.

59. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW iii, 110 (1958).

60. These crude justifications retain some hold on Western middle-class cultures through, for example, high school and even college and law school teachings. As is always the case with Legal Process theories, courts provide the model of claim adjustment. The truth almost always emerges in the course of an adjustment, under rules requiring an objectivity in fact-finding. Such findings yield patterns previously anticipated and accounted for; each fact pattern is pregnant with its own right rule. This rule is clear, consistent with other rules, and not open to question in this dispute. Applying this rule is so routine and predictable an activity that little discretion is required and only the occasional "bad" decisionmaker will screw up. See Carlen, *Control in a Magistrate's Court,* in LAW AND SOCIETY 211, 212 (C. Campbell & P. Wiles eds. 1979); W. CHAMBLISS AND R. SEIDMAN, *supra* note 1, at 178, 220; Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1-2 (D. Kairys ed. 1982); R. UNGER, *supra* note 1, at 201. Insurgents or deviants may lose the outcome, but the process itself will be satisfying enough to keep them coming back for more. This is an attempt to palliate conflicts temporarily (the short-term perspective), an often-transparent attempt to paper over a dissensus which can exacerbate crisis conditions.

61. S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 166 (1985).

to produce rival outcomes.[62]

The legal process itself thus gets used in efforts to plug the gaps in consensus. There is an insistence on a legal logic (justifications for outcomes) tight enough to leave little room for an arbitrary power.[63] To tempt insurgents to come in under the legal process umbrella, the "historic bargain" of liberal democracy exchanges a limited autonomy of legal institutions for their reciprocal legitimation of political activity.[64] Law is made more distinctive, so that it is less likely to be confused with other, perhaps discredited, social controls wielded by incumbents. Separated from and given a limited control over politics, formally at least, law is then imbued with Weber's hyper-rational ideals. In exchange, legal institutions promise to practice self-restraint, the "passive virtues." This is a tradeoff in which legal institutions surrender much control over the substance of policy to gain a procedural autonomy, an autonomy that is used to help legitimate the politically-bargained substance.

American lawyers would see Justice Frankfurter's, and thus Hart and Sacks', procedural due process at work. This powerful resource for legitimation held sway from the Court's 1937 "switch in time" and until legitimacy was dissipated by the Burger Court's dissensus and incompetence over concocting justifications. Frankfurterian justice is regularity, a means of getting one's "due" under established rules. These rules are deemed to secure a (procedural) equality when they are applied evenhandedly. Compelling demands for a substantive equality are thought to illustrate the dictum that hard cases (about widows and orphans, for example) make bad law. The legal process ideal then spreads beyond legal institutions; for example, the process values of an impersonal fair-dealing get reflected in the ideology of a "corporate social responsibility."[65]

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62. H. HART & A. SACKS, *supra* note 59, at 1-2, 124. Their consensus is narrower and more limited than those typically postulated by sociologists of process or of a structural-functionalism. *See* W. CHAMBLISS AND R. SEIDMAN, *supra* note 1, at 18.

63. *See* S. BURTON, *supra* note 61, at 173.

64. *See supra* note 28.

65. *See* JONES, KERNOCHON & MURPHY, LEGAL METHOD 762, 766 (1980); P. NONET & P. SELZNICK, *supra* note 1, at 58, 67, 69; E. SCHUR, *supra* note 1, at 108-09; Selznick, *Legality*, in LAW AND SOCIETY 125, 136 (C. Campbell & P. Wiles eds. 1979). Hart and Sachs argue that an institutionalizing of procedures for the settlement of "questions of group concern" is the "central idea of law." *See* H. HART AND A. SACHS, *supra* note 59, at viii, 4. Domination is legitimate only if it takes place in accordance with a legal order whose validity is presupposed by the acting individuals. *Id.* This is rather too formalistic. According to Rosenblum, the systematic philosopher's answer to - "Why should I obey authority?"- is: "Because that is what authority means." Rosenblum, *Studying Authority: Keeping Pluralism in Mind*, in AUTHORITY REVISITED 102, 107 (J. Pennock & J. Chapman eds. 1987). The Frankfurterian answer might be: "Because authority is based on fair procedures which generate neutral outcomes."

Many of the costs and benefits of attempting to deal with insurgents through the legal process can be traced through three examples: American labor, American farmers, and the German Green Party. Unions had been America's longest-running insurgent organizations. Incumbents saw union officials as European-style radicals who endangered a growing corporate (incumbent bureaucratic) capacity to "discipline" resources for production and distribution. Initially, then, unions were labelled as deviant and repressed. Leaders were jailed for criminal conspiracy, and one after another of the outcomes produced by unions were decreed illegitimate.[66] With most legitimate avenues foreclosed, union temptations to (respond to) violence were sometimes overwhelming, especially in mining areas during the 1920s. But Roosevelt saw unions as playing important roles in producing New Deal outcomes. He brought them into legal processes through a tradeoff: a limited legitimation of union quarrels over how employers cut up the economic pie was exchanged for limiting the unions' political role to one of lining their members up to vote Democratic.

Klare generalizes the subsequent outcomes into a liberal democratic "ideology" of collective bargaining:

> By emphasizing process at the expense of substance, indeed, by fostering the belief that "justice" is conceivable without regard to substance, collective bargaining law nurtures the idea that industrial democracy resides in the bargaining process itself, even if the "core" issues have been removed from the table before the bargaining gets started. Conceiving justice in procedural terms diverts attention from the top-heavy asymmetry of power....[67]

This process has been so successful from the incumbents' point of view that, often as not, a now-bureaucratized union coercion gets directed against itself, in a tendency to self-destruct under Hoffa, Jackie Presser, etc., rather than against

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66. For example, employers began to use "yellow dog" contracts: employee promises not to unionize as a condition of employment. Playing the process game, unions lobbied successfully in Kansas to have such contracts declared illegal. But the U.S. Supreme Court held the Kansas statute unconstitutional; it "naturally happens" that parties to a contract "are not equally unhampered by circumstances." Coppage v. Kan., 236 U.S. 1, 17 (1915). The employees' threat to strike if a closed shop (all employees must join the union) is not granted was declared illegal in Hitchman Coal & Coke v. Mitchell, 245 U.S. 229 (1917). But the employer's threat to fire the employee if the employee did not agree to a closed non-union shop remained legal. A state statute restricting the use of injunctions during a labor dispute was declared unconstitutional in Truax v. Corrigan, 257 U.S. 312 (1921). Employers could thus continue to misuse the Sherman Act of 1890 to obtain an injunction against a strike, despite fairly clear language to the contrary in the Clayton Act of 1914.

67. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

management. Pushes toward a social democracy/welfare statism[68] like those sponsored by unions in other countries have been safely aborted. A brief contrast with Poland under martial law is relegated to a footnote.[69]

The history of American farmers is perhaps the mirror image of labor's. Farmers might have been the quintessential incumbents Jefferson hoped they would become in an agrarian society, but it proved impossible for independent and physically isolated farmers to augment their power by organizing effectively. Corporations succeeded as organizations and passed farmers by; a late nineteenth-century agrarian populism lost out to a corporate logic of economic growth. Roosevelt tried the same tactics he used on labor, syndicalist tactics Hitler and Mussolini were using for different purposes, but Roosevelt was stymied when the Supreme Court held his Agricultural Adjustment Administration unconstitutional.[70] Over time, farmers grew increasingly marginal to coalitions of incumbents, although they are still lauded and occasionally thrown a bone because their support is sometimes needed in the Senate, in "Southern strategies," etc.

By the 1980s, farmers were playing the game just the way government "experts" advised, going deeply into debt to produce more and more. But family farmers lost, economically and then through legal processes. Ostensibly-protective foreclosure procedures failed many of them and, this time, farmers lacked the political power to obtain a *Blaisdell* solution[71] from a legislature.

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68. *See supra* notes 43-46 and accompanying text.

69. Staniskis comments that:

> The creation of mediating structures [a role American unions cheerfully play] is exceedingly difficult. Authorities seem to be afraid of genuine, lively union structures. [Like Roosevelt, Polish authorities] might be willing to negotiate a formula for self-limitation by Solidarity, but they can hardly afford it. [While other East European rulers were working against such a formula, Polish] authorities know that the crisis is deepening, and they need unions as a buffer. Chances to recreate corporative structures are minimal.... Using the Church as a mediating structure is difficult because of the apparatus' anti-clerical attitudes.

Staniskis, *supra* note 5, at 100.

At this level, the big difference between the U.S. and a Poland under martial law is that American incumbents are well endowed with buffers and mediation structures. Indeed, liberal democratic processes excel at producing such organizations. American labor needs the incumbents more than vice versa.

70. United States v. Butler, 297 U.S. 1 (1936). This was a case of unfortunate timing for farmers and for Roosevelt, coming just before the 1937 "switch in time." *See, e.g.*, Helvering v. Davis, 301 U.S. 619 (1937): Ignoring *Butler*, congressional powers for dealing with old age benefits are unlimited during an economic emergency. *See also supra* note 23.

71. In Home Bld. & Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934), a Minnesota statutory moratorium on foreclosure of mortgages, an apparent violation of the Contracts Clause, was upheld as constitutional because of the economic emergency of the Depression. Note that this decision was prior to both the 1937 "switch in time" and *Butler*.

Some farmers are thus rapidly sliding into an insurgency, into joining the Rainbow Coalition, a right-wing religious and/or anti-semitic group, etc. The occasional murder of a rural banker or coerced boycott of a farm foreclosure auction masks subtler but more significant changes. Small-town bankers and agricultural extension agents, stereotypical incumbents who control the scarcest resources for much of local production, have been pushed off their pedestals. They can no longer organize rural life as effectively, and many complain that "no one speaks to me at the Lion's Club or the bowling alley any more."[72]

Powerline[73], on the other hand, shows farmers "winning" one. A high-voltage powerline running through rural Minnesota was to be sited under State statutes and policies lauded for their emphasis on public participation. Farmers played this process game (as Blacks, feminists, environmentalists, and other moderate insurgents are encouraged to do), appeared at all the relevant hearings, and lost. An experts' "avoidance rating" preferred State lands, forests, and interstate highways over farm lands, so it was unlikely that the farmers ever could have won by rerouting the powerline. After they lost in court, the farmers took their harassment beyond the legal process. They blocked surveyors with farm machinery and disrupted radio communications by running chain saws. The largest mobilization of Minnesota state troopers in history proved fruitless because an experienced antiwar activist was planning farmer activities. As soon as electricity pylons were erected, "boll weevils" knocked some of them down. Vital glass insulators became clandestine targets for farmer-marksmen, and the power did not flow. Such "violence" is clearly not illegitimate among local residents. The failure of legal processes to produce desired outcomes made insurgents out of incumbents.

Like many other insurgents, some farmers and unemployed people have concluded that their demands are not "disputes" that can be sensitively processed under existing procedures. The Process model produces much wealth for the lawyers who believe in it, but too little for farmers and wage earners. Their claims are substantive: the "property" right to farm or to a job that would enable their resource stockpiles to be replenished and that only a more activist state can satisfy and finance. (The "right" to an abortion is hollow for a woman unable to afford one.) A liberal democratic Process model's jealous scrutiny (under a separation of powers) by legislature and court keeps the bureaucratic capacity of something like a welfare state from evolving. "Due process" curbs a bureaucratic discretion exerted for good as well as for evil purposes. Whether

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72. Bennett, *Farm Bankers Anguished by Fall from Pedestal*, AMERICAN BANKER, Feb. 4, 1985, at 1; Malcolm, *Murder of a Banker in Minnesota Spurs Manhunt for Failed Farmers*, N.Y. TIMES, Oct. 2, 1983, at § 1, p. 1.

73. B. CASPER & P. WELLSTONE, POWERLINE: THE FIRST BATTLE OF AMERICA'S ENERGY WAR (1981).

an eighteenth-century constitutionalism will continue to be successful in resisting some demands for redistribution remains to be seen. (Some demands get satisfied by, for example, Defense Department expenditures that are in part corporate welfare programs.) Warren Court procedural reforms, which multiplied opportunities for asserting claims, have been stretched to their limits and are now shrinking on the rebound. Such reforms kept many civil rights/civil liberties advocates playing the game as moderate insurgents, but these stopgaps clearly cannot accommodate all who would use them.[74]

The Green Party is perhaps the most interesting and dangerous (for incumbents) example. From the late 1960s on, German incumbents were harried by many militant and sometimes violent insurgents. As groupings of these radicals, the Greens were apparently brought into the legal processes to co-opt insurgency; the West German Federal Constitutional Court certainly had and has the power to choose to ban the Greens.[75] Co-option seemed to work for a time. After the 1983 elections, the three incumbent parties treated the Greens as an anomaly and shut them out of sensitive posts and information. (The CIA similarly uses alleged congressional committee leaks as *ex post facto* justifications for failing to supply information to Congress.) But the Greens did their homework well. They effectively challenged old-boy networks and habits, and they put environmentalism and embarrassing clandestine activities on the political agenda.[76]

Chernobyl and industrial pollution of the Rhine operated to favor the Greens, who increased their share of the vote from 5.6% in 1983 to 8.3% in the 1987 elections. Although they lost out in recent elections, the Greens are significant insurgents with a very intellectual approach to politics. Their conceptions of economic growth, international security, and the dangers posed

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74. Buchanan, *Political Equality and Private Property: The Distributional Paradox*, in MARKETS AND MORALS (G. Dworkin, G. Bermant & P. Brown eds. 1977); P. NONET & P. SELZNICK, *supra* note 1, at 105-06; R. UNGER, *supra* note 2, at 180.

75. In the Communist Party Case, 5 B. Verf. GE 85 (1956), the German Court banned the Party because of a "smear campaign", "statements" and "actions" that "fundamentally criticize... the general political goal" of the German "free democratic order." This order "accepts as given the existing political and social order," but the Party does not. In the Socialist Reich Party Case, 2 B. Verf G GE 1 (1952), the Court found that, like the Nazis, the SRP rejects "human dignity, freedom and equality" and "indulges in platitudes, lays down general demands that are the common property of almost all parties... and makes vague and utopian promises that are hardly compatible with each other." SRP "insults," etc. have nothing to do with free speech or "genuine political opposition." Its "concept of Reich differs from the notion of Reich in the best German tradition." Under these loose criteria, almost any week's-worth of statements by the Greens would entitle the Court to ban the Party. Case translations *quoted in* W. MURPHY & J. TANENHAUS, *supra* note 7, at 602-03, 625-26.

76. Pond, *Germany's Greens Want Higher Profile in Government*, CHRISTIAN SCI. MONITOR, Feb. 13, 1987, at 13.

by the nation-state strike at the heart of incumbent outcomes.[77] The Greens try to be a broad party, encompassing both the Realo's impure influence within legal processes and the Fundi's pure resistance: shutting nuclear plants down, leaving NATO and the EEC, and destroying the state monopoly over violence so that resistance groups can use it more effectively. There is a limited collaboration between these factions, and Realos are reluctant to distance themselves from what German criminal law now labels a "terrorist offense": attacks on electricity pylons like those in Minnesota. But the Greens' breadth did not serve to co-opt German contributions to a 1985 "Euroterrorist" wave or 1987 increases in violence as a form of youthful protest. Dany Cohn-Bendit, now a Green but formerly a student activist in the Paris of 1968, terms these *Chaosen* (chaos-minded) demonstrators "marginalized youth."[78]

Plus ca change ... (Cohn-Bendit was thought the chaos-minded youth of 1968), but German incumbents might be said to have lost their gamble. Green cosmopolitanism has provoked reactions of a parochial, perhaps fascist, chauvinism.[79] There is some chance that the Greens will attain a genuine incumbent power, which would presumably cause their movement to fragment. An organization like the Greens lacks the hierarchical authority structure of, say, a corporation, a structure that enables an organization to discipline its "resources" for the consistent production of particular outcomes. The Fundis could regularly (some would say more regularly) go violently underground, leaving the Realos to play at incumbency -- just as the Political Wing of the IRA is left with a seat in Parliament and many local government offices.

An adaptability of rational organizations maximizing *perceived* outcomes, the above-ground plus the below-ground for example, can stymie even the sophisticated legal processes of Germany and Britain. Insurgents can practice expediency as well as or better than incumbents, who are tempted into cycles of tolerance and repression that dissipate legitimacy and other crucial resources. Insurgents do not necessarily subscribe to the lawyers' ideology of the legal system as a system. A cost-benefit analysis may dictate accepting part of the system for some purposes and rejecting the rest, especially the rest that serves existing outcomes and distributions of power.[80] Preoccupied with outcomes of

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77. Hettne, *supra* note 2, at 453.

78. Fisher, *Young Make Violent Comment on Dull West German Politics*, (London) FIN. TIMES, Jan. 13, 1987, at 3; Markham, *Chernobyl and Dirty Rhine Helps the Greens Grow*, N.Y. TIMES, Jan. 7, 1987, at 4.

79. Hettne, *supra* note 2, at 463.

80. Raz sees a "popular mistake", that autonomy and authority are reconciled through consent. *Government by Consent*, *supra* note 2, at 83. Implicitly in Plato's *Crito*, the "Laws argue that if the citizen accepts the terms of the contract when it suits him, he must also accept the obligations of the contract when it goes against him." I. F. STONE, THE TRIAL OF SOCRATES 225 (1988). That may be so in logic or ethics, but it is certainly not the case in politics.

their own, organizations are not very interested in lawyers' procedural and institutional outcomes. An organization may be unable to perceive the "public interest" as clearly as some lawyer drafting administrative laws thinks (s)he can, and the organization may in any event prefer its own special interests.

When we abandon Western Process models, results will of course be very different. Presumably, no amount of co-opting by incumbents will reduce violence in South Africa. There is no plausible legal process for insurgents to regard as legitimate, and violence and the wealth produced by it seem to be the only things incumbents understand. Yet process values have taken tenuous holds recently in Argentina, Brazil, the Philippines, and a few other places in the Third World, which seems all to the good.

VII. CONSTRAINTS, MORAL AND AMORAL

Bedau argues that theorists of revolution must "identify the paradigm around which the anomie, injustice, and malfunction in our society can be interpreted...."[81] I have tried to identify one, obviously incomplete, law and economics paradigm. It locates the trouble in extant production and distribution functions. The labeling of deviants and the proceduralism of a liberal democratic (or negative) constitution have done much to shape these functions, so little real change can be expected from within their status quo. Citing Habermas, Rubin finds that nominally apolitical and coherent legal doctrines serve to repress moral or emancipatory instincts, by means of a "technocratic objectivism."[82] Revolution is one obvious solution, but many economists and others would point out that rarely if ever do revolutionary outcomes satisfy the bulk of insurgents; it is difficult to justify revolution in the hard light of a cost-benefit analysis.[83]

Less extreme constraints on undesirable outcomes may produce less theoretically satisfying but more practically useful results. For example, General Motors might like to kill (bankrupt, take over) Ford (or Tucker), but the law frequently keeps this from happening on the assumption that competition among manufacturers benefits the public. Society necessarily rests on some organizations and their outcomes constraining other organizations and outcomes. The circumstances of a particular underdevelopment are created by outcomes produced and distributed in the past. They also represent the current constraints

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81. Bedau, *Revolutionary Theory, Revolutionary Non-Violence and Revolutionary Rights*, 5 PHIL. IN CONTEXT 67, 76 (1976).

82. J. HABERMAS, *supra* note 2; Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1869, 1888 (1988).

83. Consider Ethiopia, for example. *See* P. BRIETZKE, LAW, DEVELOPMENT, AND THE ETHIOPIAN REVOLUTION (1982).

on incumbents' choices for dealing with each other, with insurgents, and with the poor and powerless. The patterns (the transaction structures or terms of trade) formed by interdependent outcomes, constraints, and dealings can all be changed fundamentally through the process of development. This is a relative and multidimensional process; nation-building in the Third World is mirrored by the many reconstructions of, for example, labor relations and farming[84] needed in the First and Second Worlds.[85]

Liberal practitioners of a constitutional theory have been searching for constraints on undesirable outcomes. But their typical emphases on procedures and on legitimating an unelected Supreme Court seem to have frustrated this search. The quest for substantive constraints is as old as natural law and as new as Dworkin's latest book. But having long had the field to itself, much of current jurisprudence has become rather loose in argument, stale, and inward-looking -- preoccupied with beloved finer points. Attacks by law and economics and by Critical Legal Studies are forcing legal philosophers to look to their laurels by coming up with more relevant and compelling analyses.[86]

The economists' model of market behavior is diametrically opposed to Western ethical traditions and their emphasis on altruism.[87] The market suffers from all of the defects of any ethnocentric social science metaphor, yet it has been applied with some success to many non-market and even non-capitalist situations. In the many areas where self-interest consistently rules, the profit motive becomes a part of nature. Any jurisprudential attempt to define a public interest above and apart from the sum of individuals' self-interest must therefore be illegitimate. Legitimacy no longer comes from the higher reaches of a philosophy or ideology but from below: the inherent justice of marketplace exchanges.[88]

Above all, economics attacks the jurisprudential assumption that rational

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84. *See supra* notes 66-74 and accompanying text.

85. Brietzke, *The Seamy Underside*, *supra* note 8, at 13, 38. *See also* J. HABERMAS, *supra* note 2, at 49. Almond and Powell have made an excellent start at identifying combinations of choice and constraint in the Third World. They identify five "models", each of which arguably spawns a distinctive type of constitution: 1) democratic-populist governments, such as Nkrumah's Ghana; 2) governments such as Brazil's and Indonesia's, where the middle class pushes for economic growth while the cost to government of keeping order escalates wildly; 3) a more equitable "authoritarian-technocratic-equalitarian" strategy pursued in, for example, Kenya and South Korea; 4) the "authoritarian-technocratic-mobilizational" strategy used in Taiwan, Cuba, Mexico, and Tanzania; and 5) such neo-traditional or "neo-patrimonial" states as Saudi Arabia and Kuwait. G. ALMOND & G. B. POWELL, COMPARATIVE POLITICS 204-07, 220, 231, 371-87, 420-21 (2d ed. 1978).

86. Brietzke, *supra* note 3, at 77.

87. Weisskopf, *supra* note 7, at 35, 37.

88. Brietzke, *supra* note 3, at 77.

behavior can be effectively constrained by the appropriate general and uniform rules. Some economists plausibly argue that American corporations and administrative laws are all but useless as constraints on organizations. These economists find that shareholders can rely instead on a greedy and grasping management, which is constrained to keep profits and thus share prices high by the no less greedy insurgents plotting a takeover of the corporation through efficient capital markets. This constraint makes corporations efficient, but the lack of an equivalent market constraint on administrative agencies permits their inefficiency.[89] Analyses like these show law and economics to be self-consciously and even self-confidently amoral. Legal constraints are only marginal costs and benefits, which are needed only in the rare instances of market failure and which are factored into rational analyses to the exclusion of altruism (*e.g.*, corporate managers or public bureaucrats serving public interests) and other moral promptings.

As useful as some of its recommendations may be, law and economics is an imperfect paradigm. Parsons[90] shows how a nineteenth century economics/utilitarianism neglects the "social order"; cooperation based on shared interests and a moral attachment to norms, among other things, necessarily supplements fortuitous and unstable congruences of self-interest. Yet many economists naively assume that a self-interested rationality operating through markets will always or usually be an adequate constraint on undesirable outcomes. Unfortunately, the relevant markets are often uncompetitive and they frequently fail outright. Such occurrences permit the exercise of unconstrained private power that, in turn, licenses public interventions. Such interventions are frequently more extensive than the marginal adjustments to costs and benefits recommended by economists. This is because government is much more than an alternative supplier of consumer goods to households. Government engages in activities ignored by many economists, perhaps because economists' rules do not always govern these activities: nationbuilding or repair, the protection and

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89. *See* Fishel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1 (1978); Hindley, *Capitalism and the Corporation*, ECONOMICA, Nov. 1969, at 426; Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975); R. UNGER, *supra* note 2, at 179; Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). But it can be convincingly argued that administrative agencies face "takeovers" - through congressional appropriations, etc., and changes of the presidential guard - more frequently than do most large corporations. According to Greer, private constraints on government include the need "to limit public-policy choices to those that do not result in massive capital flight; governments must remain within the restraints imposed by investor confidence; and the judiciary must tailor its holdings to the fundamental social limits imposed by a capitalist order regardless of personal values." Greer, *Antonio Gramsci and "Legal Hegemony"*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304, 306 (D. Kairys ed. 1982).

90. T. PARSONS, THE STRUCTURE OF SOCIAL ACTION (1949); B. BARNES, *supra* note 2, at 22-23.

violation of human rights, and deploying a wider variety of social controls than can be produced by most private organizations. Canons of legitimacy enable governments to pursue effectiveness (*e.g.*, nuclear weapons programs designed to make the rubble bounce several times) or income redistributions desirable to some, rather than an economist's narrowly-conceived efficiency.

Inequalities persist and probably increase during an economist's pursuit of efficiency (wealth maximization) under status quo ("given") distributions of wealth and power. Law and economics thus operates systematically to favor liberty values (liberal democratic freedoms from governmental intervention) over equality values, while effective dealings among incumbents and with different kinds of insurgents require some delicate balance among liberty and equality values. For several reasons, then, law and economics lacks an adequate concept of justice. America's legal process has rather efficiently implemented the interests and the liberty values of middle- and upper-class businessmen, professionals, and artisans. But the system produced a less than just share for slaves, sharecroppers, native Americans, women, and other resource-poor groups.[91] Law and economics seems unable to tolerate changes in the system that would produce the corrective justice such insurgents are beginning to demand.

Dworkin and some other legal philosophers are struggling with some success against the growing dominance of our legal culture by an economist's taste-shaping. The most effective jurisprudential tactic seems to be the elaboration of a substantive morality of justice, to counter an amoral efficiency/wealth maximization.[92] Unfortunately, some philosophers have difficulty applying moral constraints to organizations. Their worry is that organizations lack minds[93] and thus "the emotional capacity to be moved by moral concerns".[94] This seems an unnecessary worry. Organizations clearly have the *will* to produce unjust outcomes that individuals within these organizations would be unable (for lack of resources) or afraid to produce by

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91. Friedman, *supra* note 48, at 249-52.

92. One argument is that a procedural "morality of means" which consistently favors existing patterns of power and privilege will, for some insurgents and legal philosophers at least, frustrate the very expectations of fairness that the legal process is to designed to encourage. *See* P. NONET & P. SELZNICK, *supra* note 1, at 67. Contrary to amoral theories of deviance or economic rationality, insurgents are often moral "persons" marching to the beat of a different drummer: Gandhi, Martin Luther King, etc. Occupying the high ground, these insurgents may put the moral or ideological (as opposed to the legal) burden of proof on incumbents ("liberal" Afrikaners or Israelis, for example) concerning their conformity with injustice. *See* A. LISKA, *supra* note 51, at 70.

93. Thompson, *supra* note 21, at 211.

94. Wolf, *The Legal and Moral Responsibility of Organizations*, in CRIMINAL JUSTICE 267, 279 (J. Pennock & J. Chapman eds. 1985).

themselves. The law can thus reason backwards from this will to attribute a moral responsibility to the organization, in the same way the law attributes "personhood" to it. A second legal fiction may, in other words, be required to cure the defects and unfair advantages spawned by the first, organizational personhood being too deeply embedded in our law and culture to be dislodged at this stage. Permitting a powerful organizational "person" to engage in immoral behavior is too great a risk for a just society to run. Constrained to act as if it were moral, an organization may over time develop the habit of morality.[95]

The most popular and enduring moral constraints are human rights, "sundry claims to be, to have, to do, and to receive"[96] that provide "adequate opportunities for hope, for fulfillment, and for equality of treatment."[97] Like the utilitarianism on which it is based, law and economics can be at its least attractive when dealing with rights. Rights become relative, subjective, and produced and distributed in a "porkbarrel" fashion. Thus our first amendment, which has inspired much legal theology, becomes special interest legislation for the academics, newspaper owners, and clergy who exerted much influence over adoption of the Constitution. No good reason can be found in Posner's economics for prohibiting the voluntary contracts of self-enslavement that maximize the wealth of slave and master alike.[98]

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95. That is, law ways can indeed shape folkways. *But see* Wolf, *supra* note 94, at 279, 282: Organizational "policies and actions merely seem to express values and goals, as a tree trunk or an inkblot might seem to represent a human face." Perhaps, but if the "inkblot" produces moral or immoral *outcomes*, why not reward or punish it accordingly? The failure to do so leaves the organization with all of the benefits of personhood and fewer of the costs. Wolf does admit that organizations have the capacity to be "guided" by moral goals. *Id.* How does this differ from the application of a moral constraint? Part of the problem may be a failure of imagination in designing organizational rewards and punishments. Thompson notes that organizations cannot be imprisoned. But their "personhood" can be suspended, by suspending their articles of association for a period, or terminated entirely (dissolution) or in part (divestiture). Thompson, *supra* note 21, at 210. A constitutional or philosophical right of association need not include the right to produce outcomes prohibited to biological persons. The German Court *may* have gone too far in the regulatory direction (see note 75, *supra*), but Wolf goes too far in the opposite direction: "When we blame the Ku Klux Klan for its activities, we blame the members for choosing to perform them. When we praise Amnesty International, we praise the founders, managers, and donors...." Wolf, *supra* note 94, at 280. But "we" may be smarter than this; we may realize that Amnesty or the Klan can produce moral or immoral outcomes far beyond the capacity of any or even all of their numbers acting separately.

96. Claude, *The Western Tradition of Human Rights in a Comparative Perspective*, 5 COMP. JURID. REV. 3, 9 (1977).

97. Goldstein, *On the Function of Criminal Law in Riot Control*, in CRIMINAL LAW AND SOCIETY 343, 346 (A. & J. Goldstein eds. 1971).

98. In part this state of affairs reflects the reluctance of some economists to make judgments about good and bad in society, judgments they fear would return economics to the inferior (unscientific) status of a moral philosophy. Some economists thus allow the "value-neutral" (more accurately amoral) criterion of efficiency/wealth maximization to trump and even define rights.

In the end, the "utility-rights dilemma" turns out to be a false dichotomy.[99] At least one facet of the economics-based analyses described earlier, the need for tradeoffs under conditions of scarcity, both adds to our understanding of the amoral basis for rights and cuts through some of the ideology of a self-satisfied sloganeering about rights. To generalize, individual political rights (liberty values) arose in liberal democracies reacting against an authoritarianism. Individual and a few group economic rights (equality values) emerged later, in communist party-states reacting against both liberal democracy and right-wing authoritarianism. But political stability within a strong state, effective dealings among incumbents and with diverse insurgents and the poor and powerless, seems to require a rough balance between liberty and equality. Some liberal democracies, Britain more than the U.S., thus traded political rights for economic rights, while some (former) communist-party states, Poland more than the Soviet Union, are now trading economic rights for political rights.[100]

The end-points of this process are presumably social democracies or welfare states that remain quite distinct from each other. Such regimes, Sweden's, for example, frequently attempt the best and sometimes achieve the worst tradeoffs among political and economic rights. In the Third World, leaders often assert the need to trade political rights for the economic development that then does not materialize. This tradeoff may be incompetently executed or it may mask a struggle for short-term survival in office.[101]

Two problems can be identified, problems that hinder tradeoffs or any other effective implementation of rights. The first concerns organizational rights and the duties with which these correlate. As mentioned before, law is usually unable to cope with organizations *qua* organizations and treats them as persons instead. This treatment on balance confers more effective rights and fewer

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Charles Fried therefore pleads that rules about bargaining not themselves be subject to the (Coase Theorem) bargaining process. There must be a "realm of moral discourse and concern for rights that stands outside the frictionless bargaining process." Fried, *Difficulties in the Economic Analysis of Rights*, in MARKETS AND MORALS 12-13 (G. Dworkin, G. Bermant & P. Brown eds. 1977). A self-respect based on minimal standards of physiological integrity is a *moral* precondition to bargaining. *Id.* But as Bentham remarked, inalienable rights often get alienated somehow.

99. It need not be the case that the objects of rights either are or are not components of human goods or welfare. A rights-based autonomy versus a goal-based well-being is largely another way of making liberty and equality into mutually-exclusive absolutes. *See also* A. Gerwith, *Can Utilitarianism Justify Any Moral Rights*, in ETHICS, ECONOMICS AND THE LAW 158, 159 (J. Pennock & J. Chapman eds. 1982); Pennock & Chapman, *Introduction*, in *id.* at xvii. A rough balance between these values is arguably essential to political stability in a strong state. To this end, rewards and punishments can be designed so that utility is increased through respecting the rights of autonomy - especially if the economic preconditions to autonomy are taken into account.

100. Brietzke, *The Seamy Underside, supra* note 8, at 58-60.

101. *See supra* note 36 and accompanying text.

enforceable duties than are conferred on biological persons. Apart from the legal fiction of the organization as a person, there is no reason to confer full moral rights on an organization. For example, denying free speech to a corporation does not operate to deny free speech to the humans associated with it. No one is entitled to an *effective* free speech, to an organizationally-enhanced power to have one's self-interested views adopted. Organizational rights and duties could be assigned in an amoral, utilitarian fashion, subject to being modified or overridden when they conflict with the interests and the (moral) rights of a majority of biological persons.[102] We might then begin to devise the principles and entitlements of "community" life, relatively free of organizational interference.[103] Do we, for example, have the right and perhaps the duty to protect human dignity in the South African part of an international community?[104] If we do, organizations with vested interests in the South African status quo should not be allowed to interfere by interposing their rights.

The second problem concerns the resources available to produce and distribute rights. These are the very same resources (law, legitimacy, coercion, ideology, bureaucratic capacities, etc.) that are already heavily implicated in many outcomes that violate rights and rebuff insurgents. The resources may thus be discredited -- legitimacy and legitimation processes may be regarded as illegitimate by some insurgents -- and this may serve to discredit good faith attempts to use these resources to implement moral constraints. Harold Laski's comments about law can be taken to refer to other resources as well:

> Those who speak of restoring the rule of law forget that respect for law is the condition of its restoration. And respect for law is at least as much a function of what law does as of its formal source. Men break the law not out of an anarchistic hatred ..., but because certain ends they deem fundamental cannot be attained within the [existing] framework.... To restore the rule of law means creating the psychological conditions which make men yield allegiance to the law.[105]

Laski's "creating the psychological conditions" reflects an interdependence of

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102. Thompson, *supra* note 31, at 214.

103. R. UNGER, *supra* note 53, at 36.

104. *Government by Consent, supra* note 2, at 80.

105. *See* Goldstein, *supra* note 97, at 346 (*quoting* Laski's *Reflections on the Revolution of Our Time*). *See supra* notes 2, 13-14 and accompanying text. P. NONET & P. SELZNICK, *supra* note 1, at 5, add that: "The 'rule of law' in modern society is no less authoritarian than the rule of men in pre-modern society; it enforces the maldistribution of wealth and power as of old, but it does this in such complicated and indirect ways as to leave the observer bewildered." *Id.* The citizens' duty to obey law has its correlative in a scrupulous official fidelity to law. *Id.* at 6.

resources and a need to assemble them into legitimate "functions" before rights can be produced and distributed effectively. Apparently we must first respect our resources, constraining their use in unjust outcomes for example, before their use to produce moral constraints will be respected in turn.

This sounds like a chicken-and-egg dilemma, and we seem to have reached a dead end: an amoral law and economics is an imperfect paradigm, yet it makes some or many telling points against a jurisprudential imposition of substantive moral constraints. Perhaps jurisprudence and law and economics could play to each other's strengths rather than weaknesses, in aid of rights prescriptions both desirable and feasible. A more pragmatic morality of rights would result, a patient working outwards from the most widely-shared areas of community morality and its sense of trust. A more frequent and effective punishing of unjust officials and organizations would help sustain moral responsibility and perceptions of an accountability.[106] Such safeguards as can be found should be "capitalized" wherever possible: "public opinion, the energy of opposition parties [and insurgent organizations], and the consciences of government officials" for example.[107] These are admittedly the frail safeguards of a limited consensus, but they also revolve around matters of perception. I have stressed perceptions of costs and benefits in this article because the perceptions entering into a rational calculus may themselves be irrational and because perceptions can be changed through education and by legal and other policies.

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106. For example, moral responsibility was reinforced when Governors Blanton of Tennessee, Kerner of Illinois, and Mandel of Maryland were separately convicted for breaches of the public trust. These breaches of a fiduciary duty (correlative to the beneficiaries' rights) literally dissipated legitimacy. *See* S. BURTON, *supra* note 61, at 174 and Thompson, *supra* note 21, at 220, 226. Establishing an absolute presidential immunity from civil damage suits in Nixon v. Fitzgerald, 457 U.S. 731 (1982), the Supreme Court made it seem as if the king could do no wrong. But the king had already been driven from office over Watergate immoralities.

A pragmatic morality of rights might combine a Weberian substantive rationality with an updating of Von Ihering's, Cardozo's, and Pigou's social utilitarianism with a human face. *See* Cardozo, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (1947); A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1962); and E. SCHUR, *supra* note 1, at 14, 108. *But see* R. DWORKIN, *supra* note 2, for his absolutist notions of principles and community integrity. A pragmatic morality would assume the need for a great deal of experimentation, due to scarcities of resources and to competence and uncertainties of expectation. A rudimentary sense of justice, which even some economists can understand, concerns breaches of reasonable expectations. *See* A. CORBIN, CONTRACTS (1952) and, Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 289 (1979). An inevitable elasticity in what is reasonable and who gets to define it might, as in contract and tort law, permit the evolution of more-or-less comprehensible principles of justice.

107. W. MURPHY AND J. TANENHAUS, *supra* note 7, at 647.

In the United States and elsewhere, the evidence is massive[108] that human rights will be violated whenever leaders *perceive* serious threats to political stability and state strength. Many of these perceptions turn out to be hysterical overreactions, such as Nixon's and J. Edgar Hoover's. Economics suggests that only pragmatic appeals to the *enlightened* self-interest of powerful organizations and officials will likely protect human rights. Lessons are driven home through the withdrawals of support and the threats of boycott or rebellion that deplete resources which officials would like to use in other ways. Enlightenment involves changing perceptions, so that leaders can read the lessons of history and understand the fate of those unable or unwilling to do so. The pragmatic appeal is to the daily exercise of power in ways designed to legitimize and thus to strengthen that power.

Ideally, the relation between coercion and legitimacy is such that right makes might and might makes right, in a dialectic of validity and effectiveness through law.[109] This is what enlightened leaders seek, and it can be used pragmatically to promote the moral constraints most of us would like to live

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108. Brietzke, *The Seamy Underside*, *supra* note 8, at 14, 16 n.39. *See* F. CASTBERG, FREEDOM OF SPEECH IN THE WEST 411-18 (1960). And as McIlwain points out: "Freedom of thought and expression and immunity for accused persons from arbitrary detention and from cruel and abusive treatment...have *always* been endangered when 'reasons of state' have been *thought* to require it." C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 139-40 (1947) (emphasis supplied).

For American cases supporting the statement in the text, see United States v. O'Brien, 391 U.S. 367 (1968) (Government's substantial interest in assuring continued availability of draft cards outweighs first amendment freedom to burn one of these cards); Barenblatt v. United States, 360 U.S. 109 (1959) (no first amendment right to remain silent on conviction for contempt of Congress, for refusing to disclose possible Communist Party affiliation); Dennis v. United States, 341 U.S. 494 (1951) (conviction upheld for failure to register party allegedly advocating overthrow of government by force); Korematsu v. United States, 323 U.S. 214 (1944) (conviction upheld on failure to obey statutorily-authorized military order creating concentration camps for Japanese-Americans); *Ex parte* Quirin, 317 U.S. 1 (1942) (access to civil courts only guaranteed to citizens, and alleged saboteurs could thus be tried militarily on President's order). *See also* Helvering v, Davis, 301 U.S. 619 (1937); Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934); Schenck v. United States, 249 U.S. 47 (1919) (freedom of speech sacrificed to wartime hysteria); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (state secrets privilege absolute); United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (first prior restraint on publication, based on flimsy showing of danger to national security). *But see* Scales v. United States, 367 U.S. 203 (1961) (saving rights through narrow construction of legislation); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President's seizure of steel mills because of strikes during Korean War not justified by emergency); *Ex parte* Milligan, 71 U.S. 2 (1866) (after-the-fact invalidation of military tribunal proceeding in area where civilian courts' functioning unimpaired).

There are, of course, many other restraints on rights which did not spawn leading cases, including: the Alien and Sedition Act, clandestine spying on domestic insurgents by the CIA, and FBI Director Hoover's persecution of Martin Luther King.

109. Brietzke, *The Seamy Underside*, *supra* note 8, at 26, 61-63.

under. Unfortunately perhaps, the rational conduct of public affairs requires that the majority be able to coerce the minority -- subject to the always-limited constitutional protections designed to forestall the exploitation of minorities. As Hobbes[110] puts it, "covenants, without the sword, are of no strength to secure a man at all." The public domain must obviously have enough resources to override or transform individuals' goals antithetical to the public interest, and to coordinate and sustain collectively advantageous action.[111]

VIII. CONCLUSION

Coping with and through law, legitimacy, and coercion amounts to plotting a safe course between injustice and authoritarianism. The voyage should be a democratic one for, as Reinhold Niebuhr[112] reminds us, "democracy is a method of finding proximate solutions for insoluble problems." As the quintessential approximator of solutions, economics has, in its law and economics guise, found new analytical and political powers. Law and economics may offer enough insights about the choices, resources, outcomes, and tradeoffs to be encountered during the voyage that it fulfills one of Bedau's[113] meanings of "revolutionary theory": novel, sweeping, and utterly at variance with prevailing jurisprudential explanations. But in the hands of some of its practitioners, law and economics seems to have a counterrevolutionary purpose. A political economy or the institutional economics of the Progressives may thus prove a more congenial partner for a liberal jurisprudence, and some of my analyses tend in this direction.

A jurisprudence remains necessary because law and other resources cannot be used in a circular fashion so as to legitimate their own mode of production. Ends seldom if ever justify means, especially when an end (efficiency, for example) is also a means to some other end.[114] It may be that "you can't

110. A. CASSESE, *supra* note 1, at 86.

111. B. BARNES, *supra* note 2, at 42, 135, 143.

112. R. NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS 118 (1944).

113. *See* Bedau, *supra* note 81, at 67.

114. Robert Unger adds that "the choice among possible views of humanity [including philosophers' and economists'] is likely to be itself influenced by moral and political perspectives that cannot be wholly justified by the view one chooses." R. UNGER, *supra* note 2, at 42. Likewise, law "upholds a specific *kind* of order" which is "problematic [and] subject to historically changing expectations" which require reconstructions and a broader participation and consent. P. NONET & P. SELZNICK, *supra* note 1, at 6. The "views of humanity" and resources like law come together in what Michel Foucault calls "regimes of knowledge," the intersections of knowledge and power we call academic disciplines - each with its own politics, rewards and punishments. *See* Schrag, *Liberal Learning in a Postmodern World*, 54(1) (Phi Beta Kappa) KEY REPORTER 1 (1988). While they may legitimate or delegitimate state power, academics *qua* academics do not exercise it. Rubin, *supra* note 82, at 1870. But as the old joke has it: "I don't need power; I'm a tenured full professor."

make an omelette without breaking eggs," but philosophers and social scientists will want to see the omelette, taste it, and explore the rest of the menu. Reasonable tastes will differ, but the economist George Stigler[115] has a sensible last word: criticizing the Interstate Commerce Commission for pro-railroad policies is like criticizing Giant Foods for selling groceries; organizations merely do what they are designed to do. If we do not like many of the outcomes, a new logic of public life is called for. There are many opportunities for collaboration on this new logic, among economists, sociologists, lawyers, and others enlightened about each other's methods.

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115. Stigler, *supra* note 7, at 17-18.