The Unintended Society? Some Notes on Nozick

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"The main task of social sciences . . . is to trace out the unintended social repercussions of intentional human actions."—Sir Karl Popper[1]

I

Robert Nozick's *Anarchy, State, and Utopia* is only one of several recent books fusing political philosophy, ethics and law with economic analysis. A corresponding effort at broadening the field of enquiry is apparent in current economic literature. It suggests to me that the social sciences are abandoning the studied aversion to philosophy which was professionally *de rigueur* in the 1950's and for most of the following decade. We had been taught and we taught that between the two disciplines ran a clear boundary across which only a disreputable scientist would stray. Taken at its unexamined face value, the proposition "All knowledge that men have is scientific knowledge" has mislead social scientists and has made them mislead the public. It may be optimistic but I think it is not altogether foolish to believe that a sense of realism is returning.

We clearly have to believe that the problems we deal with in social sciences are merely temporary gaps in knowledge. Everything is knowable in the sense that any scientifically phrased question can be answered—which is far from saying that omniscience is possible. Yet from Laplace on, the temptation of omniscience has been interfering with scientific work. An apparently respectable, certainly profitable, branch of the economics profession is preoccupied with forecasting the values which the key variables of our economic systems will assume in the future. That "scientific forecasting" is a contradiction in terms seems to have passed unnoticed.[2] It was more logical and indeed more scientific to entertain the hope that the business cycle might flatten out, perhaps disappear, as more and more businessmen came to understand its monetary theory and act accordingly. It is not just the difficulty of being already in the future while still in the present that makes forecasting, the short-range holism of economics, an essentially fraudulent activity. The view of scientific method on which it is predicated also implies that history (or if history is not a science, then all social sciences together) should eventually be able to specify the unique alternative world which would have evolved had Napoleon Bonaparte died at the age of thirty.

The bulk of current work in the social sciences is still carried out on the assumption that such a complete dissolution of uncertainty is the end we are aiming at. The typical social scientist still considers himself developing new "technologies" for a more effective governance, a more deliberate and firm-handed shaping of the

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society's future. A whole series of questions arises from my conviction that social sciences—as a profession, an organized body of interest—have overreached and oversold themselves. If it is impossible to construct a world which never knew Napoleon, *what* is it that is unknowable? Is it important from the viewpoint of social science (as it may be from that of ethics) whether something is unknowable in principle, or whether it cannot be known "only" because it consists of too many *prima facie* equally important details? Attempts to grapple with questions of this kind may yield some enlightenment as to what it is we are doing as social scientists.

II

In the critical reception of Nozick's book, I have noted several interesting misreadings of its historical concern, principle, and method. One critic, acknowledging that social contract was only a philosophical construct, thought it a much more useful, because inherently a much more plausible, explanatory device than the fanciful notion of competition and consolidation of protective associations—even though the latter is only a condensed analytical history of feudalism and emergence of sovereign nation-states. Another found Nozick's treatment of experimental utopias an imaginative and delightful speculation but irrelevant to the earlier and weightier themes of the book—even though the "framework for utopia" may be read as an extension of the earlier themes on the global society, composed as it now is of some 140 sovereignties with high (utopian?) aspirations. Both metaphors—the protective associations and the framework for utopias—emphasize the tentativeness, the experimental or evolutionary nature, of social change. They suggest a rephrasing of the earlier questions in the following form: In what way is a society "free" (able) to control and deliberately steer its own development, and to what extent, by what methods? How much is governed by the invisible hand, and how much deliberate and effective use is being made—can be made—of various filter and design devices? Isn't this the central question of the social sciences? It is of course the political question.

III

All political philosophy could be classified according to its answer to this central question. A very schematic classification could be along a line. At one end, we would have the famous passage of Friedrich Engels:

> The objective, external forces which have hitherto dominated history will then (after the seizure of the means of production) pass under the control of men themselves. It is only from this point that men, with full consciousness, will fashion their own history; . . . that the social causes set in motion by men will have, predominantly and in constantly increasing measure, the effects willed by men. It is humanity's leap from the realm of necessity into the realm of freedom.[3]

The phrase about the effects willed, or intended by men, gradually predominating, strikes a remarkably contemporary (or XVIIIth century) note. We recognize here the central belief of all radicalisms: since people can control and improve themselves, they also can, collectively, by deliberately manipulating their institutional arrangements, mold their social environment to any shape they desire.

For the other extreme, numerous texts offer themselves.

> God lets men direct their particular passions and interests as they please, but the result is the accomplishment of not their plans, but His, and these differ decidedly from the ends primarily sought by those whom He employs. (Georg Friedrich Wilhelm Hegel)

Alternatively one could choose the frequently cited battle scenes from *War and Peace* in which Tolstoy heaps detail upon detail to show why the commanders-in-chief cannot know what is happening on the battlefield. Adam Smith's deistic metaphor of the Watch and the Watch-

maker (*Theory of Moral Sentiments*), his notion of "nature establishing her own design" in the course of her operations in human affairs and, finally, his "invisible hand" would serve equally well. All these writers present in different philosophical languages the same perception.[4] (Never mind the teleology. Teleology is not a hypothesis but a state of mind.)

The midway positions are usually, almost by definition, wishy-washy, have the least character. Our midpoint might be John Dewey:

> Every measure of policy put into operation is, logically, and should be actually of the nature of an experiment . . .[5] [Political philosophy and social science are to] aid in creation of methods such that experimentation may go on less blindly, less at the mercy of accident, more intelligently, so that men may learn from their errors and profit by their success.[6]

Between him and Engels would be spread the Contractarians (men create society and design its institutions); around Dewey a cloud of American Liberals, British (non-marxist) Labourites, and continental Social Democrats; and in the right-hand segment the radicals of liberty and the conservatives (society creates men and social institutions grow like coral reefs from the accretions of experience of past generations; there are good and valid reasons for things to be as they are). Hayek, Nozick and most economists and lawyers would be in this half of the spectrum, ranging, say, from Popper on the right of the cloud surrounding Dewey to Burke to the left of Hegel.

IV

This simple array is how a teacher of an introductory course might present the field of social thought to his students. It is at the same time a political classification. The view expounded by Engels has a large constituency, not merely because it is pleasant to believe that as a society we can attain anything we want, but mainly because the belief draws a degree of plausibility from the indisputable fact of progress. (It does so in the following way: since on the whole we like what has happened to us as society, we must have always wanted it, yes, we have planned for it to happen.)[7] An even larger constituency occupies the middle ground, as all post-war elections show. Unsurprisingly so: when one is caught in the crossfire of two strongly held contradictory views, both difficult to understand, a half-way position seems eminently reasonable. The constituency right of the center is, at present, a dwindling minority. But let us analyze.

In the passage quoted, Engels appears to be promising full social control of social development—a freedom within freedom, full individual liberty within a society which is free as an entity to choose the shape into which it will grow. Even to a glutton this should give pause as perhaps too much of a good thing.[8] We can talk about society "controlling" specific variables such as weights and measures,[9] the amount of noxious emissions from the industrial process, or the value of its money.[10] Such control is effected by collective (political) decisions taken at the highest level where the whole of the society is represented and bound. And we must immediately note that only a small fraction of all the decisions which influence social development—"shape the future," so to speak—are taken at this level. To maintain the possibility of the Engelsian collective freedom in the face of this fact is to be involved in a logical contradiction. A society deliberately shaping its future in this sense would, for example, have to steer its scientific research and development toward discoveries it had correctly anticipated. Collective decisions with a declining and ultimately zero complement of unintended consequences would be possible only if (a) there were no innovation and (b) all members of society wanted the same things in the same order through all time—in a society, that is, in which individual preference orderings were uniform and stable. In such a society, individual freedom would have no meaning.

At the other extreme we are offered two alternative ways of conceptualizing another perception. We can bow either to Natural Law (Divine Plan) which is complete and perfect in itself, though as yet incompletely discovered (realized), or to "blind" evolution of which we can understand the abstract principles but not foresee the next stage. Both versions have room for individual freedom and both exclude the collective freedom (or rather, certainty) envisaged by Engels. But they do more than point out that our temporal choices are enveloped by uncertainty. They also imply that certain kinds of collective choices are more likely to be frustrated than others. In this they suggest a research program for social sciences which has not yet been taken up systematically. What kinds of collective decision, framed according to what criteria, reached by what process, made in what order, exhibiting what attributes, are most likely to attain their objectives?

Between a promise, the falsity of which is logically demonstrable and intellectually consistent, and a plausible theory (to some, even, intuitively plausible) which however cannot be empirically tested and made compelling, what position can be effectively defended? To be a distinct one, it would have to disavow, on the one hand, the Engelsian claim that society could attain a state of certainty, and admit that any collective decision (policy) was likely to have any number of unintended, unforeseeable consequences; but it could maintain that, should these consequences appear to be undesired by a sufficient number of individuals, the policy could be abandoned or changed in time and its objective attained by a different route. On the other hand, it would have to claim that the experimental approach *enlarged* the range of effective social choice, making it possible to realize not only all the collective goals which appeared feasible in the Natural Law or Evolution view of society, but also some which this view ruled out. When articulated with care, that appealing and reasonable middle-of-the-road view thus turns out to be not only no more verifiable than the Natural Law or Evolution position but, more widely distressing no doubt, no less vulnerable to logical criticism than the Engelsian promise.

V

The notion of "experimentation" presents serious difficulties in the context of public policy, especially when posed in Dewey's sweeping terms. Popper's "piecemeal (experimental) social engineering" refers to institutional innovation in both the private and the public sector. In the case of the former, there is no problem. "Lateral experimentation" by households, firms and other private institutions is proceeding all the time, each unit experimenting within a relatively stable environment on which its own activity has but a small impact; experiments can be repeated and successful innovations adopted (adapted) by others.[11] Similar activities can easily be found in the public sector, either in the same "lateral" sense (e.g. where a municipal or state government develops a particular solution which is subsequently found capable of generalization) or even where a central government "tinkers" with a limited problem (e.g. improved access to medical care) in several steps, each correcting past errors.[12] The difficulty appears at some stage, which I still find difficult to specify, when the problem addressed by the central government becomes "less limited."

The essence of an experiment is that it can be repeated until the hypothesis has been satisfactorily tested. But even an unsuccessful policy—a "failed experiment"—creates new social reality with new social problems to which the policy of the next phase must respond. By the time the Prohibition Amendment was repealed, organized crime was big business. Thus it is not merely that the "experiment" cannot be repeated in the same (controlled) environment. Even more important, behind nationwide policy formulation there is not the unity of will and continuity of purpose which characterizes true experimentation. Very often society tries something, fails, and *in consequence* has different problems. A policy fails because it has set incentives for too many individuals to act in ways incompatible with the proclaimed objective. By the time the failure is obvious, the original majority backing the policy has disintegrated, the next majority abandoning or, rather, re-ranking the original goal. It is not even clear in what sense and to what extent past policy failures constitute useful experience for the guidance of next-stage policies.

It follows, as a second point, that situations in which a policy can be adjusted in the light of experience are exceptional. To believe in the possibility of such adjustments as a general rule implies the assumption, seldom made explicit, that all relevant knowledge is concentrated in the policy-maker while those affected by his policies respond to them in a Pavlovian manner. It was a feature of Absolutism that the King and his ministers ruled as though the subjects had no opinions of their own; and it would be difficult for us to agree today in what sense, if any, that policy worked. In economic life, each unit acts on carefully formulated opinions of its own. When we take account of time and expectations, of learning, of government and private units making decisions on the basis of knowledge which is continually growing but never perfect and never identical from one decision-maker to another, the notion of an experimental *tâtonnement* of policies is revealed as self-contradictory. The effects of a new policy evolve and change their nature continuously through time, beginning with anticipation of the change, going on to impact or announcement effects, and stabilizing only when the new policy comes to be generally believed to be permanent—a belief that can only be formed through an actual, sufficiently long experience of stability. Any change in policy gives rise to speculation on further change; the relation between the government and private economic units is one of a game-theoretical nature.[13] The sequence of policy changes constitutes the learning process. Policies which seek to attain their goal by exploiting the economic public's lack of knowledge cannot be sustained. When the objects of policy—the decision-making units of the private sector—learn that they can, through reactions to a policy change or through direct pressure on the government, enforce further policy changes, the relation between the makers and the objects of policy is an unstable one. Changes in economic policy may eventually become so frequent as to make private long-range economic planning impossible, in which case the policy may be said to have destroyed itself.

The third point is that governments generally pursue several objectives by several different policies simultaneously. Since the economy and society is a sensitively interactive system composed of self-conscious, choosing units, these policies necessarily interact, too. In consequence, it is most difficult if not impossible to identify the effects of any particular policy. The very concept of "policy results" is a notion not easy to specify, as will be shown in a moment. To restate this consideration in plainer language, though still with a charitable qualification, most of the time governments simply do not know what they are doing and nobody, not even the social scientist, can tell them.

Fourth, a society's perception of a "policy failure" has little to do with a determination in the strict sense of the actual effects of the policy in question. Some policies may be repealed when a sufficiently large part of the electorate is convinced they are not delivering what has been promised sufficiently rapidly. In other cases, certain undesirable events may be plausibly and, what is politically crucial, *obviously* related to a given policy. For example, a society attempts to "humanize" its criminal law, the rate of violent crime rises, and the demand for a re-introduction of the death penalty gathers political force while social scientists will go on arguing for years whether

the correlation contains any causation at all. But with respect to most policies it is impossible to construe any obvious (that is, politically effective, regardless whether true or false) cause-effect relationship, and so they continue of their own momentum increasing some social problems and alleviating others.[14] They may be changed only if and when their effects become cumulative, resulting over a period of time either in an acute crisis, or in a kind of unfocused but intense and widespread dissatisfaction, or a feeling of being manipulated and cheated, which induces the formulation of political strategies aimed at a regroupment creating a new majority.

It should be noted, finally, that so far we have been considering the implementation of and response to various policies within a single society only. If it is realized that these policies also have repercussions abroad, and that their domestic effects also include the refraction these repercussions—both through automatic responses via market and quasi-market mechanisms and through the often irritated responses of foreign governments—the possibility of experimentation appears even more threadbare.

The notions of "policy experimentation" and "social engineering," even piecemeal and experimental, thus appear to be dangerously misleading. Their only intelligible content is the vague metaphorical meaning of a society experimenting (or learning from the experience of other societies) out of some collective will and memory which is continuous over long periods of time in which the body of the society changes as cohorts of individuals come and go. It seems to me much more precise and illuminating to view the processes of policy-making and policy change as "invisible hand processes" exhibiting virtually one-to-one concordance with the process of adjustment in competitive markets.[15]

VI

The problem of ascertaining how a policy works deserves closer attention. When society gets sufficiently worked up about a problem, the government "implements a policy" for it. The policy is invariably successful—as an anodyne, that is, for once it is in place, it seldom occurs to anyone to ask what its actual results are. Knowing that "the government is doing something about it" is apparently enough. Partly because of this lack of public interest and partly due to the difficulty of the subject, empirical analysis of the effects of particular policies is the least developed area of the social sciences. In economics we have had some preliminary, theoretical discussion of the "assignment problem"—where are the main effects of the several basic types of policies to be looked for?—and are still not agreed on the issue, although it is generally admitted that the full ranges of policy effects partly overlap. (The unintended results of a policy stem precisely from the "spillover" effects of the measure on variables other than the one it was intended to influence.) After some two centuries of effort, tax incidence analysis is even poorer in agreed conclusions, leaving governments in ignorance as to who actually pays the taxes they impose. Executives and legislatures know next to nothing about the working of the subsidy programs they implement.[16] Before the 1960s there was virtually no systematic empirical analysis of the effects of particular policies. G. J. Stigler's 1962 summary of the economic-analytical achievements in this area still conveys the exhilaration of a pioneer roaming a virgin territory:

> . . . it is roughly true that we know where to go. *We do not know how to get there.* [Italics in original.] This is my fundamental thesis: we do not know how to achieve a given end. We do not know the relationship between the public policies we adopt and the effects these policies were designed to achieve.[17,18]

The main difficulty is that the effects of a policy can only be specified in a comparative way. Generally we use the simple model of a competitive economy to indicate what would have happened in the absence of a given policy, or under an alternative policy. But the model is too simple to tell us anything about the effects of one policy out of many pursued simultaneously (and, we may add, its relevance and predictive power must be diminishing in a situation in which between one and nearly two thirds of national income is generated or spent or in some way redirected through the public sector). When political choices have to be made among extensive combinations of goals, some of which appear so important that a number of policies are directed at them, the very notion of the effects of a policy becomes complex and in a sense circular: these effects can be specified only in terms of alternative policies. We would have to have a model in which the degree to which a given goal was actually realized would be attained by a different policy. The actual values of all other important target variables could then be compared with those ground out by the model under the alternative policy. This would be the "effects" of the policy actually pursued: its cost (positive or negative) in terms of all the other objectives (appropriately weighted) which governments seek to realize. But given that the alternatives to actuality are infinite, can we at all imagine the required model in which all the relevant interconnections would be specified? Would it not be the kind of "model" on which history could be replayed without Napoleon—a model which, in other words, could transport us into the absurd realm of the Engelsian freedom-cum-certainty? In any case, we do not have it.

VII

To take an example, admittedly not a simple one, what is the result of thirty years' of policy effort to bring about a more equal distribution of income? The two main difficulties of knowing are as follows. Equalizing policies have been deemed necessary on the widely shared though unexamined assumption that the natural tendency of the free enterprise system is to increase inequality. Even F. H. Knight held this belief, somewhat incongruously with his (and other economists') constant use of the theorem that with free entry into industries, competition would equalize the net rates of return between them. Deductively there are many reasons for believing that a competitive, fully employed, expanding economy should by itself, without special policies, generate an increasingly more equal distribution of income. The second difficulty is that empirically we know nothing about the present state and trend of development of the only income distribution that is relevant in this discussion, namely that of life-time incomes. The statistics which we have—those of annual income distribution—tell us nothing about life-time income distribution. The former may be growing more unequal while the latter is growing more equal and vice versa. Theory cannot help without facts.

And theory itself is continuously developing and changing our perceptions and our understanding of them. An even stronger statement can be made if we descend to the more practical level of policy making. While circumstances often press for prompt action, it takes a long time before all that social science can contribute to clarification of a given problem is actually brought to bear on it. A good example is the problem of how labor supply may be expected to respond to progressive taxation.

When I was a student, this issue was approached as a problem in short-run analysis—the work-leisure choice of a rationally calculating individual with given tastes (most of which, we failed to note, were habits, i.e. had a time dimension). Later in the 1950's, it was occasionally acknowledged that this form of taxation will also have long-term effects, mainly through its influence on the choice of careers;[19] but the nature of this influence was not analyzed systematically. It was only recently that H. G. Johnson described some of the effects that heavy progressive taxation is likely to have in the long run on education and career choices:

. . . the more relevant choices are those between (i) careers involving more and less investment in the formation of human capital, with a corresponding more or less foreshortening and "bulginess" of the time-profile of income received; (ii) careers involving more or less assumption of risk in the return; (iii) careers involving more or less time—daily, weekly, annually, and life—on the actual job and more or less consumption utility from the job; and (iv) careers involving more or less opportunity for tax avoidance and tax evasion.[20]

A corroboration of Johnson's point (ii) may be found in numerous articles in the British daily and periodical press complaining of the national industry's inability to attract top-level talent. J. Vaizey, a double authority since he is both an academic teacher of economics and a specialist in the economics of education, writes, for example:

. . . this failure of management spreads right back into the universities and colleges, so that only the less bright students are generally willing to go into British business and industry.[21]

Under normal conditions, one would expect a bad performance by existing managers to be an incentive and an attraction to new talent. Of all the other possible explanations of why people best endowed with the requisite talent (which prominently includes the ability to think in terms of discounted future values) shun enterprise and management, Johnson's is the simplest. Incidentally, this example also shows how long the chains of unintended consequences of public policies may often be. If a significant fraction of the best potential entrepreneurs of a nation prefers, say for tax reasons, to enter government bureaucracy and the welfare-services administration instead, we should not be surprised when these sectors develop a long-term boom, ultimately to remain the only major growth industries in the country.

It is not only that we do not know what the effects of our present forms of taxation on the distribution of life-time incomes are, and have reasons to suspect the worst. If society "sincerely desired" more equality, more promising policies to that end could easily be devised. The difference would be that they would work through the market mechanism, consisting mainly of policies ensuring free entry into all occupations. But societies often seem to get more satisfaction from *doing* something about inequality than *having* more equality through the "impersonal forces" of the market.

VIII

So far my main effort has been to show that most ways of talking about society having control over, or choosing, its future involve the anthropomorphic fallacy. There is, however, a way of interpreting the notion without falling into the trap. The degree of control a society has over its future can best be related to the extent to which reasonable expectations of the individuals composing the society are eventually borne out. Such expectations are formed on the basis of judgment, including judgment about present and future policies. By "reasonable" expectations or judgment we mean exactly what we say: something considerably short of omniscience. Policies proclaimed and widely believed to be fundamental and quasi-permanent enter as data into individual plans. If such policies unexpectedly turn out not to be sustainable, we shall be justified in talking of large-scale frustration of reasonable expectations, of society losing control of its future—that is, literally, of itself.

The kinds of policies affording more or less control in this sense could perhaps be summed up by describing two ideal types. The first consists of policies defining in a general way the conditions of individual action in the social order, such as the conditions of access, the necessary development of law, the modalities of social insurance systems as built-in stabilizers; a policy of steady expansion of monetary aggregates would also qualify here, along with a policy guaranteeing a minimum income. From individual reactions to general policies of this kind various social and economic structures, patterns, and distributions would spontaneously develop, the specific shapes of which the policy-maker could not have foreseen. As long as the policies were mutually consistent, the society could function smoothly; moreover, *if all policies were limited to such general measures*, possible inconsistencies would soon be discerned and could be corrected. On this basis and to this extent it would be possible to speak of policy experimentation. The second type would include policies framed to realize particular (preconceived) structures, patterns, and distributions. Aiming at specific objectives, these policies would have to discriminate among groups. Individual reactions will again produce unintended results but it is precisely with respect to this policy type that we encounter the difficulty, already discussed, of attributing particular results and costs. It is due to this difficulty that the attainment of this class of objectives is so difficult if not impossible. The same difficulty explains why the pursuit of objectives of this kind continually multiplies the number of policies in use and increases the frequency of policy change.

The minimal state is by definition restricted to policies of the general kind. It can thus be said to offer the society a high degree of control over its future in the foregoing sense of the individual citizen's ability to plan his or her future. In contrast, the overgrown state, through the very expansion of its specific commitments, makes its policies increasingly unstable, and reduces everybody's control over the future, including that of the governments and the individuals composing the society, as well as other societies and governments. (In this context, I am convinced that J. M. Buchanan and several other contemporary libertarians misconstrue the danger when they call the overgrown state the Leviathan. No matter how annoying the ways of bureaucracy, the democratic state is unlikely to become ferocious. What really threatens us now, when the need for effective—yes, strong—government should be beyond dispute, is the Dinosaur state—a creature that has to spend all its energy on just staying erect, avoiding collapse under its own weight.)

IX

The arguments of the preceding sections suggest rather strongly that such stability and progress as our societies have enjoyed in the past have had relatively little to do with scientific knowledge of social structures and relationships, or social engineering. The importance of the general policies just discussed, and the nature of the processes by which their mutual compatibility is (eventually) ensured—as well as the phenomenon of social learning, not so much through experimentation and analysis of particular policies and their results as through broad comparisons with the kinds of policies other societies pursue and the overall results they obtain—suggest to me that the historical coherence and progress of our societies have had much more to do with the general principles of law, that is, with the nature and influence of jurisprudence as a purely normative discipline. The social sciences' attempt at positive understanding therefore requires, it seems to me, "the elucidation of the link between the law that describes and the law that ordains."[22]

A society can change or reform itself only by changing its rules. Indeed the development and renewal of law is continuous, occurring in response to changes in the needs of individuals as average education and income advance, technological changes generate new opportunities and responsibilities, contacts with other societies intensify, and so on. Any existing legal system thus contains loose elements—particular laws which are contested or still being tested. It also contains, however, all the justice the society could so far agree upon. Here is the

difficulty of collective self-reform in a nutshell: all the opportunities for easy agreement have already been exploited and realized. If there were general agreement on an additional requirement of justice, it could easily be embodied in law. But the initiatives for the necessary further development of law can only come from minorities who seek to gain adherents to their view of how the prevalent notion of justice should be changed or enlarged. Even if the majority lets itself be persuaded by the activist minority the matter does not end there. The proposal, convincing enough in the given circumstances, may turn out unworkable or worse. Any change in law is a change in incentives and disincentives guiding the behaviour of millions of individuals; the resulting individual reactions are difficult to predict yet, in their aggregate, they will be the social result.

At various stages of the process, appeal is made to one or the other, or both, of two sets of criteria: those of substantive justice and those of formal or procedural justice; or, alternatively, to the principles of morality and the principles of law. It is clear that Nozick's distinction of end-state vs. historical principles of distributive justice is only a particular instance of this more general distinction. The issue was taken up by several of Nozick's critics but not in a very fruitful way. S. Gordon, for example, is clearly in error in believing that these two sets of criteria furnish or represent two contending theories of justice.[23] What calls for debate is the function of these two complementary sets of criteria in the process of collective self-reform and, indeed, their relative status as *criteria*—that is, a set of agreed unambiguous propositions to which the facts of a case can be easily seen to conform or stand in contradiction.

The standard works of jurisprudence leave one with the impression that what we mean in the ordinary use of the word "justice" is largely accounted for by the formal or procedural criteria. If a polity routinely settles its disputes by a procedure ensuring that[24]

> No man can be judge in his own cause and the actual dispute-settler has no bias in favour or against a party; each party is given a fair notice of the proceeding and arguments and evidence of both parties are heard, each party speaking only in the presence of the other and having an opportunity to respond to the arguments and evidence of the other party; and the terms of the settlement are supported by reasons referring to the arguments and evidence presented,

we can be sure that, by and large, its disputes are settled justly. Since no statute can ensure justice in every case of its invocation, there have to be criteria of legal interpretation (often called the judicial procedural virtues): "impartiality and neutrality in surveying alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision."[25] These, too, are purely formal. The characteristics or attributes which make a statute just, finally, are also largely formal in nature. The main principles of legality which a statute has to satisfy are its generality (not applicable to particular persons), applicability to future cases only, and non-contradiction to the existing laws. It is thus possible—to come back to a point made earlier—to say that all the justice a society could agree upon is embodied in the formal and procedural criteria. "(J)ustice is little more than the idea of rational order and coherence, and therefore operates as a principle of procedure rather than of substance."[26] (In a democratic state, that is; the statement does not hold with respect to the law of totalitarian states and to problems of transition from that state form to more normal conditions.[27])

The ideas, precepts, principles, or theories of substantive justice are mainly invoked in criticism of particular points or aspects of the justice implicit in the idea of rational order and coherence. Whatever their content may be—an eye for an eye; to each according to his need, merit, contribution or whatever; inequality only to the extent that it benefits the least advantaged—it is clear that they do not suffice to determine the justice either of a particular decision or of a particular legal system. They are not *criteria*, "workable measures of decision,"[28] because they never command or even approach the extent of agreement converging on the formal propositions that judges should be impartial or that one law must not contradict another. In fact, most propositions of substantive justice are claims, themselves to be adjudicated. (Rawls' theory can be read as the impossible attempt to establish substantive propositions which could be as generally acceptable, as undoubtable, as the formal requirements of justice.) Consequently, while the formal criteria yield yes or no answers when applied to particular cases, the substantive propositions in similar use only rephrase the question. The difference in status is striking: while the procedural criteria are agreed, the substantive are contested. Where the former are based on experience, the latter tend to be speculative; the former are stable, the latter changeable; objective as against subjective, reasonable vs. emotional, matter-of-fact vs. rhetorical, etc. The chain of contrasts could be extended at will. We may say, therefore, that the general stability of society, the usual preponderance of the intended over the unintended effects of legal change, is the result of a preponderance in the execution of the change of formal over substantive criteria. The idea of the change usually arises from substantive considerations; this is the "little more" in D. Lloyd's definition quoted earlier. But it is the all-important function of formal criteria to ensure that the change will not establish behavioral incentives conflicting with those which the rest of the system is intended to promote.

X

The claim for justice as (greater) equality in results logically presupposes a belief in the possibility of social engineering. An early, explicit, and highly instructive conjunction of the two ideas occurs in a lecture given by Roscoe Pound fifty-five years ago. It could have been written yesterday.

The second chapter of *An Introduction to the Philosophy of Law* discusses the views, prevalent at different times and places, of the end or purpose of law. The core of the lecture consists of the four-stage scheme, elaborated in several of Pound's works, of the historical evolution of thinking about the end of law. At its primitive stage, law exists to keep the peace in a given society at any price: general security is the overriding purpose of legal order. At the next stage, Greek philosophers and Roman jurists came to think of the end of legal order as the security of social institutions generally, as the preservation of the social *status quo*. This conception survived into the Middle Ages. The disintegration of the feudal order was followed by a third stage of law: with the growing importance of the individual in a society engaged in discovery, colonization, and trade, it became the main function of the legal system to secure

> . . . the claims of individuals to assert themselves freely in the new fields of human activity which were opening on every side . . . Men did not so much desire that others perform for them the duties owing in some relation as that others keep hands off while they achieved what they might for themselves in a world that continually afforded new opportunities to the active and the daring.[29]

This idea took form in the seventeenth century and reigned for two centuries thereafter. But now we are moving onto a new stage, Pound maintains, and a fourth conception of the end of law is beginning to assert itself. There are no more continents to discover. The horizons are closing. The main natural resources have been discovered; now the need is for a rational use of what remains available.

> Today a newer and broader idea of security is appearing at a time when the world seems no longer to afford boundless opportunities, which men only need freedom to realize . . . . So long as there are (such) opportunities . . . security is taken to mean a regime of ordered competition

of free wills in which acquisitive competitive self-assertion is made to operate with the least friction and waste. But when and where such an ordered struggle for existence does not leave opportunities at hand for everyone, and where especially the conquest of physical nature has enormously increased the area of human wants and expectation without corresponding increase in the means of satisfying them, equality no longer means equality of opportunity . . . . *Men begin to assert claims to an equality of satisfaction of expectations which liberty in itself does not afford them.* [emphasis added] Quest of an ideal relation among men leads to thinking in terms of an achieved ideal relation rather than of means of achieving it . . . Hence security is to be security from what may stand between them and that relation . . . The ideal of a world in which all men are to find themselves secure in that sense may be called the humanitarian ideal.[30]

Pound concluded the lecture by remarking on the need to maintain balance between general security and security of "the individual moral and social life," and restating his view of legal history as a development toward "a continually wider recognizing of human wants and claims or desires through social control; . . . in short, a continually more efficacious social engineering."[31]

This view of the function of law in modern society is today instructive mainly through its several contradictions. The most striking one is between Pound's methodological approach to legal history as a continuous, logical development and progress, and the 'frontier thesis' equally influential in his argument. In that historical thesis freedom as we know it (that is, individual liberty secured through political constitutions) was contingent on the open, empty spaces of the world map into which potential conflict could overflow. As long as they lasted, life ceased to be seriously competitive for individuals; with their exhaustion, life would revert to its earlier norms of discipline imposed by arbitrary, hence, unpredictable, power. Freedom and democracy were, so to speak, a brief accident of history. It is thus a logical–though probably not a conscious–implication of Pound's view that equality in results, which liberty alone cannot guarantee, becomes an appropriate end of law in the post-frontier, post-liberty phase of social development. It would have to be the law of an arbitrary (unpredictable) power. Law?

The second and third contradictions are explicit in the cited text. When expectations increase without a corresponding increase in the means of satisfying them, is redistribution a sustainable solution? And what kind of social engineering can help when men begin to think "in terms of an achieved ideal relation rather than of means of achieving it"?

The view of law as a means of "a continually wider recognizing and securing of human wants and claims or desires through social control" comes perilously close to considering justice a public luxury consumption good: justice is what a society can afford. The opposite view, of the justice embodied in the legal system as social capital,[32] is more nearly true: what a society can afford depends largely on the conception of justice it holds.

References

1. *Conjectures and Refutations* (London, Routledge & Kegan Paul, 4th Edition, 1972) p. 342.

2. But note the obvious unease with which W. Fellner handles the issue in his recent *Towards a Reconstruction of Macroeconomics* (Washington DC, American Enterprise Institute, 1976), Chapter VII.

3. Quoted from C. Wright Wills, *The Marxists* (Pelican Books Edition, 1963) pp. 77-78.

4. Placing Hegel in this group does not imply a view of his rank as a philosopher. Indeed, having sampled him early in life, I still agree with Sir Karl Popper's assessment of his philosophy (*Open Society and its Enemies*, Chapter 12) and consider Sidney Hook's reading of him ("Hegel and the Perspective of Liberalism" in *Pragmatism and the Tragic Sense of Life* [New York, *Basic Books Inc.* 1974] – from which the quotation is taken) much too charitable. It is the surprising formal similarity that I want to emphasize here.

5. Dewey, *Logic: The Theory of Inquiry* (New York, H. Holt and Co. 1938), p. 508.

6. Dewey, *The Public and Its Problems* (New York, H. Holt and Co., 1928), p. 34.

7. Or consider the attractiveness of a similar argument to the less developed countries: "The rich have become rich haphazardly, without a method, over centuries. With a proper method, with planning to make us free as societies, we shall be able to do it in decades."

8. Indeed, already in the early decades of this century political and legal philosophers realized the possibility if not probability that "social freedom" could become a substitute for, rather than complementary to, individual freedom. See, for example, Hans Kelsen: "(The) fundamentally irretrievable liberty of the individual recedes into the background and the liberty of the social collective occupies the front of the stage." Cited by F. A. Hayek in *Constitution of Liberty* (The University of Chicago Press, 1960) p. 238 and p. 494.

9. But consider the difficulties of metrication in the English speaking countries.

10. It would be superfluous to expand on the problems of social control over the real value of money. We may note, instead, that the French people in their overwhelming majority still refuse to acknowledge that the franc has officially shed two zeros eighteen years ago.

11. A good example of such "lateral experimentation" is the development of company pension plans described in P. F. Drucker's *The Unseen Revolution* (London, Heinemann, 1976).

12. In the most recent years, attempts have been made in the U.S. at experimentation in the form of "policy try-outs" on a sample of individuals or in selected localities. However valuable the insights that may have been obtained in this way, two basic limitations of the approach seem insurmountable: (a) reactions must be different to a policy known to be an experiment than to one which is the law of the land, and (b) the full effects of a policy on economic incentives guiding the choice of individuals can only be observed on the generation which has grown up under that policy.

13. See H. G. Johnson, *Inflation and the Monetarist Controversy* (Amsterdam, North Holland, 1972) pp. 14-15. The same theme (of "the public's self-justifying skepticism towards the policy-makers") runs through W. Fellner's *Towards a Reconstruction of Macroeconomics*.

14. Many particular policies were not intended to benefit the society or economy at large but represent concessions to special interest groups. With respect to these policies, the groups concerned, together with the sections of bureaucracy administering the policies, will develop considerable effort aimed as preventing the society from learning the true effect of the policies in question.

15. And it also seems to me that there is only an insubstantial difference in phrasing between the notion of an "invisible hand process" as used by Nozick and Hegel's "gradual unfolding of an idea."

16. Consider the following excerpts from the 1972 statement before a subcommittee of the JEC of the US Congress:

(Prof. Carl S.) Shoup: Federal subsidies are the great fiscal unknown. The Federal budget presents no comprehensive summary of subsidies: there has been no monograph on subsidies in the English language.

Chairman Proxmire: I don't like to interrupt you, but I think that is an incredible thing; it is an incredible thing (that with) all the colossal amount of work . . . not one single monograph has been done studying and analyzing subsidies.

Mr. Shoup: Yes.

Chairman Proxmire: That alone is an amazing revelation to me.

Mr. Shoup: The subject has been fragmented among many studies of this or that particular subsidy but no monograph, no general or analytical monograph on subsidies, what they are for and how they achieve their purpose. It is really astonishing.

See, *The Economics of Federal Subsidy Programs*, Hearings before the Subcommittee on Priorities and Economy in Government of the J.E.C., 92nd Congress, Washington DC, January 1972.

17. G. J. Stigler, *The Citizen and the State* (The University of Chicago Press, 1975), p. 24.

18. It would be nice, too, if more philosophers read economics. Compare Stigler's conclusion with the following statement made a decade later by a radical philosopher of some repute: "The original laissez-faire liberals viewed the laws of the market as objective laws of a benevolent nature; modern laissez-faire liberals propose that we go on confusing nature and society, even though we have the knowledge to subordinate the market to our collective will and decision." R. P. Wolff, *In Defense of Anarchism* (New York, Harper & Row, 1970), p. 81.

19. See, for example, B. Hansen, *The Economic Theory of Fiscal Policy* (New York, St. Martin's Press, 1958), pp. 178–181.

20. "Equity, Efficiency and Intervention," *1975-Yearbook of the School of Law and Economics* of the Aristotelian University of Thessaloniki. (Quoted from manuscript)

21. *Encounter*, February 1976.

22. R. Mangabeira Unger, *The Law in Modern Society* (New York, The Free Press, 1976), p. 44.

23. S. Gordon, "The New Contractarians," *Journal of Political Economy*, Vol. 84, No. 3, June 1976, pp. 573–590, see esp. p. 588.

24. Abridged from A. P. Golding, *Philosophy of Law*, (Englewood Cliffs: Prentice Hall, 1975), pp. 122–123.

25. H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961) p. 200.

26. D. Lloyd, *The Idea of Law* (Pelican Books, 1964), p. 123.

27. See, for example, the now famous debate on legal-philosophical problems of post-WW2 German Courts, H. L. A. Hart "Positivism and the Separation of Law and Morals" and L. L. Fuller, "Positivism and the Fidelity to Law," *Harvard Law Review*, Vol. 71 (1958), pp. 593–672.

28. R. Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1922), p. 159.

29. *ibid*, p. 37.

30. *ibid*, pp. 32–33.

31. *ibid*, p. 47.

32. J. M. Buchanan, *The Limits of Liberty* (University of Chicago Press, 1975), Chapter 7, "Law as Public Capital."