USING LAW TO UNDERSTAND SOCIETY
A Program

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I. *The theory*

I believe we can make better progress in the social sciences. These are the sciences which trace and correlate patterns of human behavior set in motion by internal "systems variance", those scarely explicit and constantly fluctuating value judgments of the individual person. Using these variances that issue in behavior, we try to explain social trends and institutions which result from interaction and from social influence, these latter which, in turn, condition these interactions and influences. The social sciences of sociology, law, ethics, economics, language, education, psychology, religion —all these, it seems to me, except economics—, are today in a shamble. Little agreement exists regarding procedures. Little agreement exists regarding their legitimate boundaries or whether there are any, their central terms and paradigms, their most truitful assumptions and methods, or whether the physical sciences aptly serve as their model.

[1] This is a well-known approach to the social sciences called "methodological individualism," the only approach that, in my opinion, yields dependable regularities and networks of social causation. A seminar paper is J.W.N. Watkins, "Ideal Types and Historical Explanation", often reprinted. See, e.g., H. Feigl and M. Brodbeck (Eds.), *Readings in the Philosophy of Science,* N.Y.: Appleton-Century-Crofts, Inc., 1953. See also Richard De Charms, *Personal Causation,* N.Y.: Academic Press, 1968. Michael Polany's intensive studies on knowledge rest on methodological individualism. See especially *The Logic of Liberty,* Chicago: Univ. of Chicago Press, 1969. Max Weber's fundamental work in the social sciences is still another example, but only as he deals with individualistic ideal types.

Economics rests on the classical doctrine of individualism. See, e.g., the following: (1) F.A. Hayek, *Individualism and Economic Order,* Chicago: Henry Regnery Co., 1972; *The Counter-Revolution of Science,* Glencoe, III.: Free Press, 1964; *Studies in Philosophy, Politics and Economics,* Chicago: The Univ. of Chicago Press, 1967. (2) Murray N. Rothbard, *Individualism and the Philosophy of the Social Sciences,* San Francisco: Cato Institute, 1979; (3) Ludwig von Mises, *Human Action,* Chicago: Henry Regnery Co., 1966; *The Ultimate Foundation of Economic Science,* Kansas City: Sheed Andrews and McMeel, Inc., 1978; *Epistemological Problems of Economics,* Princeton, N.J.: Van Nostrand, 1960, (All

If we assume as a starting point that *all social phenomena are conceptually reducible to individuals in interaction,*[1] my thesis in that we can use a certain kind of positive law (*lex*) to stand as a scientific "control" in the gaining of social knowledge. Law as a control should enable us to observe consistencies and generalities, repetitious social interactions and their functional dynamics in consonance with their growth products, social institutions. Positive law of a certain kind, being constant and relatively unchanged, enables types of fixed patterns in human actions and interactions to recur, and accordingly, to be observed or postulated. Concomitantly, such law prevents other types of human actions and interactions from occurring. Thus, if we monitor social relations, processes, and events through the application of legal enforcements strategic to our purposes, these enforcements will have the effect of holding constant basic and uniform features of social life that freely recur, preventing others from appearing, exciting still others into realization. Regularities or patterns that can be said to comprise the dispositions of human nature rhythmic within the

the subject matter of social knowledge, artificially, but usefully, divided into the subject matters with which we are familiar.

A certain type of positive law already familiar to us we call "constitutional". This is the law that constitutes, or that partially constitutes, the basis of social life found in individuals' interactions and implicit influences. A paradigmatic example of constitutional, or constitutive, law is the rule of law (*nomos*), or "liberty under law". Liberty under law, if applied equally to all, describes a law against all coercion except what liberty itself requires. It *entails* that social association, given the disposition of man as a social being, is normally consented to and chosen (though not without discrimination conditioned by

of Mises' writings rest on individualist assumptions.) (4) Edwin Harwood, "Alfred Schutz's Contribution to Social Science Methodology" (a talk prepared for the Symposium, "Theory and Method in the Social Sciences", of the Institute for Humane Studies, Milwaukee, Nov. 16, 1978). (5) Peter Winch, *The Idea of a Social Science,* New York: Humanities Press, n.d.

Many fine papers on the subject, and criticisms of these papers, are to be found in (1) May Brodbeck, *Readings in the Philosophy of the Social Sciences,* New York: The Macmillan Co., 1969. (2) Alan Ryan, *The Philosophy of Social Explanation,* Oxford Univ. Press, 1973. (3) David Bray brooke, *Philosophical Problems of the Social Sciences,* New York: The Macmillan Co., 1970. An exceedingly illuminating reading is "Holism and Individualism in History and Social Science" by W.H. Dray in *The Encyclopedia of Philosophy,* Vol. 4, New York: The Macmillan Co. & The Free Press, 1967. A very recent conference on the subject is reported in the article, "Methodological Individualism Colloquium Held at Sheffield University", *Austrian Economics Newsletter,* Vol. 2, no. 2, New York: Center for Libertarian Studies, Fall, 1979.

man's valuational preferences). Where persons or agencies cannot threaten or force other persons or agencies to do their bidding, except at threat of legal coercion, then those latter persons or agencies are *at liberty* to discover and to develop their own relationships, influences and preferred orders of action and interaction. Because consent and choice are released and enjoyed when coercion is prevented through the mediation of law, then, I hypothesize, common social relations and institutional arrangements will evolve. These common social orders, if I am correct, reveal internal to their nature organic inter-adaptations — "systematic variance"— as a result of their being chosen on the basis of individuals' subjective values. We would naturally expect them, then, to be generally adaptive, evolving, effective. And if "man has a nature", we would expect this nature as it interacts with the social environment, to show up —and in turn to act upon that social environment through explicit choice and implicit influence.

These postulated variable-manifold recurrences constitutive of human social life, we can call *social laws* if we do not press for their simplicity, single-featuredness, single-directedness or theoretical purity. They reciprocally interact. Their terms always are contestable.[2] But their explanatory power, within supporting theory, aptly casts them as social knowledge.

An analogy helps make this thesis clearer. To understand and explain the characteristic animal orders, we watch animals behaving in their natural habitats, and over a long enough time to size up variations, trends and evolutions. We watch how these, in turn, affect and modify more primitive dispositions or behaviors. But if we imprison animals in pens, obstruct their impulses, put them through bizarre cruelties or through artificial instruments inhibitory of what they otherwise would do, how shall we know what dispositions are natural to them or whether there are any long-range developments of

2 The term, I believe, was first used by W.B. Gallie. A term is "contestable" when its border cases are many and its relations of class-belonging are unclear. Weber's ideal types to which social reality only approximates are an attempt to deal with the fact that precision in the classification of "social facts" is not possible; accordingly, deductive-type explanation with covering laws, which rests on exactness in the terms, is not possible. Useful articles discussing the contestable concept are Alasdair MacIntyre, "The Essential Contestability of some Social Concepts" and Norman Care, "On Fixing Social Concepts", *Ethics,* Vol. 84, Oct. 1973. Robert MacIver in *Social Causation* (Peter Smith, n.d.) deals with the notion.

In my papers, "Conceptual Impossibilities in Using the Law to Allocate the Economic Product" (World Congress on Philosophy of Law and Social Philosophy, Basel, 1979, unpublished) and "Law as Facilitator of Social Knowledge: The Less Essentially Contestable Concept" (Second International Congress on Legal Science, Amsterdam, 1980, unpublished), I distinguish between benign and invidious contestability in social explanation. For a fuller comment on contestability, see footnote 10.

these dispositions? How shall we know what are the distinguishing features of the species? Under interfering, frustrating conditions, animal behavior necessarily must be deviant, idiopathic, retrogressive. No knowledge of the norms, of the forms and shapes of the species, can be relied upon.

Of course, many factors conditions and alter social tendencies and their outcomes. Some obstruct the visibility of the social forms, which are always, under all circumstances, contestable to a degree. Climate, geography, native resources, existing and past traditions —ail differentiate, confuse and alter the particularities and idiosyncrasies through which the many variables serving social development show themselves. One oak tree grows very large while another remains dwarfed as a result of the different soil or climate they are subject to or of some accidental variation in their genetics. Nevertheless, this does not prevent us from knowing that both are oak trees and that, as such, both reflect dispositions to appear and grow in similar ways.

Analogously, I hypothesize, social appearance and growth also repeat themselves in ways universal to mankind. Resembling components —universal coordinates of human social life— connect causally and logically (though complexly) with other continual of the social life. But they do this only if they are *allowed* to do this. The positive law, therefore, is the "control" that makes the difference one way or another. How, exactly, does this work?

Equal law against unprosperous coercion has, when implemented, the effect of letting persons and groups choose to do what they will, consonant with the like right of all others. This rule of law stands as a necessary condition for our observing (or cognitively postulating through theory) propitious uniformities —"social universals"— that may result, uniformities that in the social life are both cause and effect through the medium of human belief, free choice, and influences, always at work. These social universals furnish the rudimentary terms of the "causal laws" in social science, enduring, ubiquitous classes of interaction that under common conditions, selected through the discerning hypotheses of social theory, disclose themselves. It is clear that this discernment and what it discerns are not an empirical process; nor do they denote an empirical referent. They are a quasi-empirical process and they denote a quasi-empirical referent. What constitutes them is not independent of human mind. Choice and valuation that result in human acts are always present, imparting *theoretical rationalism*, *methodological individualism*, and *normativity* to social knowledge. This is because *what* is socially known is the result only of individuals-in-interaction. Human beings, believing and

valuing certain things, are disposed to cause social life in its various ramifications. And so —they cause it.

Besides the substantive liberty —liberty under law— which helps to generate the data of freely chosen actions, fixed, basic law exhibits formal features that ably equip it to act as a "test control". This integrative function of law makes possible configurational fields of social conduct, our inferences from them, and certain broad expectable results. What are these features of the basic positive law, the law that constitutes society itself?

1. Constitutional law is *general and equal.* Accordingly, it comprehends all cases of a like kind, treating them alike because they *are* alike. It classifies, along lines of rudimentary social interaction.

2. Being *rule-structured and prescriptive,* it invokes actions that can be observed to fall into broad but discernible classes. It is not claimed that these classes of human actions are not contestable or could not be described in other ways. It is only necessary that what is sufficiently precise for law or for judiciability is also sufficiently precise for social description. Directly, then, the law *participates,* and is partner, in social knowledge.

3. *Precision in law* helps to eliminate ambiguities and vagueness in social terms; classes of action are more well defined and discriminable, less contestable. Their contestability, like their abiguity, is systematic. It is *relatively* fixed.

4. Because law is *enforceable,* and when legitimate, generally effective in gaining the conformity that follows upon acceptance, the implicit threat of sanctions tends to limit actions to those that are allowed, prohibit the disallowed, and require the necessary. Substantive types of differentiable actions and non-actions thereby result and are predictable.

5. Fundamental law is *enduring.* While the interactions that it governs change in their particulars, basic law does not itself change. Identifying social continuities and discontinuities —eliminating the freak, recognizing the frequent— requires this duration because causal relations in the social disciplines are tenous, many-factored, reciprocal and remote. Time is required for relationships among constancies and consorts to show themselves.

As an example of this, price changes in economics cannot show up immediately. But they are not, when social exchange is free, arbitrary They are created by this social exchange. Many factors —magnitude of the resources, entrepreneurial activity, consumer preferences, inventory flow, rates of interest, competition— functionally but sys-

tematically vary before prices can even provisionally be known. Yet the known outcome of this spontaneous complex is this vital and practical "signal of the market", price, to which countless personal, sometimes profound, decisions of persons daily respond. Decisions both cause and result from economic price. The voluntary exchange of individual interactions is therefore the social core of economic knowledge.

These five characteristic formal features of constitutional, or basic, law seem suitably to fit it to serve as a methodological constant in the pursuit of social knowledge. Reliable, constitutive law holds itself steady and inalienable while the life of human choice and value in the social provenance is given free rein to alter and adjust its particulars in infinite ways. If economics as a social science is our methodological paradigm and model, and I believe that it is, then these infinite variances of human interaction seem to result in common clusters, the fixed action patterns and social concordances that are the stuff of knoledge.

We can view the methodology I have described as holding that carefully discovered *prescriptive* laws govern indirectly the *descriptive* content of social functioning, the social constants or universals that emerge under the integrity of these five formal features of the rule of law. The general and equal, rule-structured, fixed and enforcible constitutive law, when its language is precise (action sets are well defined) and when its material purpose and directive is liberty (equal allowance of all non-coercive human actions by means of the entailed prohibition of their invasion) —*this rule of law is itself a social law.* Social knowledge contains norms. The legal normativity of prescriptive rule, general and objective, releases the valuational normativity of personal choice, particular and private. A valid rule to which only enforcement has been added so as to prohibit anti-social conduct, is itself social, and thus it belongs to social theory. Knowledge of the proper and prescriptive necessity of law, its meta-functions and its yield, is part of our understanding of what society and human social relations are.

This social rule of law is a kind of methodological principle; it is a "meta-law" of sorts with respect to the "object-laws" that monitor specific actions. It is a meta-law also with respect to the "lower-order" municipal laws whose consistency it often tries to correct. If the meta-science of proper positive law, or juriscience, is to be seen as a methodological foundation in that its application to the social order helps bring to light what is general and universal in human relations, it follows that this liberty-law postulate of legal science is logically

foremost. It must be laid down as a rudimentary norm a presupposition that underlies social science. Seriously it behooves us, then, to undertake the discovery of what these legal principles of social science must be. We can call them, if we wish, "natural laws".

II. *Application of the theory*

Economics already has emerged as a systematic and reliable social science. Possessing well defined constructs central and shown to be necessary to its functional interdependencies, economics possesses internally consistent and coordinate complexities, "variable patterns" in our language. It possesses coherent theory suitably comprehensive in explanatory scope and fertility. It possesses predictive-type hypothetical syllogisms which, when the conditions in their protases occur, correlate with corresponding events. Economics has demonstrated logical relations between its concepts, corresponding to empirical, or quasi-empirical, referents as vindication of their accuracy in practice.[3] It is quite clear that the working, and the working out, of this advanced and great social science, which has at its core individuals' interaction, depends, and historically depended, upon liberty law reflecting features that make common properties and social universals visible on the landscape. It is this analogy with economics through its clear and requisite reliance upon liberty law that suggests the extension of its methods. For in economics we perceive that only when the individual is free under the rule of law do his subjective values initiate the kind of exchanges that in time mirror regularities in the social life of man. Upon rudimentary social relationship –individuals in voluntary interaction– this/economic explanation and the social knowledge it generates prosper.

Consider once again a paradigmatic theoretical economic construct, that of pricing. The positive law I have called constitutive, in that its basic prescriptive principles help to constitute social facts, in allowing equal and free exchange (by preventing its coercive invasion), imparts existence, effectiveness and meaning to economic value or worth, called "price". Price is the created product of agreements between reciprocating parties in a free exchange. It is a level that presupposes,

3 The Austrian School has been foremost in stressing the axiomatic and apodeictic character of much of economic theory, especially the works of the great economist Ludwig von Mises who writes extensively on social science methodology. See, e.g., *Human Action, op. cit.* The empirical counterpart is found in the economic and epistemological works of Mises' student, F.A. Hayek, especially *The Ultimate Foundation of Economic Science, op. cit.* (See the works by Mises and Hayek cited in footnote 1.)

finally, a match between supplies of what which is wanted and those wants themselves. Diversities in prices abound, like temperatures. But the universal notion of price, like that of temperature, is the same wherever one goes.

Consider now the obstruction of this social relationship, a relationship whose parties in consulation with their own values normally determine what costs they shall bear for what it is that they prefer. Consider a political program, for example, in which economic law is ignored while prices are coerced by fiat as a result of interest-group victory or compromise (a strike, a forced arbitration, a legislative or judicial judgment granting a subsidy, tariff or tax, an industry-wide regulation, a "price control") in some arena of ultimate dirigist control. The examples are common; their numbers are legion.

The inevitable outcome of coercive pricing is that persons' desires for the goods whose prices are coerced either exceed or bypass the supply; for their desires were not consulted in the developmental process out of which price arises. Expectedly, anomalies and disvalues show up, usually wasteful inventory and needless shortages as the suplly itself is abused. When suddenly the political fix is removed or changed, again at the whim of interest-group victory or compromise —prices soar (or cave in) in a delayed and bizarre attempt to attain an undulation that was frustrated in its natural time and order.

The inference to be drawn from many such economic malfunctionings caused by statist control, is that similar maladaptations and disvalues, *mutatis mutandis,* occur with respect to our manifold social relationships whenever we are prevented from doing the harmless or propitious things we otherwise would do. It is understandable that under these conditions, evasion, deviance, counterproductivity, and crime accelerate.

Economic relations are but a segment in the social life. Multiple types of interests and influences generate, and result from, peaceable interpersonal relations enjoyed both for themselves and as instruments. Economics is nonetheless se important that its central concepts, those like time and cost, risk, rewards, savings, incentive, investment, sacrifice and effort, prevade many aspects of social endeavor. Religious experience, for example, is in part a social expression which we conceive to be as far from economics as the sky is from the earth. Notwithstanding, the most exultant faith communicates with some of the same concepts that define and explain the economic life because comparing and assessing, *human valuing and freedom of choice,* bridge all the associative provenances of human life. Consider the interesting case of that most spiritual of religious persons, Dr. Martin Luther,

torn in his pietistic moments by a nagging question. Time and again, Luther pleaded, How many self-abnegating actions must I engage in, of what magnitude and at what cost and sacrifice to please the Lord? Luther's question discloses a parallel in structure and content with that of Mr. Everyman choosing edibles at the market. Luther was calculating his charces of heavenward entry. But clergy or clerk —both, *all,* weigh their actions in terms of the marginal utilities to be enjoyed at a cost adjusted by their own incentives and subjective values.[4] A great deal —by no means all— of moral judgment is expedient in just this same way: benefits and sacrifices, and to whom, are evaluated by a "cost-efficient" reason.

Economics is not, I believe, an independent social science. Its core notions not only supply analogues for the other social sciences. Because the mind and emotions and flesh of the human species are of one kind, and because the desire to improve one's lot and to act on one's purposes —axioms in economic theory— are universal, religion, ethics and law also converge with economics on the concepts of value-autonomy and responsibility, and on obedience to rule. Ethics and economics also share the vocabulary of personal freedom, rational purpose and subjective value. We choose economics as a baseline for social knowledge only because historically we understood it first; through historic accidents[5] the gradually evolving methods of economics, a highly cognitive science with empirical counterparts, have pulled together a body of related data which adequately submit themselves to explanation.

[4] A comment is in order with respect to economics and religion. Many persons inveigh against advertising on the grounds that it does not speak to a pre-existing, discovered demand but determines its own demand for what it advertises. This is not true, because the causal nexus works in both directions at once as a result of social processes. Advertising influences (it does not coerce), but in so doing, it necessarily picks up on existing desires. Advertising phobics should realize that fervent religious exhortation and missionizing have the identical aim and that is to help influence demand. The hardest sell I have ever confronted came from a Baptist minister. A very illuminating and readable short piece is Israel M. Kirzner "Advertising", *The Freeman,* Sept. 1972.

That religion is a worthy desire and certain commercial values unworthy may be true. But if law is to be neutral as between idiosyncratic tastes, it must leave these matters to the discipline of the individual, to his voluntary educational and communication instruments, and to what Montesquieu called *les corps intermédiares,* that vast body of social influences generated in the plural society.

An economic notion on loan not to religion but to law is "payer-usen". Studies are now appearing illustrating the social benefits of removing certain goods and services, such as parks and education, from the political sector and replacing them within their original social matrix —those persons and associations who generate the desire for them and who actually use them to their satisfaction.

[5] I have in mind, of course, the English discovery of economic functioning as a spontaneous result of the development of English liberty.

Another bridge concept illustrating close relatedness among social disciplines is "cost efficiency", an important construct shared by economics and law.[6] Still another concept links economics and law:

> The denationalization or depoliticization of money and of law are seen as comparable processes in harmony with the natural order. The cases of the inflation of money and the inflation of legislation, with the good being depreciated and driven from use by the bad, are envisioned as similar in concept and in practice.[7]

These examples illustrate syntheses, borrowings and consonances between the social disciplines, whose truths must in the end be compatible, suggesting again an unity in their subjects and their highly cognitive methods.

One cannot complete these analogues and suggested interrelations without a mention of logic, a science whose quality is so abstract as to be eternal, relative only to the nature of the human mind; for logic regulates all knowledge, all propositional communication. Here, indeed, is a social universal —the laws of the laws of nature, the science of all sciences. Because logic fuses intimately with referential and semantic meaning whose boundaries of intelligibility it limits, it follows that in a society in which the rule of law is absent or defective, or one in which it is continually confounded by an obtruding administrative detail of the state, language goes astray in the same way that society goes astray, and anomalies occur that are irreversible. If regularities in the social order are broken into by decisions that deflect that order through coercion at junctures where personal adaptations ought freely to flow, the language by which we describe and explain things, which conveys to us the nature of this order and through which the beliefs on which we act are conceptualized, loses, like law itself, its mediating character. Under this abnormal social untruth, logic only solidifies the error; for logic states that *whatever* we require to be. Clarity, consistency and constancy in positive laws become impossible under these conditions. Human valuation takes on transitional disturbances that reflect and reinforce the corresponding disturbances in the social order. Jargon and journalese substitute for clear-

6 Two recent works that illustrate some general relations between law, economics and the social sciences are Richard A. Posner, *The Economic Analysis of Law,* Boston: Little, Brown, 1972, and Ronald H. Coase, "Economics and Contiguous Disciplines", *The Jr. of Legal Studies,* Vol. 7, p. 201.

7 Leonard Liggio, Editorial, *Literature of Liberty,* Vol. III, no. 3, 1980, Institute for Humane Studies. See further "proof" in Henry Hazlitt, "The Torrent of Laws", *The Freeman,* Jan. 1979.

spoken opinion which in theory can be falsified. "Freedom" no longer means security from the oppression of politics. It means, rather, being kept, controlled, by political fiat as the state decides what persons need and ought to want. "Social Justice" loses its meaning, that of substantive due process, desert, and equality under law; it comes to mean, instead, a distribution to the unproductive of that which is earned and created by the productive. "Equality" means no longer equal treatment based on respect for equal persons; it comes to mean, instead, discrimination between moral and legal equals on the basis of that which is morally and legally irrelevent.[8] While white turns into to black, only the perceptive person notices what is happening; for the social landscape is difficult to read at close hand. "He who would destroy a culture must first destroy its language."[9]

Like law and economics, language too is a social science, but a very special one in that it serves both as the object of study and the means, or tool, by which it studies itself. Social institutions and, correspondingly, social terms are of different kinds: Economics, law and language are processes; "legal individuals" like persons or corporations, are particulars; norms, social influences and customs are causal events. But all except language and logic are reducible to interpersonal relations, the rudimentary social nexus. All are given causal impetus by individuals acting on what they believe to be true.

These social phenomena of different kinds are spontaneously developed as media of communication. Like language, they impart signals —influences— to which persons respond. When regularities and anticipations in these processes are disturbed by legal intervention or neglect (as when contracts between consenting parties are not enfor-

8 I have in mind especially that misbegotten and expectedly controversial and devisive executive order appropriately labeled "reverse discrimination". One among many is a trenchant and most insightful treatment of the subject, Walter E. Williams, "Government Sanctioned Restraints that Reduce Economic Opportunities for Minorities", *Policy Review,* July 1978. Williams, is but one of a plethora of studies that point to counterproductivity resulting from political inteference in social functioning. Two comprehensive but short books on reverse discrimination are George Roche, *The Balancing Act,* La Salle, III.: Open Court, 1974, and Barry R. Gross, *Discrimination in Reverse, Is Turnabout Fair Play?* New York: New York Univ. Press, 1979. See also the anthology edited by B. Gross, *Reverse Discrimination,* Buffalo: Prometheus Books, 1977.

The author's, "The Erosion of Legal Principles in the Creation of Legal Policies", *Ethics,* Vo. 84, Jan. 1974, tries to demonstrate the *logical* impossibility of reverse discrimination as a social policy. The ineffective outcomes of political policies in general are examined in the author's "The Methodology of Confirming the Effectiveness of Public Policy", *The Monist,* Vol. 56, Jan. 1972. A newspaper article on the ineffectiveness of political policies, an article typical of many whose volume continues to increase, is "Chaos in Domestic Aid Programs Is Laid to Congress in U.S. Study". *New York Times,* Aug. 28, 1980.

9 Both Plato and Lenin made this similar statement.

ced), coherent explanation that results from discernment of these interactive coordinations is not possible. Concept contestability, otherwise benign as it registers free choices, worsens.[10] Empty holisms and rhetoric characterize covert interest-group pressures.[11] Ideas that once had their referents clarified by common and repetitive experiences of mankind no longer hold these meanings enduring so that the beliefs and values which persons express through them can adapt to, and influence, the social community.

I have tried to show how the rule of law —equal liberty under law— may let us read off whatever patterns, processes and uniformities —whatever habits, associative preferences, dispositions, social developments— people create through natural interactions. Information about social phenomena is revealed at the same time these phenomena are created. Thus does the rule of law as an integrator condition social knowledge, knowledge about what people freely, naturally, tend to do. This is knowledge about how people meet their material needs, apportion duties, create and anticipate promises and obligations; how they are disposed to educate their young, prevent and punish wrongs, confront the spiritual life, care for the needy; how they enjoy language and use it to gain their ends, adapt to insecurities, play, improve their lot. And so on. It is my belief that we can obtain knowledge of elaborate causal interactions in the social processes that persons both create and conform to if they are allowed to create then by their choices, and that it is only persons freely created choices constituting the social processes that causally interact in complex but regular ways. Social knowledge gained in this way may answer for us important questions. Are any moral values common to persons everywhere? If

10 "Benign contestability" (my term) in the social sciences results from methodological individualism which unavoidably introduces into social terms the subtle and manifold variances resulting from personal choice. Its "solution" is not to create holisms, non-reducible social terms. On the contrary, holistic terminology in the social sciences obscures further the subtle adjustments between personal choice, action and effectiveness of outcome, so that the epistemic result is an *even greater discrepancy* ("individious contestability") between social reality as created by persons in interaction and "social reality" as created by holistic theory. In destroying the opportunity for adaptive personal judgment, political decisions, e.g., tend to create conglomerate "forces" over which the person has little control. It is these "forces" that become the data for holistic analyses in social science, imparting to it a spurious authenticity. What is overlooked, however, is that these putative "forces" are not natural to social life —they do not arise endogenously within it— but are artificial creations of coercive fiat in the social porveanance where they do not belong. Social theories conceived along lines of a holistic epistemology then "see" these forces operating in the public life and mistakenly infer that the social life of man is determined or positive. Durkeim's and Mannheim's theories are examples of the latter. So is "structural-functionalism" currently in fashion in sociology.

11 See the author's paper, "Conceptual Impossibilities. . ." *op. cit.*, foot note 2.

so, have they a course of development? By what social arrangements is prosperity created and maintained? Under what conditions do affiliative rather than selfish or criminal human relations prosper? Why do grave and lasting social disturbances result whenever governments inflate currencies? Are there effective alternative methods for coping with "affairs of state" besides the political process as we know it? What is the optimum role for the state? What are the mechanisms by which domestic peace can be maintained and criminality kept under control? Does stability rest upon the acceptance of various forms of institutional authority? If so, which ones are decisive? What educational instruments best further the personal progress of individuals? Do any conditions endogenous to community life foster war? How do personal property entitlements relate to justice? to economic law? to social progress? Is religion necessary to stable community life? Is egotistic rational calculation, or are altruism and affiliative sentiment, the catalsyt in developed civilizations? How does the causal nexus work between human action and personal freedom?

We do not have answers to these questions. Nor, perhaps, do we phrase them in the right way. Nor, perhaps, have we garnered the most significant ones. But if what I have said is basically correct, the rule of law, enforced effectively, equally, and lastingly, will awaken in persons free and natural ways of being social. These, I feel quite sure, will disclose coordinate uniformities in interactive conduct and in the institutions that evolve from these uniformities. Over time, agreements will be reached, in observing and explaining these coordinate uniformities, as to definitions and central concepts, area boundaries, valid data, methods and assumptions. These will comprise our science of social knowledge and direct the proper procedures and approaches for its extraction from the infinite panorama of human affairs.

How appropriately this crucial point about law was put far back in the 7th Century BCE by the Chinese author Kuang Chung. "When a state is governed by law, things will simply be done in their regular course. . . If the law is not uniform, there will be a misfortune for the holders of the state." And, I add, there will be no understanding of the social life of man.

III. *A case study*

To help fix the meaning and implications of my thesis, I want to describe an interesting case.[12] In the State of Indiana, a recent statu-

[12] Steven J. Schmutte, "Interrelations of law and economics: The case of stream pollution" (unpublished Ph. D. thesis, Purdue, 1971).

te defines "pollution" as "the presence of foreign chemicals in a natural stream". The statute stipulates that no one, except under easement, licensure, or "reasonable use", may dump pollutants into any stream in that state. On the surface the statute looks innocent and beneficial. Who can object? The objective is a worthy one, and with respect to it, enforcements often are necessary.

Let us point out first that precision of language is lacking in this statute. What it is exactly that constitutes "the presence of a foreign chemical in a natural stream" is not measured or denominated in terms of amount. Accordingly, since imprecision in legal language invariably demands discretion, undefined authority is given to officials. Someone, too, has to decide when a license shall be granted or when "reasonable use" is satisfied. Also, statutes whose purpose is not to prevent interruption of a liberty but to prevent liberty itself require more enforcement agencies, offices and personnel than liberty under law, for the freedom to do what one chooses, if equally enforced, does not require such surveillance. It is obvious that enforcement of this Indiana statute does not, as does the rule of law, help to promote personal choice. Enforcement of the statute aims, rather, to stop persons from doing what they otherwise might choose to do. With respect to the statute under discussion, and with respect to thousands of others like it, the power to coerce is granted to some but not to all. It is unavoidable that privileged potentates will favor some but not, equally, all.

But, we might argue, the aim is nevertheless achieved. Persons' choices on the matter might lead to harm —shouldn't they be stopped? If an injustice occurs, that is unfortunately the price one pays for satisfaction of a public good. The harm to be avoided is dumping pollutants in natural streams.

But let us see. Was this harm really avoided? Was the public good forwarded? Stepping back in time, how did the legal society that had developed in that community handle its pollution variances before the statute was enacted? Common law proceedings brought against a polluter had in the past *favored plaintiffs* who claimed their downstream properties were polluted by upstream parties. (This was called the "natural flow theory entailed by a property right with a stream.") Under this common law and its infrequent jural invocation, felt harm to a *single denotable party* was quickly resolved, and nearly always in the plaintiff's favor. It was done so by anticipated, because reliable, precedent. This common law procedure had the expected effect of *discouraging pollution*, since jural outcomes favorable to the plaintiff and costly to the polluter were anticipated. Moreover, to avoid a case

coming to law, compromises were often initiated by stream property owners and dumpers. In interpersonal proto-legal negotiations, in voluntary, bi-lateral relationship, the parties calculated the costs and benefits to themselves of dumping or of allowing pollutants, or some agreed-to amount of then, into a stream. The cost-efficiency concept which we mentioned earlier, borrowed from economics, played a part in these voluntary, proto-legal associations, associations which, if the view presented here is correct, initiate and furnish the foundation of the reliable network of social life.

What the new statute did was to destroy this common law procedure. In doing so, it destroyed a natural problem-solving process, a social interaction that was effectively developed by persons seeking reliable resolutions that best mirrored their respective, mutually adapting values. By reciprocally adapting these relevant components to the situation at hand, the common law precedent, custom, and developed "rules of thumb" had already established broad regularities that could count as empirical "laws" of some segment of the social life for the parties involved. But by substituting for liberty under law a supernummery, prohibitive-type statute, a real "pollution probblem" was defined and created. The state police power increased too. And as we might predict, counterproductive anomalies and assaults resulted from this unintelligent and artificially contrived act of coercion.

First, since the politically exploitative use of the exceptions and "reasonable use" clauses gave officials the right to discriminate, *more* of the proscribed pollutants contaminated the streams than ever before! Vagueness in the statute allowed politicians to determine who lost and who benefitted, by authorizing them to define "pollution" as they wished. Officials directed patronge to parties who benefitted from using bribery to gain pollution rights. This tempted the large polluter, usually a corporation. The outcome was that politicians gained power through the bestowall or withholding of favors, Corporations gained power through the bestowal or with holding of favors. Corporations gained power through being the beneficiaries of patronage and *ad hoc* "rights".

An onrush of litigation also resulted from the reversal of precedent, as pollutors, not plaintiffs, came to believe they could win their case. This drove up costs and increased legalisms and jural bureaucracies. Gone was cost-effectiveness, a benign process in which those involved match closely their subjective valuations in assessing what polluting or constraint is worth *to them* to read off in exchange for some known loss or gain. Under the statute, all citizens were compelled to incur costs for benefits that were not theirs, that affected them

not at all or could not be shown to affect them. Exactly what were the "costs" of polluting could not be known. And the spread of the cost-loss drove incentive to be careful out of business.

Most crucially violated were the basic and harmony-making principles of property, the rule of law, liberty of choice. The mutual adjustments of the affected parties in knowing what redress or what injunctive penalty they could expect under the earlier and dependable common law were painfully distorted. Potential social knowledge decayed and dissipated.

We can draw a lesson from this common example. Enforcing ideas that have no initiating source or referent in persons' perceptions or beliefs creates social problems because it concomitantly destroys the knowledge that could avoid or resolve these problems. This is because social problems like the one we have just examined *result* from the destruction of knowledge. Unpredictable, radical shifts in otherwise stable notworks of social and legal conciliation tend to arouse irrational risk-taking, adversarial, interest-group conflict, flirtation with fraud and criminality —pervasive loss of dependabilities in the entire social order.

This syndrome of social decline due to imposed centralization of power does not result from the enforcements that secure rather than prevent liberty. For in these cases, the destruction that results from the abuse of persons, from injustice, from violence and cruelty, is a less tolerable destruction than that which results from ignorance in preventing or solving problems. We do not care to know what totally unfettered man is like. Nor could we know. Social knowledge can neither be generated nor put in use in a state of strife. The problem is not practical but conceptual. The subject matter of social knowledge is patterned regularities and these do not occur in a continual war of each against all. But whatever unfettered man is like, he is worse if his positive goals are abused when he could try to attain then himself, provided that others are allowed to do the same. It is only loss of *social* knowledge that leads to decline. Letting our darker nature rove wide and free is already to abandon the social life, so that there is no social knowledge, after that, even to forego.

IV. *Summary and conclusion*

Conceiving of positive law as a social science assumes that certain norms are "true". They are not true, certainly, in a straightforward empirical way. No independent normative proposition reality". corresponds to reality." The conceptual distinction between descrip-

tion and prescription remains and is valid for many purposes, especially for criticism of existing conduct. But certain legal norms, what I have called the rule of law or liberty under law, are *true-making,* if my thesis is correct. They aid and abet systematic variances in interpersonal relations, in social processes and events, and in the emergence of common and shared institutions. These organized regularities become the subject —the universal "laws"— of social understanding.

Social uniformities are not contextless, contingent conditionals of the "A implies B" type. Rather, they have to appear within organized and coherent systems in order to be explained. They have to appear in cognitive-rich theories since the variables are many and, in my opinion, often rationally connected. In these systems or social theories, the causal nexus go both ways because of the nature of influencing and of being influenced. Persons engineering their own decisions adapt their values-at-the-moment to their perceptions or ideas of reality, and these act-making beliefs may fix upon both past and future as materials for the pursuit of the present purpose. Once having acted, however, or once conscious of acting, this scarecely accomplished event in turn, can influence the agent in some new decision. It is both effect and cause.

Trends and dispositions characterize our knowledge of what people do; it is very doubtful that there are human laws of a general, *all* nature. Simple comparisons and ordinal magnitudes describe rudimentary interpersonal relations if they describe them at all, and these relations are idiosyncratic. We want *so much* of something. We want it *more or less* than we want something else. We prefer this to that; this is better than that; this is best for the moment. We will forego just this much and not that. It's worth to us thus-and-thus degree or amount —no more. Since all social phenomena except language reduce to internal features of individuals, like valuing, the mainsprings of association are individual actions informed by personal consent. In no way does individual self-causation imply that man is "possessive" or "egotistic". His nature is social. All of human action attests to this self-evident conviction.

What guarantee have we that the release-value for personal liberty, political liberty as I have advocated it, does not lead to a Hobbist state instead of to peaceable interaction?

The beginning of an answer lies in the fact that liberty under law is equal and ordered, hence, no person can advance upon another —nor can the state— in ways that would allow that person himself not to be advanced upon. If this legal-fairness foundation is maintai-

ned firmly, then that which is social and affiliative in human beings will emerge because destructive desires will be punished.

The other part of the beginning of an answer lies in the fact that the regularities that make social knowledge *causally possible* –no regularities no social science– also *logically entail* social order and stability. Social order just is people freely participating in generally reliable interactions this is what we mean by the term. The internal dynamics of peace are, by definition, dependable variations-in-unity, which we can perceive as familiar features of our environment. Social life and social science both are constituted of the same events, and these can be anticipated. In science, these events form "laws" that we understand. In social life, the same events form knowledge upon which we act. The uniqueness of social explanation lies in the fact that *understanding* social regularities and how they come about or can be maintained *works causally to forward* these same social regularities and their sustained development.

This mutual aid, time-bound, does not happen in the physical sciences. We can understand a-temporal scientific laws and relegate then to books collecting dust on shelves. By contrast, social knowledge of necessity influences us, in that what we know creates its own subject matter for the unavoidable continuum of understanding.

It is simply a fact of human nature that we prefer peace to chaos, reliance and trust to suspicion, tranquillity to anger, pleasure to pain, love to antagonism, affiliation to separation and isolation. And so, we temper our actions to maintain and gain by these values. Since peace is the matrix for effective accomplishment of our plans, we naturally desire it.

Social knowledge, therefore, is a communicant, a go-between. Entering the belief systems of individuals, it forwards their actions more effectively. The more effectively these actions are forwarded (being self-chosen), the more social knowledge in turn, is generated. This is how social knowledge coordinates both liberty and peaceable interaction.

Does it seem coincidental, providential, to think that the freest society should correspond with the society whose potential for knowing its own constituents is also greatest? Is this too facile and propitious an hypothesis?

Certain it is that no social uniformities can be created by coercion. Coercion represents deflection, a maladaptation of the coerced person's behavior since it corresponds to no value or purpose of his own. In aggrandizing, the coercer may satisfy *his* value. But his value is momentary "out-of step" with the rest of the social milieu. Behavior

issuing from and causing coercion is adventitious. It coordinates with no mutually adjusting social interactions, except just possibly for a time those few which may, for the coercer's ad hoc purpose, be accessory to his act. By no larger, enduring, or uniform social experience can aggressors measure the income and outgo of the influences and facts necessary to effective adjustments between their plan, their action and its outcome. It is lack of this knowledge which makes coercion so often go astray in so many ways.

The social sciences as I conceive them are not deterministic. Invariant and general laws do not explain classes of intentions, actions and outcomes. (We must, of course, build in the necessary norms.) Human actions cause outcomes, but *they* are not caused in the usual sense. Certainly material, efficient, or contingent implication cannot serve as the model for social interaction —for understanding causal relations such as influencing, obligating, promising, judging, preferring, intending, associating, and the like.[13] Again, economics is our premier performer; it suggests our direction. Already economics has constructed coherent sets of functionally interdependent "hypothetical syllogisms", defining the concepts and demarcating the classes we fruitfully may consider. *Given* individuals' causal agency as a starting point, determinable economic interrelationships can be shown, and are explanatory. Consider how property integrity in law directs economic functioning when through individual choice rather than "social planning" or political redistribution property is held, disposed, used, exchanged, bequeathed, and the like. We know that ownership of property innately stabilizes the person and that wide distribution of ownership stabilizes the society when its dispersal is decentrally developed through investment and earning. Laws enjoining respect for property so earned and used reinforce this stability; indeed, they govern the "market" mechanisms by which it is so dispersed. Here, then, is a legal concept based upon individuals as self-generating causal agents. On the basis of *individuation,* or "methodological individualism", economic causal regularities are generated.

These "covering laws" do not, and cannot, explain the *individual choice* to exchange A for B, since individual choices are not determined by laws but by personal values. (Even the botanist does not know which leaf will fall first.) On the contrary, individual choices ex-

13 The philosophical works of, e.g., A.I. Melden, R.S. Peters, Donald Davidson, and Richard Taylor argue forcibly for a conceptual relation between intensionality and action. The entry by A. Oldenquist, "Choosing, Deciding and Doing," in *The Encyclopedia of Philosophy,* Vol. 2, *op. cit.* is comprehensive and well-documented.

plain the lawlike interrelationships since individuals are disposed to make such choices. Since the rule of law makes equal liberty an inalienable entitlement of individuals, we may say that this positive law determines social relations indirectly. Hence *prescriptive* enforcements of a certain kind are a precondition for the emergence of the *descriptive* coordinates and common denominators of social rhythms.

The thesis I have put forth may be called legal sociology. It stands in contrast to the more familiar sociology of law. Sociology of law studies how social life causes positive laws of certain kinds to come into existence. Legal sociology studies how positive law of a certain kind causes society to maintain benign stabilities through reliable anticipations. These stabilities, in turn, make possible the social sciences. There is a danger in both these approaches if they are not carefully conceived and applied. Sociology of law runs in dangerof *allowing any law at all* to express itself so long as some "felt need" can be identified and justified by "the social interest". Thus a mere play of terms can be used to set legislative or curial machinery in motion; to bogus holisms are imparted causal powers. These putative powers run all the way from conservatives' "social consensus" or "public interest" to the Marxists' "economic forces" or "historical necessity". In between are the liberals' "Social contract", "the welfare state", or "economic class". All these terms are reified; they are thought of as causally self starting agents determining what the laws must or ought to be. We do not need to think long or hard to realize that a society that uses empty rhetoric to rationalize its legal enforcements as compelled will perish in a typhoon of administrative tyranny, if not moral evil. For the real causal agents are politicians. This imprecision in law allows a vacuum in authority and legitimacy, always filled by *de facto* personal power until no moral reality fixed in enduring law exists to oppose it.

But similarly, legal sociology runs in danger of people *laying down wrong laws* to help maintain social regularities, believing somehow that the manipulation of law towards goals and outcomes is a magic determinant, fashioning whatever the society construes itself to be or to want.

We must say, I think, "A plague on both their houses!" Both approaches can lead to statism. Enforcements, even wise ones, do not create social orders. At best, the wise enforcements —basic ones, and irrefragable— facilitate their effective maintenance and fuller development. Nor can social orders indiscriminately "make laws" based on "felt need". They do so at grave peril. Certain social dispositions, constitutional, seem already to have to be in existence, inherent,

somehow, in the communal mass —for social orders to last long enough to discover the few auxiliary positive laws that may sensitively help their citizens face and resolve temporary problems and stave off the potential for decline.

The thesis I have been suggesting is that a *certain law, the rule of law* or *liberty under law,* may help societies to retain themselves. But it does so only by representing and releasing the maximum of spontaneous social interactions. Necessarily, out of these interactions certain values will harmoniously converge and correlate. They will visibly announce themselves. It is out of this sustaining harmony that we may be able to discover universals in the social order of man. In generating universals, a free society both causes and explains itself. If what I have outlined is correct, it follows that social science is possible only in an open society.