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Rule of Law in Legal and Economic Theory

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RULE OF LAW IN LEGAL AND ECONOMIC THEORY

It is one of the curiosities of the academic world that one dimension of human experience will sometimes be investigated from multiple disciplinary, theoretical, and methodological perspectives. This is clearly the case with legal theory, which has grown out of traditional studies of the law as a means of bringing more coherence and order to those studies. But law must also be one of the important features of human societies to be investigated by the comparatively young social sciences. While empirical social science has struggled through a troubled infancy and childhood, one has to hope that it will someday mature to the point that it can deal with law in a way that does not oversimplify or compromise the centuries of insight that have accumulated in more isolated legal studies. And once that happens, a much broader platform of understanding of human action may facilitate important new understandings of law and legal systems. In this paper I will show how recent developments in economic and sociological theory may facilitate some expanded union of analytic philosophy of law with the empirical social sciences, a union which, in turn, may bring important new understanding of the rule of law. As I have explored the implications for our understanding of rule of law elsewhere,[1] the present essay will document the reluctance of leading legal positivists to make strong connections to the social sciences and will describe the developments in the social sciences, inspired principally by economics and rational choice theory, which make such a union more promising at this time.

I. Social science and legal philosophy.

Before the development of empirical science, philosophy first arose as a means of investigating the world of human experience. With the subsequent rise of science, the range of philosophical inquiry has repeatedly given way to accommodate scientific theories that provide

[1] See Reynolds papers listed in bibliography.

testable explanations for some dimensions of our experience. The natural sciences are the most obvious examples. Less obvious, and much more recent, is cognitive psychology, which is taking over much of the work of traditional epistemology. The general principle seems to be that philosophical analysis can be effective in sorting out the implications of human experience with the real world as collected in memory and language. But a significant advance is made when we can find ways of rendering our inquiries empirical--of stating general propositions that are empirically testable--against experience, as well as against logic and intuition. That advance is the stage at which philosophy becomes science.

Perhaps the slow progress of the social sciences in the twentieth century is partially explained by the accident of an early infatuation with behaviorism and a consequent reluctance to accept as "scientific" any accounts of man or society that invoked mental entities like beliefs, rules, values, world views, or strategies. Today the materialist presuppositions of behaviorism have been largely abandoned in all the social sciences. Contemporary approaches recognize the essential role of intentionality and individual mental activity in all human action. My project exploits social science advances in the characterization of social conventions to answer questions and resolve problems that have long plagued legal philosophy. The questions and their alternative possible answers have long been formulated and analyzed philosophically. But new developments in economics, psychology, and sociology make it possible to offer an empirical description that makes sense of our traditional reflections about law and that may help us resolve contradictions between competing philosophical theories of law.[2]

It is not hard to see why even the legal positivists, who are temperamentally disposed to encourage the scientific outlook, and the social sciences in particular, have resisted the idea that theories of law and society must be integrated. Through much of the twentieth century sociological theories focused mostly on macro features of societies in explaining social facts. Neither marxism, structuralism, functionalism, nor normativism look to responsible individual

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[2] See, for example, D. Schwayder and N. Luhmann.

actors as explanations of social facts. Yet, it is the essential character of law to represent legal society in terms of individuals interacting knowledgeably and purposefully with each other in the context of established norms, which the individuals themselves can create, terminate, or manipulate. Legal positivists modestly defer from forging links between the theory of law and sociological theories, in spite of the fact that law is one of the most fundamental and pervasive features of human societies. Sociologists of law, on the other hand, have looked at law mostly as a category of social problems for analysis in terms of traditional sociology, including criminology, penology, etc.[3] In 1962 William Evan identified five distinct approaches to the sociology of law, all of which

were problem oriented, and none of which presumed any union of sociological and legal theory. At the one point where the uninformed reader might sense theoretical overlap, the use of "norms" as explanatory elements in both law and sociology, Evan was quick to point out that the term has different meaning within the two disciplines (2, 5). In her 1968 summary of twentieth-century intersections between law and sociology, Rita Simon could only list studies that feature or recommend the sociological method as an asset to law and legal understanding. The German sociologist, Niklas Luhmann, has attempted an explanation of the continuing insulation of these disciplines from one another by referring principally to the "self-sufficiency of legal science" (274).[4]

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[3] Niklas Luhmann has been an important exception, as I will demonstrate below; but, he is not known well in English-speaking countries))in spite of the availability of much of his work in excellent English translations.

[4] Luhmann recognizes that "there is no rational founding relationship between the two disciplines in the usual hierarchical or logically deductive sense," (275) but does see them focussing on a number of identical issues and subject matters such that they could cooperate more. While he believes the evolution of law has "led to the differentiation of a legal system which can realise its own societal function in relative autonomy," sociology has failed until now to produce a "sociological theory of the unity of the legal system (281)."

There are increasing signs that the long-standing log jam in sociological theory may be breaking up. And the agent for change is turning out to be that most successful of the social sciences, economics. For in economics, before any of the other social sciences, it became apparent that the most successful theories are not the ones that focus on class or other holistic social concepts in explanation. Rather, it is the individualistic neoclassical school, with its basic assumption of rational, self-interested actors, that is producing the most satisfactory explanations for large-scale economic phenomena. Micro-level analysis explains macro-level events. Gary Becker recently received the Nobel Prize for his use of this kind of economic analysis on issues traditionally considered the province of sociologists. In his acceptance lecture, Becker clarified that the assumption of rational choice is methodological rather than metaphysical. He further explained:

> While the economic approach to behavior builds on a theory of individual choice, it is not mainly concerned with individuals. It uses theory at the micro level as a powerful tool to derive implications at the group or macro level. Rational individual choice is combined with assumptions about technologies and other determinants of opportunities, equilibrium in market and nonmarket situations, and laws, norms, and traditions to obtain results concerning the behavior of groups. It is mainly because the theory derives implications at the macro level that it is of interest to policymakers and those studying differences among countries and cultures." (27)

The obvious question sociologists are now asking is: "If humans are rational, self-interested actors in their economic lives, why would we expect them to be any different in their social lives generally?" Of course, this has been the essential point of philosophical defenders of methodological individualism for decades. And more recently it has been at least the implicit position of philosophers, political scientists, and sociologists that have dabbled with rational choice theory as a mode of analysis. Gary Becker's work on the family and crime are leading

examples of this trend. He notes that "thriving schools of rational choice theorists and empirical researchers are active in sociology, law, political science, and history" and even to some extent in anthropology and psychology. He strongly defends this trend with the claim that "the rational choice model provides the most promising basis presently available for a unified approach to the analysis of the social world by scholars from different social sciences" (1992: 28).

Not until James S. Coleman published his monumental *Foundations of Social Theory* at Harvard in 1990, had any social theorist attempted to work out all the assumptions and implications of this approach in a complete theory of social action. While Coleman would not claim to be the first to see the need for such a theory, no one else has yet undertaken a comprehensive and systematic reformulation of social theory.[5] Not satisfied merely to point new directions, Coleman has worked out a full slate of specific research programmes for both qualitative and quantitive analysis. There is no question but that Coleman was directly influenced by economists and the loose association of legal scholars, philosophers, political scientists, and political economists that operate under the banner of *public choice* theory. This seems to be a clear case where demonstrated success at the fringes of the disciplines has led to wholesale revolution at the center.

II. Barriers between legal and social theory.

Traditional social theory, no prominent variety of which was based on a theory of individual action, was inevitably at odds with legal theory as the latter emerged from the study of law. It was precisely because the common law has as its most central assumption the responsible individual agent, making choices within established normative restraints, and bearing

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[5] The Harvard sociologist, George C. Homans, defended an individualist model for decades, but he used behavioral rather than cognitive psychology for his model of social actors. This behaviorist slant invited persistent criticism of his theory as "reductionist," by which was meant that he would not accord social reality to mental entities such as norms.

responsibility for conformity to those norms, that Roscoe Pound wanted to reform it along the collectivistic lines of modern sociology. As he complained in 1907:

> The individualist conception of justice as the liberty of each limited only by the like liberties of all has been the legal conception. So completely has this been true that sociologists speak of this conception as "legal justice," and it is sometimes assumed that law must needs aim at a different kind of justice from what is commonly understood and regarded by the community.[6]

Inspired by sociologist E.A. Ross, Pound undertook to "sociologize" the law. Because he thought the individualistic basis of the common law was out of date, he hoped to replace lingering 18th century legal conceptions that dominated many fields of law with new collectivistic approaches more congenial to social justice. Pound strove to introduce lawyers to the sociological perspective, so they would draw on the holistic spirit of sociology to create a new "philosophy of law", one that would purge the injustices of the old individualism. The widespread use of sociological studies and methods were seen by Pound as one important means of moving American legal thought in this sociological direction. However successful Pound and his followers in this social justice movement might have been in law and politics, the inherent individualism of law made it impossible to reconcile the lawyer's and actor's conceptions of law with social theories that explain all social phenomena in terms of social class or structure or functions. Inevitably, legal theory would avoid spelling out its connection to social theory. None was possible, in spite of the pro-empirical attitude of legal theorists themselves. A brief review of twentieth century legal positivism will show how these theorists kept their legal theories insulated from social theory generally.

A. Hans Kelsen

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[6] Excerpted from *The Green Bag*, 19 (October 1907): 607)615 and reprinted in Simon, p. 13.

A major objective of Kelsen's approach was to "delimit" the science of law from other disciplines with closely connected subject matters (1). His concern was that elements of the science of law had been mixed uncritically with social sciences, such as psychology and sociology on the one hand, and normative sciences such as ethics and political theory on the other. By separating the science of law from all these "alien elements", he expected to set forth a "pure theory of law" (1).

Social sciences that treat human behavior as "determined by causal laws . . . as it occurs in the realm of nature" are "not essentially different from the natural sciences like physics, biology, or physiology." The differences are a "matter of degree, not of principle" (85). The "normative sciences" such as ethics and jurisprudence "describe certain man-made norms and the relationships between men thereby created" (86). Thus, a law of nature is disproved when it does not conform to fact. But when legal laws are disobeyed, the law is not invalidated. Legal laws only state what people "ought" to do, not what they necessarily must do under certain circumstances. (88)

But the "science of law" or jurisprudence "attempts to answer the question what and how the law *is*, not how it ought to be" (1). The factual component of Kelsen's theory seems limited to the observation that human societies are in fact structured and defined in terms of different kinds of norms, many of which are laws--based in coercion. The analysis of norms is, however, purely logical. Their empirical character and reality are taken for granted. Legal norms are distinguished from other kinds in terms of their entailments. But there is no attempt to explain the underlying social reality that gives rise to law. So while we would not want to say that Kelsen was hostile to social science, we can clearly say that he could not see his way through to a connection between jurisprudence and sociology or economics. The fact that human behavior is their common object did not lead him to look for a common, or even connected theoretical account. Putting it simply, while positively disposed to modern science, Kelsen clearly

distinguished the theoretical work of jurisprudence from that of the social sciences. His work did nothing to reduce that distance.

B. H. L. A. Hart

Like Kelsen, Hart opened his book with some comments about the place of legal theory among the disciplines. The "aim in this book has been to further the understanding of duty, coercion, and morality' as different but related social phenomena" (vii). He hoped it would also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law." While lawyers will "regard the book as an essay in analytical jurisprudence", "the book may also be regarded as an essay in descriptive sociology..." (vii).[7]

Hart opened the book proper with ruminations on the persistence of the jurisprudential question "what is law" and the persistent variety of answers that are given in recent and ancient legal theorizing. Hart attempted to clarify the issue that drove Kelsen to insist on certain strained distinctions between legal and social science by distinguishing the internal and external points of view which men may take relative to the same facts. Hart characterized the social science view as external, correlating observed regularities in behavior with patterns of social reaction. This external description of legal society "cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty" (87). These notions make sense only from the internal point of view of officials and citizens. Only they, or those among them who "accept" the legal system, can see facts and rules as implying obligations for human behavior (100)108). Thus, analytical jurisprudence can be characterized as descriptive sociology when read from the external point of view, and as an extension of legal practice when read from the internal.

But Hart's distinction between the internal and external points of view, which has been almost universally accepted by legal theorists, fails to see that post-behaviorist social science really should claim to provide a comprehensive model of humans and their societies that embraces both--reducing Hart's external and internal points of view to one single account of what

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[7] Luhmann later took this suggestion seriously. See p. 276.

law is that will work both for social scientists and legal practitioners. Why not hope for an account of the origins of legal obligation that means the same thing to both jurists and sociologists? Hart's bifurcation of viewpoints serves to preserve the isolation of traditional analytical jurisprudence while maintaining the fiction that somehow it must all fit comfortably in normal social science.

In his effort to disprove the predictivist thesis of legal realism, Hart assumed a behaviorist stance for social science--not allowing the external observer to speak or think in terms of rules and obligations that might be guiding social actors. He allowed the behaviorists' denial of explanatory importance to internal beliefs to shape his own characterization of what external and internal perspectives might mean. This is further confused by equating this external perspective with that of individuals who do know the system of rules and obligations from the inside but choose not to "accept" them. But contemporary social science does not take this kind of external perspective. Rather, it attempts to understand the reality of rules, norms, and obligations that structure the social and legal worlds. And those who choose not to accept the system are not at all external to it, but are rather deviators who continue to use their knowledge of the system to personal advantage, avoiding consequences to the extent possible without suffering all the disadvantages of strict adherence to the rules, and recognizing full well the fact of their obligation to obey the rules.[8]

Hart criticized Austin for failing to take account of rules as the basic elements of law, as opposed to "orders, obedience, habits, and threats" (78). Hart advanced a two-tier structure of rules as the true "key to the science of jurisprudence" missed by Austin and went on to accord

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[8] These paragraphs only summarize a point that deserves much more extensive development. From the perspective I've developed here, one would say that the true "external" point of view is not that of social science, but that of the philosopher (or reflective citizen) who wonders occasionally whether the actual legal obligations he and others face are consistent with moral truth. But citizens and judges know that this is a difficult question of uncertain answer. The law, because it is a stipulated norm, is certain, knowable, and obligating.

this union of primary and secondary rules "a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought" (79).

Hart clearly maintains the tradition of analytical jurisprudence in his assumption that the function of a legal theory is to elucidate legal concepts. His explanation of law consists in a clarification of the logical relationship between two classes of verbal elements of legal system. The claim that his work could be seen as descriptive sociology is never developed. He never identifies specific links to any sociological theory, and as has been argued above, even confuses the potential connections that are implicit in his theory.

C. Joseph Raz

Hart's accommodating gestures toward empirical social science disappear altogether in his student Joseph Raz's major works of analytical jurisprudence. Following Hart's book by one decade, Raz objected that his predecessors in the tradition of analytical jurisprudence thought the crucial theoretical problem was "to define 'a law'," on the apparent assumption "that the definition of 'a legal system' involves no further problems of any consequence" (2). Raz sees his contribution to be the insight that the *legal system* is the critical concept to clarify in advancing the understanding of law. "It is a major thesis of the present essay that a theory of legal system is a prerequisite of any adequate definition of 'a law', and that all the existing theories of legal system are unsuccessful in part because they fail to realize this fact." Raz may have sounded like he was linking legal theory to social science when he claimed:

> "The three most general and important features of the law are that it is normative, institutionalized, and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force." (3)

Because Raz saw these as the chief features of the law, he believed that every theory of legal systems must explain them: "Naturally, every theory of legal system must be compatible with an explanation of these features. Because of their importance we shall, moreover, expect that every theory of legal system will take account of these features, and will, at least partly, explain their importance for the law" (3). But where one might expect each of these three features of law to provide a direct link to empirical social science--which does investigate norms, institutions, and coercion--Raz assumes these concepts are not themselves problematic, and that what needs explaining is their interconnectedness in law.

Whereas earlier analytical jurisprudents might have cast longing glances at the theoretical materials developed by sociologists, Raz, like Kelsen before him, gives us quite a clean version of analytical jurisprudence. For Raz, the significant features of legal systems can be analyzed down to three basic components, which will not permit further reduction. The job of a theory of legal system (or law, given that he sees this as part of the former) is to advance a comprehensive description of these significant features that answers his four basic problems of legal theory and maintains internal consistency. It must also take account of the phenomena of law as they occur in legal systems everywhere. Counter examples arise for any theory that cannot simultaneously explain modern legal systems, international law, and customary law.

Of course, Raz may have to implicitly assume that he already knows what law is in order to determine which legal systems exist and need explanation--ie, can provide counter examples against competing theories.

What he clearly does not do is rest his explanation of law and legal systems on any deeper account of human beings or their relationships that give rise to norms, institutions, and coercion. While analytical jurisprudence is connected to reality by its determination to provide an account of existing legal systems, it simply accepts these as givens which need no further explanation. The task is to provide a general description which works for all of them, but distinguishes them

from other kinds of normative arrangements among human beings. It is an exercise in logical criticism and linguistic distinctions, not empirical social science.

D. John Finnis

It must come as a surprise to many that among contemporary writers on legal theory, the natural law theorist, John Finnis, argues most clearly for a firm connection between legal theorizing and social science. The catch, of course, is that Finnis also wants to see an Aristotelian reform of the social sciences. In his opening chapter, Finnis reviews the attitude of earlier legal theorists on this question, and advances his own view, which amounts to an argument to social scientists that they are fooling themselves when they try to divorce a science of human action from values when values are at the core of all human action. Finnis describes social science as an effort "to describe, analyse, and explain . . . human actions, practices, habits, dispositions and . . . human discourse," etc. (3). His complaint against "value-free" approaches to social science rests on his claim that these things "can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc." (3).

This opening statement makes an additional claim which introduces important tensions which Finnis later recognizes and believes he resolves, but which may constitute the fatal flaw in his natural law approach. As just quoted, Finnis wants to claim that he (and social science) can develop theories that rest finally on the experience and cognitions of individuals. But he does this because he believes all theorists will have to recognize that individuals always act with reference to some conception of the good. And he explicitly acknowledges the potential relativism in this view: The actions of people and the concepts they have relative to those actions "vary greatly from person to person, and from one society to another." "*How, then,*" he asks, "*is there to be a general descriptive theory of these varying particulars?*" For Finnis the answer lies in identifying seven basic (universal) goods which seem to lie behind all human intentions. It is a job for philosophical analysis to sort out this irreducible set. But, of course, this is really a lot

for "value-free" approaches to social science to accept. The more value neutral approach to social science and jurisprudence is fully maintained when we agree that human actions are informed by values, to one degree or another, but make no attempt to distil one set of universal (or "true") values from our observations. Modern economics accepts the pervasive importance of individual values in shaping human action, and uses these to explain and predict action--without any thought that these values must be analyzed or reduced to a common core. Their infinite variety and distribution pose no problem for an individualistic economic explanation.[9] Ignoring this effective and established social science approach, Finnis reverts to a traditional Aristotelian perspective and forges a set of universal criteria by which he can actually overrule mistaken individual actions in legal societies. In other words, his claimed individualism returns later in his treatment as a problem. And his claimed derivation of universal values from observation of individual action becomes an argument for imposing standards on individual behavior (which might not conform!).

Errors Finnis might have made in attempting to incorporate a modern liberal individualism into his basically Aristotelian scheme do not, however, impair his analysis of the methodological approaches of his positivist predecessors:

> How does the theorist decide what is to count as law for the purposes of his description? The early analytical jurists do not show much awareness of the problem. Neither Bentham nor Austin advances any reason or justification for the definitions of law and jurisprudence which he favors. Each tries to show how the data of legal experience can be explained in terms of those definitions. But the definitions are simply posited at the outset and thereafter taken for granted. (4)

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[9] See Buchanan (1985), pp. 52, 229)239, 261)274 for explicit discussions on this point, which is clearly understood by most economists.

> In Kelsen's 'general theory of law' we find no critical attention to the methodological problem of selecting concepts for the purposes of a value-free descriptive general theory. (5)

Rather, as he goes on to explain, Kelsen just assumes that there is some essential primitive experience underlying the phenomena which in all societies are designated by the term *law*. (6)

Finnis finds the approaches of Hart and Raz much less naive. While praising Hart and Raz for recognizing the importance of a practical or "internal point of view", Finnis finds them fudging on the key issue. No theoretical concepts can be advanced in the description and explanation of legal phenomena without first making judgments of *importance* and *significance*. Finnis wants to argue that these judgments should follow those of the central case--normal judgments of the people in a regime of law. He invokes Weber for support of this combination standard.

It seems that Finnis may do some conflating of issues at this point. Obviously, an adequate explanation of law will take into account the perspectives of members of legal society. But must it adopt them? Clearly not. And decisions of importance and significance in the theoretical project are to be based on the purposes and objectives of the theoreticians. These are better understood from studies of science as an enterprise than from studies of practical reason and action. Social scientists are not social actors in the ordinary sense. By definition, they raise themselves above social life in order to see it better. They seek to describe it in explanatory terms that are universal and neutral. None of this denies in any way that human life uses a process of practical reason. Nor need it suggest that practical reason is the most basic level on which it can be understood. But this is in fact where Finnis wants to take us, and his approach appears more plausible because none of his competitors in the jurisprudence business has pressed for any more fundamental linkage to basic social theory. But once such a linkage is made, we may find ourselves in possession of a model of human action that casts a different kind of light on practical reason, treating it as derivative and relative, not basic and universal. In making the

link to social science, Finnis has opened the way for a whole new dimension in the debate between legal positivism and natural law. To the extent that these can be linked to social science theory, they become empirically falsifiable. And the debates that have appealed to intuition and logic alone must now be subjected to systematic checking against the facts of human experience.

E. Neil MacCormick and Ota Weinberger

More recently Weinberger and MacCormick have advanced an institutional theory of law which solidly locates law in social reality. Like their positivist predecessors, they reject natural law attempts to find the normativity of law "necessarily rooted in objective values or immanent principles of right" (7). Because such values and principles are unprovable and widely contested, and because it is possible to account for legal and social norms without such assumptions, they find the natural law approach unsatisfactory. On the other hand, they are also anxious to distance themselves from a behavioristic sociology that denies the reality of immaterial entities. They find norms to be real or existing entities in every necessary sense because they continue through time and because they have causal effects in the material world as people use them as guides to behavior. Having said this, however, they are satisfied to leave an examination of the empirical origins and existence of norms to sociologists (47, 49). Yet they do want to claim that by defining law as "institutional fact" they are establishing a theory of legal dynamics which emphasizes the social reality within which the normative system is to be studied and understood by legal scientists. But while recognizing that jurisprudence "must remain a joint adventure of lawyers, philosophers and sociologists," MacCormick advances a theory which he understands to be concerned directly with the philosophical issues alone. Consequently, he uses the term "institution of law" to signify "those legal concepts which are regulated by sets of institutive, consequential and terminative rules..." (53), and not any more fundamental sociological realities.

III. Developments in the Social Sciences.

While Weinberger and MacCormick seek to establish the sociological relevance of their approach by repudiating behavioristic social science which will not acknowledge social realities

like rules or other "institutional facts," I will simply assume an intellectual climate that has little loyalty to classical behaviorism, and explore those sociological processes which account for norms and institutional facts, with the hope of augmenting our understanding of the nature of law. I want to approach the theory of law explicitly on the assumption that law is a phenomenon common to most human societies, past and present. While not universal, it seems to emerge naturally at times and places where it has been absent. As human beings come and go in this mortal existence, almost all adjust their lives to accommodate and support law as a fundamental feature of their existence and their relationships with others. It would seem obvious that a comprehensive theory of law needs to account for the existence of law at this level, as well as for the many forms that law takes in various social contexts. Perhaps a theory explaining law at this basic level might also help us understand better the alternatives to law in human experience, and the inner structure of legal relationships common to all law that may be what natural lawyers intuitively recognize and struggle to identify coherently.

Philosophers of science have wonderfully expanded our understanding of the character and function of scientific theories over the last half century. They have shown us that theories cannot be proved true, but may be shown to be false when they predict events that do not occur. And they have helped us see the heuristic functions of theories, by which their adequacy must be judged. The present project arises from the judgment that the time may be ripe to move legal theory firmly into the domain of general social theory. This will give us new perspectives from which to evaluate old issues. My thesis is that such a move may offer promising new solutions to some of the most persistent conundrums of legal philosophy.

A. Economic theory

The idea of merging the theory of law and society is not new, and can be seen in the writings of some legal theorists early in the twentieth century. But holistic social theories have never offered legal thinkers attractive handholds by which to effect a convincing merger. Furthermore, with the emergence of normativist social theories in the work of Parsons and others

after mid-century, it has been easy to assume an unstated and undeveloped congruence between law and sociology.

However, not until the emergence of neoclassical economic theory in the 1970s and 1980s as a clearly superior model of human action in the economic sphere did individualistic theories of society begin to gain courage and overcome barriers between the social science disciplines. The key to all these approaches has been the rejection of classical holism, which held that features of society as a whole could only be explained with propositions about social wholes. The neoclassical economists were explaining every kind of general economic fact by reference to the actions of individuals, who were characterized in turn as purposeful, self-interested, and rational in their conduct. As practitioners of sociology, anthropology, political science, and history began to incorporate this theoretical framework, they, too, advanced explanations for general features of society in terms of the behavior of individual members of the society.[10]

B. Niklas Luhmann

Interestingly, the most powerful and insightful attempt to link legal and social theory during this period, though still committed to traditional holistic sociology, did consciously begin with a specification of those "elementary law-making structures and processes" which sociology and psychology must share, i.e., characterizations of individual action in the creation of norms (23)24). As Luhmann further noted in 1972, "more recent developments in psychology, social psychology and sociology exclude the possibility of completely differentiating the subject areas of these disciplines at an ontological level, i.e. distinguishing between individual and society or between experience and action" (23). While Luhmann excuses his foray into the unavoidably individualistic foundations of his theory as a necessary preface, he does manage to clarify some important issues about the nature of norms beyond what other theorists have accomplished.

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[10] See Opp, p. 208.

Luhmann was driven to this individualistic level of analysis by the need to accomplish what legal theorists and sociologists of law everywhere persisted in failing to do, that is to account for the very *positivity* of law. How do norms made by men gain obligatory status in the lives of people and societies? "Until today there is not a single notable beginning to a sociological theory of the positivity of law. The positivism debate was left to the jurists and was, in their hands, irremediably restricted to the immediate legal problem of the legitimating bases of positive law" (20).

C. Rational Choice Theory in the Social Sciences

Despite the fears of Luhmann and other traditional sociologists of being tainted with "psychologism" or "methodological individualism," the rational choice model from economics has been sweeping through the social sciences. Surveying recent developments in anthropology, Robert Edgerton has described the full-blown apostasy from the mid-century normativism derived from Durkheim and Parsons. On the normativist model, "society after society was depicted primarily in terms of the consistency, regularity, and continuity of its system of rules and of the power of these rules to bring about behavioral conformity. But, as Edgerton reports, critics of this view came to characterize humans as strategists using these rules in calculated ways to promote their individual welfare. "The essence of human life did not lie in following rules and in being rewarded by one's virtue but in making the best use of rules for one's own self-interest, depending on the situation" (13). To illustrate how far anthropology of law has moved from mid-century holistic normativism toward a rational choice model, Edgerton cites anthropologist S. F. Moore as saying, "the making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing and unmaking of rules and symbols in which people seem almost equally engaged."[11] Edgerton observes that these views have become conventional, replacing the earlier normativist approach.

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[11] Citing S. F. Moore, *Law as Process: An Anthropological Approach*, London, Routledge & Kegan Paul, 1978, p. 1.

"In most social theory today, rules are seen as ambiguous, flexible, contradictory, and inconsistent; they are said seldom to govern the actions of people, much less to mold these people by being internalized by them. Instead, they serve as resources for human strategies, strategies that vary from person to person and from situation to situation. . . . Order is never complete and never can be" (14).

D. James C. Coleman

Coleman explicitly rejects the old normativism, in advancing his own rational choice model for the foundations of social theory (4). While Coleman clearly understands that his individualistic approach to social theory will provoke his critics to revive old complaints about "reductionism" and "methodological individualism," he believes the traditional alternatives have failed, and economics is the only success story in town. Moreover, he finds much of the older criticism of individualistic approaches misplaced. He argues that for any science, system level explanations are always less adequate than explanations in terms of the actions of units at a more basic or fundamental level. In descending below the system level, he finds "that a natural stopping point for the social sciences is the level of the individual," and that explanation "based on the actions and orientations of individuals is more generally satisfactory" (4). He goes on to identify law as one of the main areas in which the process by which individual actions combine to produce system level outcomes is poorly understood (21).

IV. Conclusions

Given the confusing and ineffective theoretical approaches developed in the first century of the social sciences, legal theorists may have been well advised to keep their much older theoretical tradition separate. But legal positivism, the leading version of legal theory, has shown that a concentration on the meanings and logical relations of legal concepts, however much supplemented by intuition, common sense and legal experience, is not adequate to make full sense out of the human experience of law, and the traditional understandings of legal obligation and rule of law in particular. However, modern economic science has advanced a radically

individualistic theoretical approach which has propelled economics to the fore as the most successful of the social sciences. And its basic theoretical stance is proving both attractive and adaptable to all the other social sciences. It might be hoped that the current revolution in social science theory has opened a door through which legal theorists might enter, giving legal theory the advantage of a powerful additional perspective in future efforts to develop the understanding of law.

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