Readings in comparative sociology of law

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PART ONE
THEORY
CHAPTER 5

METHODOLOGIES FOR CRITIQUING AND JUSTIFYING LEGISLATION

A. INTRODUCTION

PROBLEM

From: Director, Drafting Section

To: Mr Wang, Senior Drafter

We are asked to consider the problem of our foreign private investment laws. As you know, these have become extremely important in light of our Reforms. I should like you to review our present legislation and prepare a memorandum suggesting the ways in which you think we should amend them in order to achieve the Reform's objectives.

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NOTES AND PROBLEMS

1. To answer the Director's question, what steps would you undertake, and in what order? Answering that question constitutes the theme of this Chapter.
2. What does it mean to "think like a lawyer" about legislation. All efficient thinking requires --

(a) an agenda that, if followed, likely leads to useful solutions to the sorts of problems addressed;

(b) an overall perspective that explains how things work in ways relevant to the subject-matter; and

(c) a set of concepts (or vocabulary) appropriate to the subject-matter.

These same three elements constitute a "theory" A adequate theory for law and development must consist of an agenda of steps to take to decide what the legislation ought to contain, perspectives likely to insure that the legislation fits government's overall policies, and a vocabulary that directs the investigator to the relevant material, and excludes the irrelevant.

3. In this Chapter we discuss alternative methodologies--ends-means, creeping incrementalism and problem-solving. Throughout this book we discuss alternative theories and analyses, and try to induce the reader to debate them and finally decide which makes the most sense for the discipline of Law and
Development in China's circumstances.

Why do we discuss alternatives instead of telling the student which we, the editors, believe the best? We do this for two principal reasons: First, as a matter of ethics of teaching, we believe that teachers have a moral obligation not to impose their judgments of what is good upon the students. Of course we, the editors, like all teachers, have our view of which of these methodologies best serves our purposes (we believe strongly that problem-solving does, and we use that throughout the remainder of this book). The reader, however, may disagree. We must give the reader the opportunity to make up his own mind. We cannot do that unless, as fairly as we know how, we present the reader with these alternatives.

Second, as a matter of good teaching, we believe that people learn in the context of debate and controversy. We hope that students will actively argue over which of these various theories that we put forward throughout the book will best serve the purposes for which we put them. Only so can students learn the critical habit of mind — and without that habit of mind, they will never think creatively. Without critical, creative thinking by its practitioners, the legislative process will never produce the excellent legislation that China needs.

3. This book aims to help readers learn to develop new
legislative programs that will help solve China's social, economic and political problems. We do not know how directly to teach students to think. We cannot reach into their minds. We do believe we can teach students to write competent justifications of their decisions. What is a justification? A justification consists of reasons written after the decision has been made justifying the decision.

What relationship does a justification have to the actual reasons for reaching a decision? Judges frequently write opinions in cases before them. Without exception, decisions constitute justifications for the decision. The judges always write them after making the decision, not before. They surely do not represent the way judges reach their decisions. Some judges reach a decision in a sudden flash of understanding. (The psychologists call that a "Gestalt"). Other judges reach decision only after a painstaking, logical construction of a logical argument. Others vary between these. We can only be sure that practically never did a judge reach decision by the same process as the argument in the opinion or justification.

The justification, nevertheless, bears an essential relationship to the decision. For many, probably most judges, the process of close analytical reasoning begins not before the decision, but later, when the judge tries to write out his justification. It is as though the decision is an hypothesis
that the judge later must "prove" correct by writing a closely-reasoned, analytical justification. Sometimes judges say that their first decision "would not write", that is, that they could not write a sensible justification for the decision. Then a responsible judge must change the decision. The justification becomes the aspect of decision-making which ensures its rationality, its close attention to the facts and to the law. The justification, not the original decision, becomes the essential step in judicial reasoning. (In some American states this has seemed so important that the constitution requires judges to give written opinions in all cases!)

So also with the process of reaching decision with respect to legislation: Whatever method one uses to reach decision, the close analytical reasoning required really begins in earnest when one tries to justify or critique legislation. The memorandum explaining, justifying and critiquing legislation thus serves a function in legislation analogous to that served by a judicial opinion in the judicial process. Learning how to write good memoranda justifying or critiquing legislation is the process of teaching students to "think like a lawyer" about legislation.

5. In this Chapter we compare and contrast three quite different modes of policy-oriented decision-making that we denote as ends-means, creeping incrementalism and problem-solving methodologies. A "methodology" can be viewed in two ways. On
the one hand, it is an agenda of steps to take to reach a
decision. On the other, it can be viewed as an epistemology.
Epistemology is the philosophical discipline that asks, How do we
know that we know what we think we know? When I say that the
Resolution about teaching basic knowledge of law is a wise, or
good, or sensible law, how can I be sure that I am right?
Usually, we believe that we are correct because we have reached
our decision by a methodology -- that is, a series of steps--
that we believe likely to reach a sound conclusion. What people
believe constitutes a reliable methodology varies from era to era.
In the past, in some countries among some peoples, it was
believed that if one burned incense in front of a shrine, the
correct answer would come from the Gods. In other countries it
was believed that if a Great leader said a particular proposal was
a Good Thing, that made it so. In other times and places, it was
believed that the only propositions that had any basis were those
that rested on data that could be counted -- "if you can't count
it it doesn't count." Our notions of what steps we have to take
to assure ourselves that we know what we know vary from time to
time and place to place.

That states the first requirement for an adequate
methodology. When we discuss agendas (that is, steps to take to
reach a decision) ask yourself not merely whether the agenda
seems efficient and useful. Ask also whether the steps seem
calculated to result in a sensible, wise, and just conclusion.
Methodologies for the legislative process have a second required characteristic. Because lawyers in the legislative process must always justify their proposals to others, no agenda will serve unless it makes possible public justification. An epistemology that rests upon completely subjective factors will not serve that purpose. A lawyer in the legislative process can hardly go before the Standing Committee of a local People's Congress, for example, and when asked why he recommends a particular bill, respond by saying, "Because that is the sort of person I am." He must give reasons that other people can see make sense -- and other people cannot look into the drafter's mind and heart. In a democratic society, legislation should win approval not because it is advocated by a charismatic Leader, but because the reasons given for the legislation persuades the public on grounds based in reason and evidence, not bias and prejudice.

A. ENDS-MEANS METHODOLOGIES

C.E.LINDBLOM, THE POLICY-MAKING PROCESS (1960)

P.12

1. Faced by a given problem,
2. a rational man first clarifies his goals, values, or
objectives, and then ranks them or otherwise organizes them in his mind;

3. he then lists all possible ways of policies for achieving his goals,

4. and investigates all the important consequences that would follow from each of the alternative policies,

5. at which point he is in a position to compare consequences of each policy with goals,

6. and so choose the policy with consequences most closely matching his goals.

Some people define a rational choice as one that meets these conditions. Others have merely claimed that these are the steps that any rational problem-solver should take. Either way, these steps constitute a classical model of rational decision.

In A Primer for Policy Analysis (1978), Stokey and Zeckhauser state that their approach is that of "the rational decision maker who lays out goals and uses logical processes to explore the best way to reach those goals." This involves five steps:

1. Establishing the Context. What is the underlying problem that must be dealt with? "In a market oriented society" [Stokey
and Zeckhauser do not consider the problem in any other society; the question becomes: Is the market performing satisfactorily in this area or not?" There are six possible explanations for unsatisfactory market performance:

"1. Information is not shared costlessly among all prospective participants in the market.

2. Transaction costs [that is, the costs of making a bargain] significantly impede the conduct of beneficial trades.

3. The relevant markets do not exist.

4. Some of the participants in the market exercise market power.

5. Externalities [i.e., costs of doing business that for one reason or another the producer does not have to pay, but can load onto somebody else without paying for it] are present, so that the actions of one individual [or organization] affect the welfare of another.

6. The commodity involved in the policy choice is a welfare good.

What specific objectives are to be pursued in confronting this problem? These must be stated specifically, preferably in quantitative terms.
2. Laying out the Alternatives. What are the alternative courses of action? These must be catalogued. Can the alternative courses of action be designed so as to take advantage of additional information as it becomes available?

3. Predicting the Consequences. What are the consequences of each of the alternative possible actions? In particular, what techniques are available for making those predictions? Here, the analyst frequently turns to a "model" of the problem, and uses the model to predict outcomes. By model the authors mean "an abstraction of the real world designed to capture the essential elements of the problem." If outcomes are uncertain, what is the estimated likelihood of each?

4. Valuing the Outcomes. First, how should we measure success in pursuing each objective? Second, Recognizing that an alternative will inevitably be superior with respect to certain objectives and inferior with respect to others, how should different combinations of valued objectives be compared with one another? "The public decision maker is elected or appointed to make the tough decisions among competing objectives. . . ."

5. Making a Choice. When all aspects of the analysis are drawn together, what is the preferred course of action?
1. Compare and contrast Lindblom's with Stokey and Zeckhauser's formulations of the ends-means methodology. Lindblom wrote his formulation in order to demonstrate its inadequacy -- a criticism we consider in the next section. How do these two formulations differ, if at all? Which seems to you the most useful?

2. "Organized systems of thought are results of man's efforts to cope with experienced difficulties. The configurations of such a system of thought will be different if establishment of basic institutions is a key issue, in contrast to the system of thought that emerges from inquiry into policy issues that arise within an established and accepted institutional framework." P. Dorner, "Needed Redirations in Economic Institutional Framework for Agricultural Development", in P. Dorener (ed.), Land Reform in Latin America (Madison Wisconsin: Land Economcs, 1972) p. 5. Into which of these two systems of thought does Stokey's and Zeckhauser's methodology fall?

3. To discover the objectives of policy, where -- if at all-- to Stokey and Zeckhauser advise the policy-maker to search? Whence do they derive their means? How would you do research on the desirability of ends? of means?

4. Stokey and Zeckhauser state that in a "market-oriented
society" every question can be reduced to this: Whether the market is working satisfactorily. Do you agree? What use is this in an economy aspects of which operate in terms of the market, but in which the dominant aspects operate in accordance with a Plan? Where do Stokey and Zeckhauser take problems of distribution of income into account?

B. MUDDLING THROUGH; CREEPING INCREMENTALISM

LINDBLOM, THE POLICY-MAKING PROCESS (1963)

pp. 13-27.

[AFTER SETTING FORTH HIS VERSION OF THE "CLASSICAL" MODE OF DECISION-MAKING, SEE ABOVE, P. XX, THE AUTHOR ARGUES THAT IT HAS MANY INADEQUACIES].

"Policy-makers are not faced with a given problem. Instead they have to identify and formulate their problem. Rioting breaks out in dozens of American cities. What is the problem? Maintaining law and order? racial discrimination? Impatience of Negroes with the pace of reform now that reform has gone far enough to give them hope? Incipient revolution? Black power? Low income? Lawlessness at the fringe of an otherwise relatively peaceful reform movement? Urban disorganization? Alienation?"
For complex problems, none of steps 2-6 of the classical formulation can actually be performed, for lack of adequate information. There is never enough time or resources to do a complete research job; all decision-making takes place with incomplete information. It is difficult or impossible to find appropriate values to guide policy choices. There is no agreement on values except in terms so vague as to be meaningless ("freedom" or "wealth"). The phrase "the public interest" in fact goes no further, for there is always conflict over whose interests constitute the "public interest". The phrase "the public interest" is only a shorthand for the speaker to say that he or she is concerned about the issue and that others are also concerned -- or ought to be.

Seven strategies or "dodges" can be used to make decisions that move a policy along without risking too much:

1. Satisfying: find a goal short of maximization, and pursue that lesser goal.

2. The next chance: Choose a policy (even if not exactly the right one) that leaves open the chance of rectifying a mistake and making a better, next step.

3. Feedback: Choose that policy that will generate new information about how things work -- "feedback" -- for use in
taking the next step.

4. Severability: Focus policy on removing difficulties one by one, not on achieving objectives.

5. Seriality: Policy-making is a never-ending process in which we take little nibbles out of a difficulty, not one great big bite. Design policy looking out for a possible next step, and third and a fourth step as well.

6. Bottlenecks: Plan policy around the most obvious difficulties -- the places where decision-making seems to break down, rather than planning policy on the notion that it is possible to make everything fit with everything else.

7. Usually a policy that is politically feasible is only incrementally or marginally different from existing policies. Adopting that policy has three advantages: (1) it concentrates analysis on familiar, better-known experience; (2) it sharply reduces the number of potential alternative policies to be explored; and (3) sharply reduces the number and complexity of factors the policy-maker has to analyze.
C. PROBLEM-SOLVING

In discussing how to use law to overcome social problems like rioting in the cities, Chambliss and Seidman propose a methodology completely different from the two already discussed: Problem-solving.

CHAMBLISS AND SEIDMAN

LAW, ORDER AND POWER

(2d ED., 1981)

pp. 9-19

How to use the experience with the legal order's response to discrimination in education, industry, and universities to fashion a solution to discrimination?

Every human situation has unique qualities; two people never view the moon from precisely the same angle. Factories differ from universities. How do we learn from always unique experience something helpful about a new situation which is itself necessarily unique? With respect to the legal order, that plainly calls for knowledge of two sorts: knowledge about the uses and limits of law, a methodology for acquiring usable knowledge, and knowledge about the methodology of making workable policy judgment. What sort of knowledge can at once derive from unique, nonreplicable human experience, and at the same time teach us something useful about a new, unique problem? We try to characterize the sorts of knowledge required in the following section.

1.4 KNOWLEDGE ABOUT THE LEGAL ORDER

Sensible problem-solving through the legal order requires extensive knowledge about how the legal order works. Just as a cabinetmaker cannot expect to produce well-designed, long-lasting furniture without extensive knowledge about the capacity of his tools and woods, so we cannot solve our problems through the legal order
without knowledge about its limits and potentials. We conceive that the study of how the legal order actually works becomes a necessary, but not sufficient component of an adequate theory of justice. Justice theory must concern itself with the question, What ought the law to be? The ought supposes the can, or the question becomes idiotic. For example, in 1954 it appeared that the institutionalized patterns of discrimination in education would be permanently destroyed with the decision in *Brown v. Board of Education*. Almost thirty years later, buttressed by streams of federal and state legislation and numerous court decisions designed to achieve racial equality in education the problem has scarcely been touched. In 1972, it appeared that to ensure equal employment opportunities for academic women required only that universities in their roles as employers change their behavior to act in a nondiscriminatory way. Machinery to accomplish that already stood in place, created for industry by the Civil Rights Act of 1967. Under sway of the normative myth, how easy it was to assume that the Civil Rights Act secured the rights it purported to do, and sweep under its scope university women. A sophisticated decision-maker might have asked what we could learn about the problem from the industrial experience in the five years since the enactment of Title VII, and more generally from law and society studies. How to use the experience of trying to solve employment discrimination in industry to resolve employment discrimination in the academy? How to learn from experience?

That general problem has a long provenance. It is evident that underpinning attempts to control the world must lie knowledge of the world. Long ago, Sir Francis Bacon put the objective of learning to be the discovery of the "secret motion" of things, to the end that people could control their environment. An airplane designer ignores the law of gravity at peril. Lawmakers equally at risk ignore the "secret motion" of people-in-society. Solutions aimed at symptoms rarely succeed. We must first understand causes—the "great motion" of things.

The difficulty is that people and things have different characteristics. The eighteenth-century conception of society copied that of the physical sciences, taking as its model the clock. A rubric expressed its central principle: "same causes, same effects." Lawrence Friedman and Stuart Macauley have the same model in mind when they argue that "the ideal for the social sciences is the situation in the physical sciences; what is true of falling bodies in New York is true of them in Brisbane tomorrow and Nairobi yesterday. It is a view which assumes that there are systematic, universal ties between law and society and that these ties can be uncovered through the methods of the physical sciences."²⁰

Laws of course embody purposes, plans, policies, desires, ends, goals, anticipations—that is, they embody conscious choice. If society really does constitute a giant clockwork, then choice disappears, for even our sense of choosing becomes only an illusion. Material causes, it seems, make our choices ineluctable. Law embodies choice. Unless we have some degree of freedom in choosing, the creative use of law to solve existential problems disappears.

Karl Popper and a host of others have pointed to the miscomprehension of the natures of people and society implicit in the clockwork model.²⁰ Human beings have
consciousness. Every human situation is therefore in a sense unique. It is precisely that consciousness and that uniqueness that distinguish people from inanimate objects; it is these qualities that distinguish social science from physical science.

History demonstrated the naiveté embodied in the clockwork view. No sooner did social scientists develop “laws” about human behavior than eternal human cussedness proved them less than invariant. Society came to resemble a cloud of midges, whose only governing principle requires one to turn back if too far from the swarm. The first view made it seem as though the amorphous cloud of society in fact operated as a clock. The second view (supported by developments in physics) made it seem that all clocks only masked a cloud. The new principle appeared to be “same causes, who knows what effects?”

If all clocks only mask clouds, however, then prediction becomes impossible. If prediction becomes impossible, then purpose disappears in the world. On that view of the world, one might as well plant a stone as a seed: what emerges depends on random chance. Like the all-clouds-are-clocks model the all-clocks-are-clouds model too made law impossible. The one denied choice, the other denied purpose.

Two positions emerged in the face of the insufficiency of both clocks and clouds. Mainstream social science asserted a sharp difference between the Is and the Ought. The world that Is became a clock; the world of the Ought became a cloud. Purpose lived, for prediction about what Is remained possible. Choice, too, lived, for the cloud remained the model for the Ought. The conventional language of ends and means captures this position. In the world of the Is, clockwork reigned, prediction became possible, and values disappeared. Propositions about the world of the Is caught unvarying relationships, true everywhere and always. In the world of the Ought, however, clouds reigned, prediction became impossible, and values determined everything. All propositions embodying a decision about what we ought to do ultimately rest upon values and sentiments. The philosopher David Hume preached the discontinuity of the Is and the Ought, and that reason should always serve as slave to passion. In that view, a proposition urging that government should enact a law of a particular sort to solve a particular problem expressed policy. Since that involved ends, it must rest upon the personal predilection of the decision-maker. Experience could only tell us the likely consequences of alternative courses of action, not whether any of these ought to come about. The personal tastes or desires of lawmakers hardly serve to justify public policy.

In this view all law—including the 1954 Supreme Court decision and the 1972 decision to include universities under Title VII—constitutes no more than the personal value-choices of those making the decisions: judges and Congressmen and women. The decisions involved the ends of ensuring equal educational opportunity for minorities and equal employment opportunities for women in universities. Furthermore, experience must be irrelevant to the decisions—they rest entirely upon the subjective values of the people. Research might explain what formed their consciousness—past socialization, interest group pressure, personal interest, and so forth. The experience of educational and employment discrimination against minorities
and women could not bear upon the issue of choice and ends, however, because experience is not supposed to advise us about ends. Only values can do that.

Such a point of view, still quite common among those social scientists who identify with an extreme form of sociological positivism, is severely myopic and misleading. Attempting to divorce social science from social policy by circumventing the problems of making choices inherent in human social relations is no solution. The problem does not disappear by fiat. Social science by its very nature discovers relationships that have political and policy implications. The output of law and society studies necessarily consists of intellectual tools appropriate to the solution of real-life troubles. However, every historical situation is unique. How to learn from one unique situation something useful for solving another problem, in another place, involving different people is at the very heart of the study of law and society. A concomitant problem is how to use the empirical investigations of social science that ineluctably deal with past events in order to understand and guide problem-solving in the future.

To accomplish these ends requires a different vocabulary than ends and means. It requires a vocabulary that does not implicitly distinguish between Is and Ought, between fact and value. John Dewey called a proposition expressing what we ought to do to solve a particular problem an end-in-view. People are starving; we seek to do something about it; we develop a plan to transfer food from one place to another. These constitute an end-in-view.

In the 1960s organized demonstrations, political mobilization, and lobbying by women's groups created a problem for the government of Great Britain, as it did for governments throughout the world. In Britain the government responded by passing the Equal Pay Act of 1970. This act, which came into force in 1975, made it illegal for employers to pay women lower wages than were paid to men for the same work. Ten years later, despite the Equal Pay Act and a number of other laws designed to accomplish the same goal, women's average earnings remain at 64 percent of those for men. The point of view that sees social science studies of law as solely concerned with the "Is" and as unable to suggest how to make law more effective denies that we can learn from this experience.

We do not agree that social science must deny the political and social implications of our work. Instead of the language of ends and means, we suggest the language of problem-solving as appropriate to the study of law and society. Difficulties, explanations, proposals for solution (or ends-in-view) are all part of the outcome of social scientific inquiry. Every proposition about the world has a value-content; every proposition also has a factual component. The task of social inquiry is to stipulate how these different facets of social inquiry mesh together.

The methodology implied by the point of view that sees problem-solving and social science inquiry as inextricably intertwined results in a variety of propositions about the world. These propositions base themselves to some extent upon knowledge about past experience. Their utility, however, lies in solving new and different difficulties. How to use past experience to generate knowledge useful in future situations?
We believe that the answer to that question lies in the concept of the *heuristic*. Propositions based on experience in one time and place cannot state reliable predictions about how people will behave in a different time and place. Human behavior too closely resembles a cloud to make those predictions very reliable. On the other hand, social behavior has some clock-like characteristics. That particular factors explain behavior in one time and place at least suggests that by examining similar variables in some other time and place we can economize our research.

We mean by a heuristic a general proposition causally relating two or more categories of experience. In policy-oriented research, heuristics focus our attention. In searching for the causes of a troubled situation, the researcher learns from heuristics that if one looks in particular areas, one will likely discover those causes. For example, research has long suggested that review agencies have great difficulty in holding accountable officials or agencies who exercise broad discretionary power. Employers always claim that the decision of which particular person deserves an appointment calls for difficult, highly subjective judgment that only management can make—that is, they claim that management must have great discretion in deciding who shall be employed. From this one might derive a tentative explanation for the failure of the 1972 amendment to help academic women to resist discrimination: courts cannot easily hold accountable university tenure decisions because they involve the exercise of broad discretion.

That proposition does not state how the world goes in every case. It does not state that universities win every Title VII lawsuit involving women only because universities successfully conceal discrimination behind the vague contours of discretionary choice. It does state that if one seeks an explanation for the general failure of courts to solve women’s Title VII difficulties with universities, it might prove useful to look at the issue of scope of discretion and accountability. Only if one has made an investigation, however, can one discover actual causes of the behavior at issue. "No historical situation can be understood by 'applying' such laws, as one applies laws to particular occurrences in natural science. Indeed, it is only insofar as one has an independent historical grasp of situations like this that one is able to understand what the law amounts to at all." 24

There is an important paradox in the study of law, then, that must be recognized. Law, as Pashukanis argues, is "historically specific," but at the same time it "parallels a real history which unfolds itself not as a system of thought, but as a special system of social relationships." The study of law, thus, must not only recognize the uniqueness of law and the legal order in a particular historical period, it must also take into account the historical development of these social phenomenon in order to comprehend the potential for as well as the limits of change. This in turn requires empirical investigation. Chairman Mao Tse Tsung put it pithily, "No empirical investigation, no right to speak." 25

Given a new rule of law a proposition about its likely impact not only serves to put the law in its proper historical context but also serves as a prediction of behavior. The proposition that review agencies have great difficulty holding accountable agencies
that exercise wide discretion now becomes a prediction that if universities continue to have great discretion in awarding tenure, courts will likely continue to fail to hold them accountable.

Knowledge of this sort ordinarily falls under the rubric, "the limits of law." To optimize legal impact, we must honor the limits of law. Our knowledge about these limits takes the form of propositions, general in form, stating the probable causal relationships between law and social variables—sometimes called "theories of the middle range." These "seek to map, and proclaim the propriety of mapping, the social world in a limited way—province by province, sector by sector." However dogmatically phrased, a proposition purporting to express knowledge about human affairs necessarily derives from past experience. A proposition purporting to express knowledge only tells us that in the particular times and places from which it derived, it held. It contains no warranty that it will hold in some new time or place. Nevertheless, it sums up the lessons of experience. It can serve to guide problem-solving in a new arena, but it comes with a built-in warning not to trust it implicitly. We live in a world both of clocks and of clouds.

We learn through experience. We can generate theory only by experience; we can understand experience only through theory. What we learn through doing finds its expression in heuristic propositions of the middle range.

Taken together, these heuristic propositions of the middle range constitute a statement of existing knowledge about the ways that law influences society, and its limits. Generating knowledge of this heuristic sort we take as a core task for law and society studies about the legal order. The limits that society imposes upon the law's capacity to change behavior explain how society determines what rules get enacted, and why, and what rules get enforced, and why. The study of law as an instrument to mold society becomes paradoxically but inevitably also a study of society as mold of law. The enterprise of generating knowledge of that sort cannot succeed if we wear the blinders of myth; we can learn through experience only to the extent that we look squarely at the data. As Gunnar Myrdal said, "Facts kick."

1.5 THE ELEMENTS OF THEORY ABOUT LAW AND SOCIETY

As we conceive it, the outcomes of the study of law and society ought to consist of propositions about how to solve existential social problems, that is, ends-in-view. To do that requires heuristic propositions embodying existing knowledge about how the legal order works. It also requires heuristic propositions advising how to go about solving social problems through the legal order. We call this body of knowledge theory.

The subject matter of the study lies in the world of "facts," of "data," of flesh and blood. Yet propositions do not arise out of data by mere inspection. The aimless collection of "facts" will no more lead to reliable knowledge (save by serendipity) than will the ditty bag of an idiot contain only gold and precious stones. Blindly to
examine forty unsuccessful Title VII cases may only end with a catalog of plaintiffs' names, or details about the length of the opinions.

The exploration of the vast mazes of reality demands a guide. Before a geographer can construct a map, he must have in mind a process that will, if followed, yield a reliable map. Before a navigator can use the map safely, she must have knowledge about a process by which she can relate the map and the existential world. Neither geographer nor navigator observes stars or mountains or rivers at random. Each follows a procedure believed to result in the acquisition of reliable knowledge. We subsume those procedures under three headings: methodology, perspectives, and vocabulary (or concepts). Here we discuss methodology; in Chapter 2, perspectives, and Chapter 3, vocabulary.

1.6 METHODOLOGY

How to generate reliable heuristics about the legal order? Facts do not come packaged as sentences. Propositions do not lie immanent in fact. Knowledge, not facts, has a logical form. Methodology has as its central task moving from an apprehension of experience to reliable heuristics expressing causal relationships in the real world.

Law and society research usually begins with a discontent. Management uses its position to injure shareholders; the police do not investigate rape complaints with sufficient vigor; or (in the cases we earlier mentioned), antidiscrimination laws do not seem to afford women and minorities relief against discrimination. That in turn comes down to whose discontents one will investigate—an issue we return to later.

Second, having defined a particular trouble, one must propose alternative explanations for it. That calls for the invocation of heuristics drawn from past experience. For example, one might begin with four possible explanations for the failure of courts to give much relief for university employment sex discrimination. (1) In a period of raised consciousness, members of an allegedly subordinate group will bring many frivolous claims alleging discrimination; or (2) women as a class have less competence than men do to serve as professors; or (3) where judges share the same class and gender prejudices as defendants, they will rarely find against those defendants; or (4) review agencies have great difficulty in holding accountable officials or agencies who exercise broad discretion in decision-making.

How to choose between these alternative explanations? People can dream up a broad range of heuristics; only a few of them seem to help in solving problems. Those that do help to solve problems have two principal characteristics, falsifiability and empirical warrant. An explanation that one could not in principle falsify through experience does not rest upon experience. It rests upon intuition, definition, or mysticism. It defies the central proposition—that we can only learn through experience. An explanation that the real world does not deny may prove unreliable; one that experience falsifies cannot serve at all. We learn through experience by generating heuristics that seem to fit the available data, and then using those heuristics as preliminary guides to examine the problem under review.
Third, having eliminated most of the candidate explanations and thus identified the "causes" of the difficulty at hand, one can propose alternative solutions addressed to those causes. For example, if it develops that courts in fact have found it impossible to review tenure decisions because they are based on unstated discretionary standards, perhaps the law ought to require universities to state precisely their standards for tenure or perhaps it ought to create a body of independent experts to review tenure decisions applying the discretionary standards of academia but charged to ensure that no discrimination intruded in the decision.

Finally, the research requires implementation, monitoring, and evaluation of the selected solution. Any failure of the action taken to resolve the original difficulty (and no solution ever works completely) falsifies to that extent all the previous steps. The failure in any particular of the bridge falsifies not only the engineering design, but perhaps also the theoretical mechanics upon which the design based itself. The failure of antidiscrimination laws falsifies the proposition that the passage of these laws is sufficient to ensure compliance. Thus do we learn by doing (Dewey). Marx and Sartre called it praxis.

In this agenda, the law-in-the-books constitutes always a proposal for solution. The law-in-action constitutes its implementation. A systematic variance exists between the law-in-the-books and the activity it induces. That gap constitutes a new trouble, requiring in turn explanation and solution. Thus the gap between the promises of antidiscrimination laws and their failure to counteract discrimination constitutes a new trouble.

In the course of proposing explanations, we must articulate major premises in the form of general propositions. If it works in one case, a proposition has some status as knowledge, i.e., as a heuristic. The principal task in the generation of knowledge consists in generating and trying to falsify heuristics. The general stock of knowledge consists in the main of these "middle level" propositions (hypotheses, theories), all of them heuristics, and therefore none of them ever more than problematical. "Policy," "instrumental" or "problem-solving" research, and academic or "theoretical" research in this view constitute parts of the same enterprise.

1.7 VOCABULARY (CONCEPTS) AND METHODOLOGY

An adequate theory of law and society requires a set of categories to guide empirical investigations. If we have no category within which to classify an item of data, it becomes meaningless. English has only a few words for different sorts of snow: slush, powder snow, corn snow. The Eskimos, it is said, have thirty-two words, each for a different sort of snow. We lose the differences that Eskimos perceive between one kind of snow and another, because we lack categories into which to classify the information.

We cannot, however, simply increase the number of categories ad infinitum. Of course every nugget of experience differs from every other. Unless we reduce the infinity of experience into a relatively small number of categories, we lose all ability to deal with it. A map of the world on a one-to-one scale would cover the world. It would
not lose detail, but its very detail would deny its utility. Only by the inevitable loss of
detail involved in creating categories of thought can we understand.

Any choice of categories (or vocabulary) entails an evaluation. To create a
category expresses a judgment that the category helps to explain the phenomenon at
issue. The British rulers of the Gold Coast Colony in Africa solemnly recorded of every
prisoner his tribal origin and his religion. They did not record his social class, his
family situation, his mental or his educational level, his criminal record, his living
conditions, or whether he lived in an urban or rural setting. The categories selected
contained a criminological theory relating crime to tribe and religion, and rejecting
other possible causative variables.

1.8 PERSPECTIVES AND METHODOLOGY

In addition to a methodology and categories, any social theory requires a perspective.
Like every methodology for generating knowledge, the one we put forward here
requires discretionary choice. Consider, for example, the four possible explanations for
university discrimination against women faculty. All express various sorts of senti-
ments, or "values": about the psychology of oppressed groups and their response,
about the competence of women, about male biases, about the nature of discretion and
review. We must make choices at every step in the research agenda: in deciding to
research what questions, what candidate explanations, what modes of testing explana-
tions, what proposals for solutions, and so forth. How do we make these choices?
Problem-solving without explicit control over value-choice too easily becomes
muddling through—i.e., adopting the smallest possible change to help to alleviate
the difficulty. In that case, problem-solving ends up a device for tension-management and
a handmaiden to the status quo.

In research, discretionary choices appear to arise out of the personal consciousness
of the researcher. They may arise out of mere self-interest, or out of the dark, irrational
drives or "residues" or "values" of which social scientists warn us. They guide
research, but unconsciously. Unless the researcher "delivers his domain assumptions
from the dim realm of subsidiary awareness into the clearer realm of cool awareness,
where they can be held firmly in view, they can never be brought before the bar of
reason or submitted to the test of evidence." One must begin by articulating one's
domain assumptions and thus confronting them. The researcher who takes as his
explanation for testing that women and minorities do not have sufficient
capacity for
the education and work they seek ought at least to declare the perspective from which
he views the problem. Mere declaration of bias, however, will hardly do for law and
society studies. Matters of public policy require public justification. If intellect and
science can ever enlarge their control over lawmaking, public justification must rely
upon appeals to reason, not to unreason.

Stating one's values as domain assumptions, however, inevitably leads to attempts
at rationalizing and harmonizing them. Together, they become the researcher's
ideal-typical "model of society" or paradigm. The neoclassical model of capitalist
society, legal liberalism, the political scientist's model of political pluralism, and Marxism constitute examples. Such ideal-typical models serve the same function in problem-solving inquiry as do "values": they guide discretionary choice.

Ideal-typical models frequently embody proposals for solution, for they put forward programs (or "ends") that their authors think desirable. Like all proposals for solution, they either state or imply explanations, whose stated causes they address. Adam Smith did not write a tract exalting free enterprise or capitalism; he wrote an explanation for the wealth of nations.32 So also Karl Marx: Das Kapital did not propagandize for a socialist society (the word "socialism" does not appear in its four long volumes).33 He wrote a description of and an explanation for mid-century English capitalism.

In principle, every end constitutes a proposal for solution. It therefore implies an explanation. The great trick in law and society research lies in converting proposals for law reform (i.e., proposals for solution, themselves not testable) into explanations for solution, in principle subject to the tests of falsifiability and falsification. Every overarching end implies an equally overarching explanation—some call those explanations "grand theory" or "perspectives." Using grand theory to guide discretionary choices in research should lead to the same results as using the "values" or ideal-typical model with which the grand theory resonates.

For example, that antidiscrimination laws fail because male judges share the prejudices and empathize with the white male-dominated ruling class rests upon a domain assumption that ruling class males tend to have prejudices against minorities and women. That domain assumption translates into an ideal-typical model that holds that discrimination against minorities and women will persist until minorities and women make decisions about themselves. That ideal-typical model rests upon an explanation for the world that holds that people generally (and judges in particular) make decisions because they respond to their subjective values. Because social science rarely can do experiments, we cannot likely discover now if women judges in the future will actually make different decisions than do men. We can make an empirical test only of the explanatory proposition.

How to test such overarching theories? The articulation of "grand theory," like the articulation of any explanation, requires discretionary choices. How to guide those discretionary choices? How to test grand theory itself? Ultimately, its test lies in praxis, in learning through doing. The process of problem-solving inquiry requires implementation and monitoring. Implementation generates data to test all the preceding process. Just as building a bridge tests not only its particular design, but the general theoretical propositions that underlie it, the successes or failures of particular social interventions may test the grand theories upon which they were based. Ultimately, however, even that answer becomes unsatisfactory. By what standards do we measure the success or failure of the intervention? That asks not merely by what standards, but by whose? Just as the choice of whose trouble determines the domain of study, so the research must decide from whose perspective to judge success or failure. Researchers can no more avoid choosing sides in the great social struggles of our time than can anyone else.34
1.9 CONCLUSION

In our era, government's principal technique of social control consists of law and legal order. That legal order is supposed to contain within it a panoply of liberal democratic values that ensure democratic control over the state, equality before law, and the protection of essential minority interests. That the times seem so joint, therefore, implies a failure of the legal order to carry out the function it is alleged to have. Since we take as our domain of study the legal order we must examine its seeming failure.

That study, we believe, takes its significance from the legal order's significance, without invoking the legal order, no government, whatever its intent or ideology, can mold society to its policy prescriptions. Without it, ruling classes or elites cannot sustain their domination. Without it, whatever their content, democratic liberties risk. As a community, we must rely on the legal order to solve the problems that face us. Without knowledge about how the legal order works, we cannot use it effectively.

To understand the legal order, we must first generate a theory with which to approach its study. That calls for a methodology, perspectives, and vocabulary advanced a methodology that purports to aid in generating heuristics, the propositions that will guide investigations of particular existential problems. Its function is to aid in taming the biases that inevitably give to research and policy prescription. We argued the functional vocabulary (or categories) in research. In the following two chapters we discuss various perspectives and vocabularies employed in the study of law and society. (Chapter 2) we contrast formal social control systems in stateless and state societies taking the occasion to discuss a few of the broad theoretical perspectives that we have urged for law and society studies. In Chapter 3 the discussion of vocabularies and theories continues with an emphasis on theories of law and categories for studying law and legal order in state societies.

NOTES

5. Ibid., p. 28.
6. Ibid.
NOTES AND QUESTIONS

1. At the heart of the problem-solving methodology put forward in the preceding Reading lie the interrelated concepts of causality and explanation. Why do these concepts play so central a role in an adequate methodology of legislation?

"The validity of this agenda (and therefore the validity both of the propositions of reliable knowledge and policy recommendations it produces) depends upon a special meaning it attaches to the word "cause".... Most social scientists today accept the central proposition of the dialectic, that all the world constitutes an interrelated, mutually interacting set of actors and forces. Marxists addressed this in the counter-intuitive assertion of the unity of opposites. Even though superficial phenomena seem antagonistic, they have an underlying relationship. Whatever their ideological convictions, practically all social scientists today accept the notion of interrelatedness.

The startling proposition of the unity of opposites wars with the methodology by which we ordinarily seek to comprehend phenomena. Most social scientists look for hypotheses that identify an independent and a dependent variable. In that view, one set of events determine another set of events, in a causal relationship that travels only one way.

This determinism denies human choice, for it supposes that given a particular independent variable, human actors can act in only the way that the hypothesis predicts. Thus, a person may hold to the notion that the mode of production (as posited in some crude Marxist versions, the base) determines the legal order (part of the superstructure). Following the one-way causal notion, that base determines the superstructure, Tanzania's failure to use the law and the state fully to restructure its mode of production became inevitable.

That denies the dialectic's command. If all social behavior interrelates, then just as the activity that constitutes the mode of production "causes" the activity that constitutes the legal order, so the legal order "causes" the mode of production. That leads to an intellectual cul-de-sac. If everything determines everything, how to understand anything? I suggest that an answer to that question depends upon an analysis of action.

Action implies choice. Psychologists have an interest in instinctive, reflexive behavior. Social
scientists and historians study action—that is, behavior involving choice. The simplest model of society consists of people and collectivities choosing within a world they did not choose.

In that mode the constraints and resources of their arena of choice channel people's actions. It is as though the actor walked through a forest with trees, rocks, swamps, ponds, rivers. He must choose his path. That choice he makes within the constraints and resources embodied in the forest. Without divine intervention, he cannot easily pass through a rock wall, nor walk on water. By describing the structure of the traveler's world—the external forest and his subjective appreciation of it—we can explain his actions. In this special sense, we can state the causes of his behavior. Based on that explanation, we can propose ways to rearrange his milieu—by driving a tunnel through a rock wall, perhaps, or bridging a river—and thus to restructure his arena of choice. The material world constrains choice and thus constrains the range of outcomes; thus behavior depends upon the real world. Because within the arena of choice people can choose, they can by their actions change the world. People choose amidst the constraints and resources of the world. We explain their behavior by explicating their arenas of choice."


2. What do we mean by "explanation?" Consider the following two different (fictional) explanations for why a particular (also fictional) city, Qibin, is where it is:

"a. Cities usually are located on well-travelled trade routes near a good supply of fresh water.
b. Qibin lies at the intersection of two well-travelled trade routes on a river.
c. Therefore, Qibin is where it is."

This form of explanation takes a syllogistic form. The major premise constitutes a general rule or hypothesis concerning phenomena of this class; the minor premise, the facts of the
case at hand; the conclusion, the state of affairs calling for explanation.

A very different sort of explanation focuses on the particular historical facts at hand. For example:

"a. In 1848, Hai-bin and his family traveled across the grasslands and near Qibin's present site his left off horse lamed himself. As winter was approaching, Hai-bin threw up a mud hut and settled in for the winter.

b. The day before the snows came, the Qi Chenguang family arrived on foot, having lost all their wagons and cattle in a river, more dead than alive. The Wang Hai-bin family took them in and kept them alive through that winter.

c. That spring, Shao Chen-xian came by, making his way westward. He stopped and fell in love with Wang's daughter, Chiou-lin, whom he married after a whirlwind courtship. Now three families had mud huts next to each other.

d. A number of parties passed by on their way to better pastures in the west. was clever with tools, and quickly developed a nice trade in repairing wagons. All three families decided to stay where they were.

e. That spring, yet another family, Zhang Hao-lin came by. They decided that the soil looked good, and they had become dead bored with travelling. That made four mud huts.

f. In July, another family....

And therefore Qibin is where it is."

Which sort of explanation better serves a lawyer involved in the legislative process? In answering that question, consider the central paradox with which we began this section, that is, "how do we learn from always unique
experience something helpful about a new situation which is itself necessarily unique?"

3. If one uses the first sort of explanation, whence comes the major premise? Consider the following alternative possible major premises for an explanation of economic stratification in the United States:

   a. (A Calvinist explanation):
   
   God exists; existing, He loves, watches, intervenes; intervening, He punishes the bad and rewards the good;
   
   The United States contains good people and bad people;
   
   And, therefore, the United States contains rich people and poor people.

   b. (A neo-classical explanation)

   In every society, market forces tend to reward the able and disreward the incompetent.
   
   The United States contains able people and incompetent people.
   
   And, therefore, it contains rich people and poor people.

   c. (A Marxist explanation)

   In every society whose economy produces antagonistic economic classes, the economic ruling class seizes control of the State and its monopoly of legitimate violence, and uses it to ensure its own power and privilege.
   
   The United States has an economy that produces antagonistic economic classes.
   
   Therefore, the United States contains rich people and poor people.

   In the main, we look to general social, economic and political theory as a source for major premises. (In the
example given above, the explanation labeled—rather loosely—"Calvinist" constitutes in context a socio-political, not a religious, theory.) Devising a major premise—that is, a hypothesis—however, always constitutes an exercise in creativity. General theory will rarely yield an explicit hypothesis to explain particular phenomena. The researcher must tease out of the general contours of the theory a particular hypothesis suited for the task at hand.

The problem-solving methodology fashions the remedy—that is, the proposed new legislation—upon the cause revealed by the explanation. For example, if one adopts the Calvinist explanation, the new legislation should create schools designed to make the poor more moral; if one adopts the neo-classical explanation, it should create more vocational training schools, to make the poor more competent; if one adopts the Marxist explanation in the United States, one should organize the poor to revolution so that they can seize the State from the present ruling class. The solution therefore depends upon the hypothesis affirmed; and the hypothesis affirmed depends in part upon the range of hypotheses considered. If one begins and ends, say, with a neo-classical economic theory, and only considers hypotheses drawn from that body of theory, that choice of theory performs the outcomes. In the next chapter we suggest ways of using data to test bodies of theory even as overarching as the three we mention in this Note. Here, we suggest only that in considering any problem the path of wisdom requires
the researcher to think explicitly of different bodies of theory, and ask what particular hypothesis he might tease out of that theory. Faced by the question of inflation in China, for example, a researcher might wear his neo-classical hat, and tease out an explanatory hypothesis in terms of an excess of money supply; he might put on his Marxist hat, and tease out another hypothesis in terms of interest groups inflating prices for their own ends; he might don his Weberian hat, and tease out still a third hypothesis, in terms of the incompatibility of "feudal values" and the Reforms. Only by so doing can the researcher ensure that his own ideological blinders will not prejudice the research in advance.

4. What characterizes an adequate explanation? Without attempting a complete catalogue, three criteria have proven useful in practice: (1) the explanation must have a logical form; (2) it must in principle be subject to falsification by data (i.e., by experience); and (3) a conscientious search for falsifying data turns up none.

Logical Form Suppose that a researcher must find a solution for the refusal of reasonable bail for many black persons accuse of crime in the Plainville Municipal Court, in the United States. Criticize the following explanation:

1. On May 20, 1984, that court dealt with the bail of ten black persons accused of crime.
2. A was charged with atrocious assault and was denied bail;
3. B had a bad record, and was denied bail;
4. C had no permanent place of abode, and was denied bail;
5. D had no fixed employment, and was denied bail;
6. E had threatened a witness in his case, and was denied bail;
7. F had that day received a passport and had bought an airplane ticket to Panama, and was denied bail;
8. The remaining accused black persons received bail.

And, therefore a high proportion of the black persons accused of crime did not receive bail.

Could one structure a solution based on that explanation? Self-evidently, only by transforming it into an explanation with a logical structure, for example:

The Plainville Municipal Court denies black persons bail on any of the following grounds:

1. seriousness of crime charged;
2. previous criminal record;
3. no permanent place of abode;
4. no fixed employment;
5. threat to tamper with a witness; and
6. possibility of absconding.

A high percentage of black accused persons committed serious crimes, had a previous criminal record, had no permanent place of abode, had no fixed employment, threatened to tamper with a witness, or seemed likely to abscond.

And therefore a high proportion of the black persons accused of crime did not receive bail.

Stated in a logical form, one can begin to think about solutions—e.g., that persons ought to receive bail even if
unemployed, or even if they have no fixed place of abode. Unless an explanation has a major and minor premise, it becomes difficult to identify the "cause"—and unless we identify "causes," we cannot fashion adequate remedies.

(Parenthetically, this criterion makes possible the transfer of learning from one unique historical situation to another. If the major premise holds in this case, it becomes heuristic that may apply to the next problem that arises.)

**Subject to falsification** An explanation may fail because in principle nobody could falsify it. That usually happens for either of two reasons. The explanation only restates the problem, usually be redefining it as a matter of "values and attitudes"; or it identifies as a "cause" the absence of the desired remedy. Consider the following explanation for corruption:

**People are corrupt because of feudal ideologies**

**Many people have feudal ideologies (as proven by their corrupt behaviors)**

**Therefore, many people are corrupt.**

That "explanation," of course, runs in circles. The evidence reveals that in violation of the law, many people are corrupt. We want to explain that behavior. We do so by asserting that people have a feudal ideology. How do we prove that hypothesis? By pointing to the fact that many people are corrupt, i.e., the very evidence that demonstrates the problem with which we began. The purported "explanation"
only restates the problem. Or consider the following "explanation" for the same phenomenon:

"People will be corrupt where they are not subject to a penalty of five years or more in prison.

In this jurisdiction, for corruption people are not subject to a penalty of five years or more in prison.

Therefore, people are corrupt."

Obviously, the evidence that demonstrates that a trouble exists also demonstrates the major premise. On the facts of the case at hand, nobody could falsify it. In general, an "explanation" that merely states the absence of a proposed remedy never states a cause.

**Absence of falsifying data** A proposed hypothesis must resonate with the available data. In general, we search for falsifying data, not confirming data. As Karl Popper pointed out, we do not learn from confirming data. For example, we begin with the hypothesis that water boils at 100 degrees Centigrade. We make that hypothesis not out of the blue sky, but out of at least a strong hunch that it represents the truth. If we boil water in an open pot at sea level from now until doomsday, we will learn only that water boils at 100 degrees Centigrade. The confirming evidence has basically taught us nothing. We need boil water only once in a closed pot, or at a higher altitude, to learn that water does not always boil at 100 degrees Centigrade. Out of that falsifying data we can construct more interesting hypothesis relating the boiling point of water to atmospheric pressure.
We must therefore make every effort to falsify our hypotheses, not merely to search for confirming data. The same holds for social experiments. Jeremy Bentham (1748-1832), the father of Utilitarianism, wrote:

From the facts of their times, much information may be derived—from the opinions, little or none. As to opinions, it is rather from those which were foolish, than from those which were well grounded that any instruction can be derived. From foolish opinions comes foolish conduct; from the most foolish conduct, the severest disaster; and from the severest disaster, the most useful warning. It is from the folly, not from the wisdom of our ancestors, that we have so much to learn....

This book does not purport to teach methods of catching data, and how to ensure that one has made a conscientious effort to discover falsifying data. That we leave for other courses to teach, although of course lawyers engaged in the legislative process must become sophisticated about those matters.

5. One can enter the problem-solving agenda at any point. For example, if asked to criticize a draft bill, it frequently will prove useful to regard the draft as a proposal for solution (step 3 in the agenda). You must then discover what difficulty it purports to solve, and what hypothesis it assumes explains the difficulty. You can then assess the proposed bill in terms of the problem addressed, and the explanation given. For example, suppose a proposed bill provides that before appointment, a judge of the Plainville Municipal Court shall attend classes in race relations for a period of not less than thirty days and
receive a passing grade in the course. What difficulty does that suggest the bill aims at? What explanation?

6. Frequently, critics argue that in fact problem-solving merely disguises an ends-means methodology. The assertion that a given state of affairs calls for solution, they argue, does not differ from the assertion that the objective or end of the legislation lies in solving that very difficulty. Do you agree?

7. How does the problem-solving methodology deal with the supposed fact-value dichotomy?

8. In this agenda, the process of generating potential major premises explaining the phenomenon at issue, and testing them, becomes the core enterprise. Those hypotheses do not arise by inspection of the data, but out of existing knowledge--large scale ideology, as we have suggested, our from middle-level heuristics derived from other study and experience. Deriving them constitutes a creative act. For example, suppose that, concerned with the health problems caused by tobacco-smoking, a legislator asks you to generate some devices for reducing the level of cigarette-smoking in China. What explanations for continued cigarette-smoking can you suggest? We concern ourselves here with problem-solving inquiry whose outcomes consist of proposals for new legislation. Proposals for solution must address the "causes" revealed in the explanation. That means that we must in the final analysis seek to explain behavior in terms of the legal order itself. For example, in what sense can
one say that the legal order "causes" corruption? In what sense can one say that the legal order "causes" cigarette smoking?