

# Readings in comparative sociology of law

---

<https://hdl.handle.net/2144/20678>

*"Downloaded from OpenBU. Boston University's institutional repository."*

## CHAPTER II

## SOME OBJECTIONS TO THE USE OF LAW TO SOLVE SOCIAL PROBLEMS

-oOo-

As we have seen in Chapter I, this book takes the viewpoint that law has instrumental uses -- that is, it can help to solve social problems. That viewpoint makes Sociology of Law/Law and Development not merely a subject for a unit of a class in jurisprudence or philosophy of law, but a professional subject. A lawyer involved in making legislation must know the Sociology of Law just as he or she must know constitutional law.

There are those who disagree. Some, like both Griffiths and Kidder, argue that we cannot know how law affects behaviour in any important way. If we cannot know how law affects behaviour, we cannot use it purposively to solve social problems.

Others, like Singer, argue that because language contains so much vagueness and ambiguity, one can never know the content of law. Unless the law-maker and the addressees of law can communicate intelligibly, however, law can never serve to change the addressee's behaviour. It therefore cannot serve an instrumental purpose.

Finally, still others, like Buchanan, argue that we ought not use law to affect behaviour, but should leave that to market forces, that is, to permit individuals simply to bargain their

E (2)

way out of social problems. (Samuels takes a contrary position). As a preliminary matter, this Chapter considers these various objections to the instrumental use of law, in order to give readers the opportunity to evaluate tyhem in light of the central objective circumstances: Society's need for and instrument to accomplish purposeful change.

---

### SOME EXAMPLES OF HOW LAW CAN MISFIRE

Law does not always lead to the kinds of behaviours the legislators expected. In this sense it misfires, just as a gun misfires when one pulls the trigger but it does not shoot, or worse, explodes in the hunter's face.

Consider the casesbelow. Can you discover why the law "misfired", that is, failed to achieve the kind of new behaviour the legislators expected when they enacted it. Are the reasons the same in every case or are they different? Does the nature of these examples support or contradict the arguments of those who claim we cannot or should not try to alter people's behaviour by law?

1 In Nevada, a State in the United States, some years ago the legislature enacted a law requiring a government official to pay \$1 for each pair of coyote's ears brought in to the officials. A coyote is a small, wild, dog-like animal that eats

II (2)

sheep. Raising sheep is a major industry in Nevada. The State introduced the payment for coyotes' ears in order to induce people to hunt coyotes, in order to reduce the coyote population. Instead, farmers began to raise coyotes in pens. They could do so and make a profit selling the ears to the government. Instead of reducing the coyote population, the law increased the coyote population.

2. In the city of New York, by the 1980s people's changing morality concerning sex had reached a point that judges would no longer convict women of prostitution, or, if they did, they would not impose a significant punishment. The New York City police Vice Squad, however, still had as one of its missions arresting and convicting prostitutes. (The Vice Squad is a group of people within the Police Department charged with enforcing the laws against prostitution, gambling, and pornography). As a result of the new judicial attitudes towards prostitution, the Vice Squad could no longer carry out what it understood to be its duty. Meanwhile, New York had enacted a Seat Belt Law, requiring people riding in automobiles to buckle on a seat belt holding them tightly into their seats. Seat belts significantly reduce the chances of serious injury in case of a collision, as it restrains the passenger from flying about the automobile and suffering injuries when the car stops very suddenly. As its purpose, it aimed to prevent injuries in accidents. The Vice Squad, however, used it for another purpose. They would secretly watch a prostitute on a street corner seeking to attract a customer in a

passing automobile. When an automobile came alongside, and the driver and the prostitute struck a bargain, the prostitute would step into the car. (That constituted the crime of "public soliciting for purposes of prostitution"). The police would then arrest the prostitute -- for failing to buckle her seat belt, not for prostitution. That way they could convict the prostitute of a crime of some sort.

3. Consider the Resolution on Acquainting Citizens with Basic Knowledge of Law, 1985. (See abover, Chapter I). Do most citizens today have a basic knowledge of China's law? Is that a "failure" of law in the same sense as Nevada's coyote law or New York's seat belt law constituted "failures" of law?

4. Preier Li Ping said that when, as part of the Reforms, China "opened the window" to the outside world, there flew in also some "flies and mosquitoes" -- for example, corruption; using foreign exchange to buy costly consumer goods for the very rich, instead of using it to buy goods required to help China develop, such as foreign technology and machinery that China does not yet manufacture; and social problems, for example, in some of the new coastal Economic Development Zones, prostitution. In what sense can these also be considered "failures of law"?

5. In the State of Massachusetts in the United States, laws called Building Codes prescribe in great detail the duties of the landlords of apartment houses to keep the building in good repair. (For example, they must repair broken plaster, keep the electrical system operating and safe from fire hazards, maintain lights in the stairs and hallways, and so forth). State officials, called Building Inspectors, examine these buildings periodically. If they find that the owner has violated the rules, they send the owner a notice called a Violation Order, telling the owner what the violation is and ordering him to repair it. In theory, if an owner does not repair the violation, the public prosecutor will bring a criminal action against the owner in an ordinary criminal court. In fact, public prosecutors are so overloaded with "ordinary" crime case -- robbery, rape, murder and so forth -- that they never prosecute Violation Orders. So in 1972 Massachusetts enacted a law requiring every Building Inspector to send to the tenants of each building to whose owner he gives a Violation Order a copy of that Order, together with a letter telling the tenant of the legal actions that the tenant can take to ensure that the building gets repaired. Thus, for example, repairing the building and deducting the cost of the repairs from the rent; withholding rent until the building has been repaired; suing for damages; and so forth. By 1975, however, not a single tenant had ever taken any of these steps, although the number of Violation Orders issued every year in Boston alone comes to hundreds of thousands. Investigation proved that the Building Inspectors had never sent out one letter to a singly tenant. The reason was that nobody had given the Building Inspectors a form letter to send detailing the tenant's legal rights. The Building Inspectors were trained as carpenters, electricians, plumbers and so forth, not lawyers. They did not feel competent to advise the tenants as to their legal rights. The 1972 statute did not specify anybody to prepare that form letter, and therefore the Building Inspectors did not send out any letters.

6. Somebody once observed, "We have made the enemy and they is us." Many of our most serious policy problems boil down to that. We have too many people because we reproduce them; we have too little energy because we use too much; we have too little clean air and water because we pollute it; and so on, in such vicious cycle of problems that we give ourselves. Such reasoning may reflect efforts by authorities to blame their victims rather than confess their own guilt (Crawford, 1977). Yet the behavior of individual is essential to the perpetuation of many of our social problems. Whether seen as the product of multiple free wills or as socially manipulated routines, our behavior is causally implicated in our problems. Can we relieve some of these problems, then by changing our behavior? And insofar as the problems are collective and public in their consequences (and, arguably,

in their causes) how--if at all--can our government assist us in doing so.

-----  
G.I. Balch, "The Stick, the Carrot and Other Strategies: A Political Analysis of Governmental Intervention", in Brigham and Brown, Policy Implementation: Penalties or Incentives (Beverly Hills Sage) 42

## B. Can We Know the Law's Impact on People's Behavior?

II (7)

### 1. Griffiths, "Is the Law Important?" ~~WE CAN NEVER KNOW THE EFFECT OF LAW ON...~~

Some people argue that ~~what question either has no answer,~~ or that we cannot find the data to ~~answer it,~~ or that we ought not to attempt to manipulate behaviour through law. In "Is Law Important," 54 N.Y.U.L. Rev. 339 (1979), John Griffiths stated that by "law," he meant "the rules of a legal system." By asking whether these rules counted as "important," he meant, "Is their content a significant part of the explanation of social phenomena?" He answered in the negative. First, he said, the notion that law operates instrumentally is a new, rather odd notion; during most of history in most of the world, people have not taken that view of law. Second, he suggested three different sorts of effects of a legal rule. The "direct" effect consisted of behaviour that matches the behaviour the rule prescribes. These, he said, "...are usually not very interesting. Who really cares, after all, whether people drive while drunk or not? It is the accident rate we care about, and driving in one condition or another is a matter about which--apart from its effect on the accident rate--we are quite indifferent. It is true of most legal rules that the specific content of the required behaviour is a matter of indifference, and this is above all true of the sort of legislation one has in mind when thinking of law as an instrument of social change...."

A law also has "indirect" effects: "By producing conforming behaviour a rule may indirectly produce social and economic or other consequences--a lower accident rate, more efficient agriculture, healthier workers. ...Indirect effects are, in short, the implicit reference when law is alleged to be important. It is not the direct effect of conforming behaviour by people or judges that the instrumentalist has in mind, but the indirect consequences of allocation of resources or of social and economic development...." We have great difficulty in establishing these indirect effects; our understanding of them is really pretty minimal." Finally, law has an "independent" effect: "...Legislators enact legal rules every day of the week without the slightest expectation that significant direct or indirect effects will result, but with an eye, for example, to the next election. The expectation that few direct or indirect effects will take place can even be a crucial consideration in persuading a legislator to vote for a legal rule." Third, in fact, legal rules constitute the form that political decisions take. "The question, 'Is law important?', must be taken to ask what legal rules add to the political decisions they embody: the question is about law and it would be wrong to try to answer it by observing that politics is important." Griffiths concludes by stating that law has no real importance. What importance the rules of law do have derives from their political content, not their legal form.

## 2. Singer on Legal Nihilism

II  
⑥

2. Others argue that we cannot know the law -- what Professor Singer calls legal "nihilism"<sup>1</sup>.

". . . [N]ihilism has both an epistemological and a moral component. As a theory of knowledge, nihilism claims that it is impossible to say anything true about the world. No one can properly claim to describe the world accurately: Anything one says is as likely to be wrong as it is to be right, and anything is as likely to be wrong or right as anything else. . . .

As a theory of morality, nihilism claims that there is no meaningful way to decide how to live a good life. Any action can be described as right or wrong, good or bad. Just as there is no objective way to describe any action, there is no objective way to decide how to act. Because all actions that we think are good are just as likely to be bad, we have no rational way to decide what to do. Since we cannot know what to do, it does not matter what we do.

In mainstream legal tradition, the words of rules have a reasonably determinate content -- no doubt ambiguous at the edges, but nevertheless dictating the result in many "plain cases"<sup>2</sup> or "paradigm, clear cases."<sup>3</sup> The rule of law requires that ideology, or else judges must appear to make the law anew for every case. In fact, rules do not compel our choices. They fail the test of comprehensiveness (they never cover all cases, either because of limited scope, gaps (that is, unprovided-for cases), or because an existing rule only decided between a limited number of alternatives -- and a new case may call up for consideration a previously unconsidered possible rule. Rules also fail the test of consistency ("contradiction is a common characteristic of legal doctrine"<sup>4</sup>). In different circumstances on different occasions we all adopt contradictory arguments, or there exist contradictions between rules, or for every more-or-less specific rule some more general rule may trump it

("one must be at least eighteen years old to vote in governmental elections" may run up against the equal protection principle). Many rules do not really purport to constitute direction. They may include wholly vague terms ("due process" or "reasonable"); they may constitute a tautology ("like cases should receive like treatment"); or they may not determine their own reach ("that case must be limited to its facts"). Finally, otherwise seemingly determinate rules frequently fail

<sup>1</sup> Singer, The Player and The Cards: Nihilism and Legal Theory, 94 YALE L. J. 1 (1984)

<sup>2</sup> HART, THE CONCEPT OF LAW 123 (1961)

II  
④

"to specify under what circumstances existing rules should be followed and when and how they should be changed."<sup>5</sup>

That rules suffer indeterminacy does not mean that decisions necessarily become unpredictable. Judges decide as they do as the resultant of a gaggle of pressures other than the words of the rule that presumably control the case ("the institutional setting. . . , the customs of the community (such as standard business practices), the role of the decisionmaker (judge, legislator, bureaucrat, professor), and the ideology of the decisionmaker."<sup>6</sup>).

## NOTES AND QUESTIONS

1. Griffiths' argument rests upon a number of assumptions. For example, he assumes that because many political decisions find their expression in rules of law, "it would be a mistake to confuse the effect of the political decisions with the effects of the legal form in which they are implemented." That assumes that the political content of legal rules somehow stands in isolation from the form in which the rules express that decision. Would it not seem equally correct to say that it would be a mistake to confuse the effects of the legal form with the effects of the political decision? For example, the political leadership in the western states decided that they should take steps to reduce the coyote population. They make a decision that the state could accomplish that objective by offering a bounty for coyote scalps. Is that a question of "form" or of "content"? Or again: In Massachusetts, the political leadership no doubt make a decision to help tenants help themselves against multi-family landlords. Nobody make a political decision to forget to include a provision specifying who should supply the form letter to the tenants. Is not Griffiths here committing the elementary error of assuming that content influences form, and not vice-versa?

2. Griffiths also argues that in most cases, "the specific cost? of the required behavior is a matter of indifference, and this is above all true of the sort of legislation one has in mind in thinking of law as an instrument of social change.: Do you agree? Are we indifferent, whether drivers operate cars drunk? Does it make no difference what sort of taxes we levy, or upon whom, when the only questions involved concern the amount of the fisc, and collateral policies concerning investment, economic growth, etc.?

3. What Griffiths says surely applies to some laws. Does it apply to all law? If it does not, that defines part of domain to study: Why do some laws induce behavior related to the law's objects, and some do not?

4. Critique the Resolution on Acquainting Citizens with Basic Knowledge of Law, 1955, from Griffith's perspective. That bill would prohibit certain sorts of behavior. Is that a matter of "specific content" and therefore a matter of substance? Critique the bill from the standpoint of legal nihilism. As a judge, what effect would the language of the rule have upon your decision?

5. R.L. Kidder, Connecting Laws and Society: L And Introduction to Research and Theory (Englewood Cliffs, N.J.: Prentice Hall, 1983), Ch. 6:

The question of legal impact is the central concern for many of the social scientists who study law. In a general sense, all social scientific study of law is concerned with the impact question, since all studies attempt to interpret information about the place of law within larger social processes. But many social scientists see the question of legal impact as a special set of issues requiring separate study and separate interpretations.

Most of those who take this approach share a basic assumption that law is like a medical vaccine. It is a curative injected into socially ailing institutions to restore their health. As with a vaccine, the critical questions are (1) Does a legal initiative work? and (2) What are its side effects? This position is most often identified with structuralists since structural theory tends to treat existing social institutions as organisms in which the parts function to preserve the overall unit. But critical theorists often adopt vaccine-like views of the law's impact, though they differ from the structuralists in that they see the vaccine as helping to create or sustain a social monster.

Those who study legal impact under the influence of this vaccine model usually conduct their research as follows: (1) They identify a clearly defined legal action with a specific target population; (2) They search for cases where

relevant behavior should have changed, testing whether it did....(indecipherable text)

Much of what we now know about legal systems we have learned from studies using this vaccine model. This is ironic because what we have discovered is that the vaccine model badly distorts the reality of legal process. We have discovered a growing list of institutions, processes, and agents which filter any legal command, bending, modifying, or deflecting its effects according to the tides of conflict and cooperation among groups interested in, or having to react to, those laws. The filtering process is as much a process of making law as is the creation of formal legal commands. The filtering process is an ongoing expression of the same conflicts which moved people to pass a law or go to court in the first place.

Another weakness of the vaccine model concerns the intent behind laws. The environment of conflict which leads to the creation of new law may create misleading assumptions about the intent behind those laws. The existence of hidden agendas in the actions of lawmakers as well as those charged with law enforcement weakens our assumption that we can know the purpose behind a law just by reading it or by reading news accounts about why it was passed. Laws, which are the creatures of legislative or judicial compromise, may actually represent conflicting purposes, with two or more opposing sides hoping to gain control over the subsequent process of implementation. The vaccine model is weak in these cases because we cannot assume a singular definition of (1) the problem (the "disease" to be treated), (2) the content of the law passed to meet that problem (the nature of the ingredients in the vaccine), or (3) the location in the social process where the law should have its effects (location of the disease in the body).

Because the vaccine model does not serve adequately to explain how law works, ought we abandon the effort to find a model that does explain it?

6. Critique the Chinese Resolution on Acquainting Citizens with Basic Knowledge of Law, from Kidder's perspective.

7. J. R. Gusfield, "Moral Passage: The Symbolic Process in Public Designations of Deviance," 15 Social Problems 175 (1967):

Agents of government are the only persons in modern societies who can legitimately claim to represent the total society. In support of their acts, limited and specific group interests are denied while a public and societal interest is claimed. Acts of government "commit the group to action or to perform coordinated acts for general welfare." This representational character of governmental officials and their acts makes it possible for them not only to influence the allocation of resources but also to define the public norms of morality and to designate which acts violate them. In a pluralistic society these defining and designating acts can become matters of political issue because they support or

II

(13)

reject one or another of the competing and conflicting cultural groups in the society.

Let us begin with a distinction between *instrumental* and *symbolic* functions of legal and governmental acts. We readily perceive that acts of officials, legislative enactments, and court decisions often affect behavior in an instrumental manner through a direct influence on the actions of people. The Wagner Labor Relations Act and the Taft-Hartley Act have had considerable impact on the conditions of collective bargaining in the United States. Tariff legislation directly affects the prices of import commodities. The instrumental function of such laws lies in their enforcement; unenforced they have little effect.

Symbolic aspects of law and government do not depend on enforcement for their effect. They are symbolic in a sense close to that used in literary analysis. The symbolic act "invites consideration rather than overt reaction." There is a dimension of meaning in symbolic behavior which is not given in its immediate and manifest significance but in what the action connotes for the audience that views it. The symbol "has acquired a meaning which is added to its immediate intrinsic significance." . . . The use of the wine and water in the Mass or the importance of the national flag cannot be appreciated without knowing their symbolic meaning for the users. In analyzing law as symbolic we are oriented less to behavioral consequences as a means to a fixed end; more to meaning as an act, a decision, a gesture important in itself.

\* \* \*

Critique the Resolution on Acquainting  
Citizens with Basic Knowledge of Law  
from Gusfield's perspective.

II  
(15)

**T**HE PHILOSOPHER, Ernest Nagel, in his discussion of the methodological problems of the social sciences, has this to say:

Planned actions rarely if ever take place in a social setting over which men have total mastery. The consequences that follow a deliberate choice of conduct are the products not simply of that conduct; they are also determined by various attendant circumstances . . . whose modes of operation are in any case not within complete effective control of those who have made that choice. Eli Whitney did not invent the cotton gin in order to strengthen a social system based on human slavery; Pasteur would have been horrified to learn that his researches on fermentation would become the theoretical basis for bacteriological warfare; and French support of the American revolutionary cause against England did not aim at founding a nation that would eventually make it difficult for France to continue as a colonial power in North America.<sup>1</sup>

Professor Nagel's words were not written specifically about lawmaking decisions and their consequences, but they might well have been. Statutes and case-law principles do not operate in social settings over which lawmakers have total mastery. In a sense, lawmakers propose, but society disposes; the ultimate outcome of a legislative intervention will often include important consequences that were unforeseen by the lawmakers and are entirely foreign to the original legislative purpose.

Griffiths and Kidder, one supposes, would argue that therefore law is "unimportant". Lacking complete control over the environment, one can never predict consequences. Does that make sense?

Legislation <sup>comes into</sup> existence <sup>to</sup> solve a problem deemed important by somebody or some public influential enough to obtain a legislative solution for ~~it~~. <sup>the problem</sup> To solve a problem through legislation does have a cause-effect relationship of some sort to behavior, and behavior to the nature of society, its problems and therefore their solutions. Unless we can learn from past experience about how legislation works--that is, its impact-- we can never design legislation consciously. John Dewey make the same point in more general terms:

If a bird builds its nest by what is called pure "instinct," it does not have to appraise materials and processes with respect to their fitness for an end. But if the result--the nest--is contemplated as an object of desire, then either there is the most arbitrary kind of trial-and-error operations or there is consideration of the fitness and usefulness of materials and processes to bring the desired object into existence. And this process of weighing obviously involves comparison of different materials and operations as alternative possible means. In every case, except those of sheer "instinct" and complete trial and error, there are involved observation of actual materials and estimate of their potential force in production of a particular result. There is always some observation of the *outcome attained* in comparison and contrast with that intended, such that the comparison throws light upon the actual fitness of the things employed as means. It thus makes possible a better judgment in the future as to their fitness and usefulness. On the basis of such observations certain modes of conduct are adjudged silly, imprudent, or unwise, and other modes of conduct sensible, prudent, or wise, the discrimination being made upon the basis of the validity of the estimates reached about the relation of things as means to the end or consequence actually reached.

J. Dewey, *Theory of Valuation* (Chicago: University of Chicago Press, 1939) 23 Unless one gauges the desirability of legislation by its likely consequences, by what standard would one assess it? That is not to say that only legislation's intended or desired consequences call for assessment.

## C. SHOULD SOCIETY USE LAW TO CHANGE INSTITUTIONS?

Should society change law to change institutions? This question arose in a discussion between two American professors, James Buchanan and Warren Samuels, in connection with an analysis of an American Supreme Court case involving cedar rust, a strange disease that lives in cedar trees (which do not die) but kills nearby apple trees.

In that debate, Samuels argued that law properly should be used whenever the legislature thought it wise to change institutions. Buchanan argued to the contrary. He based his argument on the Coase Theorem, an economic theory that holds that in conditions of perfect competition on whom the law imposes an obligation and on whom it bestows a right makes no difference. The "invisible hand" of the market will nevertheless reach the best possible social allocation of property. We begin with a description of the Supreme Court case, Miller v. Schoene. (1926).

It seems that in Miller v. Schoene, in Virginia, (a state of the United States) a plant disease called cedar rust attacks apple trees. It lives, however, in cedar trees, to which it does not damage. From those cedar trees it flies on the wings of the wind to kill any apple tree within four kilometres. The only known solution is to cut down and burn the cedar trees which act as home for the disease.

At common law, apple tree owners could not adopt that solution easily. Under ordinary common law property law apple tree owners must respect the property of cedar tree owners. No matter how much they serve as host for cedar rust, the apple tree owners may not cut down the cedar trees. They had to stand by and watch their apple trees die. Their only solution would lie in trying to pay enough to the cedar tree owners that the cedar tree owners could consent to the destruction of the cedar tree.

Apple growing constitutes Virginia's most important commercial activity. The owners of Virginia's great apple orchards are the wealthiest men in Virginia, and some are very important politically. In 1914, Virginia enacted a statute that gave to local property owners within a four kilometer radius of a cedar tree the right to petition a state official. If, acting on that petition, the official discovered that the cedar tree was host to cedar rust, the state official had to cut down the cedar tree. The owner of the cedar tree received no compensation for the destruction of his property.

In 1926, some neighboring apple tree owners petitioned the state officials (named Schoene) to cut down the cedar tree of a man named Miller. He found that cedar rust had indeed infected the cedar tree, and said that he would cut down the cedar tree. Miller brought an action in the federal courts claiming that the Virginia statute was unconstitutional, on two grounds: First, that if it constituted a taking of property for private purposes by the State, it violated the federal constitution, which forbade any taking of private property except for public purposes. If it constituted a taking for a public purposes, it nevertheless violated the federal constitution, which forbade the taking of private property for a public purpose without just compensation.

The Supreme Court ultimately found that the statute was nevertheless constitutional. *Miller v. Schoene*, 276 U.S. 272 (1928). Whether under the common law or under the statute, one or the other tree had to die -- the apple tree under the common law, the cedar tree under the statute. Whatever the law did, somebody's property would be destroyed. In light of the economic importance of apple trees for Virginia, the choice of preserving apple trees over cedar trees was not unreasonable. The Court said: "Where, as "Where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any [unconstitutional] denial of due process [of law]."

NOTES

1. In "Interrelations between Legal and Economic Processes", 14 J. Law and Econ. 435 (1971), Warren J. Samuels argued that in unforeseen and unpredictable event, the emergence of red cedar rust, necessitated State intervention, one way or another. By doing nothing, the State permitted existing property law to decide the conflict between cedar tree and apple tree owners in favor of the former; by changing the rules, the legislature favored the latter. The legislature and later the Supreme Court "had to make a judgement as to which owner would be visited with injury and which protected." When a party challenges previously existing rights, the State must choose among the conflicting claimants. Willy-nilly, it must intervene.

2. In "Politics, Property and the Law: An Alternative Interpretation of Miller et al. v. Schoene", 15 J. Law and Econ. 439 (1972), James Buchanan argued to the contrary. Before the cedar rust emerged, presumably not explicit interdependence existed between the two sects of tree owners. No potential trades or agreements between the owners remained unexploited. Buchanan would rely upon bargaining processes between the two sects of owners to reach an optimal solution. To do that, however, requires a steady-state as a starting point: "The principle to be emphasized...is that some structure, any structure of well-defined rights is a necessary starting point for the potential 'trades' that are required to remove the newly-emerged interdependence." He concludes by sharply distinguishing between his approach and Samuel's:

• • • • • Samuels envisages an activist State, ever ready to intervene when existing rights to property are challenged, ever willing to grasp the nettle and define rights anew, which once defined, immediately become vulnerable to still further challenges. This projects an awesome role for the State in an environment that is subjected continuously, and necessarily, to the exogenous shocks resulting from natural phenomena, from technological change, from growth itself. Broadly conceived, something akin to cedar rust must appear every day, and, in Samuels' paradigm, the State must never rest. The structure of rights, as of any moment, is subjected to question, and away goes the "white knight" to decide whose claim shall be favored and whose rejected.

What if Mr. A simply does not like long-haired men? The presence of such men in the community harms him just as much as cedar rust harmed the apple growers. Is Mr. A then empowered to challenge the existing structure of rights that allows men to wear hair as they please? It matters not that "reasonable legislative-cum-judicial authorities" should always or nearly always decide in favor of the long-haired defendants. In Samuels' model, the challenge itself must be appropriately processed, and each instance resolved on its own merits, with no apparent prejudice in favor of the "previously existing rights."

My own approach is sharply different. There is an explicit prejudice in favor of previously existing rights, not because this structure possesses some intrinsic ethical attributes, and not because change itself is undesirable, but for the much more elementary reason that only such a prejudice offers incentives for the emergence of voluntarily negotiated settlements among the parties themselves. Indirectly, therefore, this prejudice guarantees that resort to the authority of the State is effectively minimized. It insures that an efficiency basis for collective action emerges only when a genuine public-goods externality arises and persists. Furthermore, this prejudice allows for a distinct and categorical separation between the legislative and judicial roles, something that is strangely absent in Samuels' vision.

3. In "In Defense of a Positive Approach to Government as an Economic Variable", 15 J. Law and Econ. 453 (1972), Samuels rebutted. He said that he had only attempted to describe what had taken place in Miller v. Schoene (a "positive" analysis). By prescribing what he believed the legislature should have done, Buchanan attempted a "normative" analysis.

\* \* \*

His use of government is a once-and-for-all-time governmental identification of property rights with subsequent change coming through market exchange of rights.<sup>5</sup> That may be how it should be but that is not how it is. Moreover, Buchanan has too pure or simplistic a theory or vision of legal history: he presumes an original identification (and assignment) of property rights that was immaculate with regard to power and change. But historically all rights have emerged from power play and have involved change of legal status and support as new and/or different interests are effectuated through government. He neglects the positive fact that the state is in these respects not only an independent but a dependent variable: going to the legislature is an economic alternative to bargaining in the market; legislation is not so much a surrogate for voluntary negotiation but an alternative. As Stigler has recently put it, "the procuring of favorable legislation is a commercial undertaking."<sup>6</sup> Further, Buchanan's "certain" rights approach, while laudatory as far as it goes normatively ("certainty" has to be balanced against "reasonableness" and "continuity" against "change"), is illusory as a matter of fact. So long as men have acted as economic men, the state has been an economic alternative, a means through which they have attempted to reach their economic objectives and thereby to influence the results of the market. Rights have always been uncertain: with respect, first, to legal change and, second, in market significance.

Buchanan's normative model, whatever one thinks of the values ensconced therein, thus obscures several things which are a matter of positive description.

\* \* \*

Second, his approach to efficiency obscures (or takes a narrow and inconclusive position on) the role of government in determining who shall count. It obscures the continuing problem of jockeying for position over income distribution, which is based on the facts that both economic optimality and income distribution are a function of the power structure within which the market operates and that the power structure is a partial function of the use of government.<sup>7</sup>

\* \* \*

Buchanan's uneasiness with my article is really a quarrel with the world, a world which does not unquestioningly and ubiquitously accept the propriety of the status quo, a world which does not accept his approach to the problem of order or of legal-economic change. Conversely, the world might quarrel with Buchanan, that he is a utopian in the finest sense of the word but that, like most utopians, his is a once-and-for-all-time system: it makes no provision for change except through the market, or no provision for structural change except as a result of unanimity and/or market pressures. Buchanan's model simply comprises his own combination of liberty and authority, with a state strong enough to maintain established privilege but not one which would alter the boundaries of privilege and of exposure to privilege; a state, that is, which is the instrument of the privileged. . . .

4. With whom do you agree?

5. Critique the Resolution on Acquainting Citizens with Basic Knowledge of Law from (a) Samuel's and (b) Buchanan's perspective.

6. Would it make a difference if it could be demonstrated that the rules of liability have no effect on the social allocation of resources? That constitutes the essence of Coase's theorem, originally stated in a seminal article, R. H. Coase, "The Problem of Special Cost," 3 J. of Law and Economics 1 (1960). H. Demsets, "When does the Rule of Liability Matter?," 1 J. of Legal Studies 13 (1972) summarized Coase's theorem:

Coase (1) showed that powerful market forces exist that tend to bring private and social cost into equality without the use of a tax, and (2) discussed the conditions under which the legal position toward liability for damages would and would not alter the allocation of resources. Coase discusses an interaction between two productive activities, ranching and farming, in the context of a competitive regime in which the cost of transacting (or negotiating) is assumed to be zero.<sup>2</sup> His analysis concludes that social cost and private cost will be brought into equality through market negotiations—and this regardless of which party is assigned the responsibility for bearing the cost that results from the proximity of ranching and farming.

The law, reasoning that crops *stand in the way* of a neighbor's cattle, can leave the farmer to bear the cost of crop damage; alternatively, reasoning that cattle *stray errantly* across farm fields, the law can assign liability for crop damages to ranchers. Coase's work demonstrates that either legal position will result in the same resource allocation—*i.e.*, in the same quantities of corn and meat—and, also, that negotiations between the parties to the damage will, with either legal position, eliminate any divergence between private and social cost. If the law favors ranchers by leaving farmers to bear the cost of crop damage, then there exist incentives for farmers to pay ranchers to reduce the sizes of the herds, or to take other measures that will reduce the amount of damage. A summary arithmetic example reveals how such market transactions lead to Coase's results.

Suppose that the net return to an owner of ranchland would be increased by \$50 if herd size were increased by one head of cattle but that the additional head of cattle would impose crop damage on the owner of neighboring farmland that reduced his net return by \$60. If the law did *not* require the rancher to compensate the farmer, the farmer would offer to pay the rancher a sum up to \$60, the damage he would suffer if the rancher increased his herd by one head. The rancher would accept the offer since any amount above \$50 would be more than ample compensation for the reduction in net returns associated with the smaller herd size.

Negotiations would continue until the net return to the rancher of a head of cattle exceeded the reduction in net return to the farmer associated with the damage done by that head of cattle.

If the rule of liability were the reverse, requiring the owner of ranchland to compensate the farmer for the crop damage, the same equilibrium would be reached. Since the rancher earns a net return of only \$50 and must pay damages of \$60 if he raises an additional head of cattle, he would find it in his interest not to increase the size of his herd. Moreover, he would reduce the size of his herd as long as the net return forgone was smaller than the resulting increase in the net return to farming since this would be the liability to him if he did not reduce herd size by another unit. He would be led to settle upon the same herd size, with the same consequence for crop size, as he would have chosen in the absence of liability. The mix of output is not changed<sup>8</sup> because negotiations between the parties eliminate all divergence between private and social cost.

The resulting equality between social and private cost is important enough to warrant a few more words. The conventional analysis of the farmer-rancher interaction would have concluded that in the absence of liability for damage (or of an appropriate tax per head of cattle) the social cost of increasing herd size would have exceeded the rancher's private cost by the \$60 damage done to the neighboring farmer's crops. The rancher, if he were neither held liable nor taxed, would have no reason to take account of this damage and would therefore be led to raise too many cattle and impose too much damage on farm crops. It is the supposed existence of this gap between private and social cost that seems to call for a tax per head of cattle or for an assignment of liability to the rancher. Coase's reasoning shows this logic to be in error. Even in the absence of a tax or liability for damage, the harmful effects of his activities on surrounding crops would be brought to bear on the private calculations of the owner of ranchland, for he must reckon as a true (but implicit) cost of increasing herd size the payment from the farmer that he must forgo if he refuses to agree to the farmer's request for a reduction in herd size. Market negotiations bring the full cost of his decision to bear on him through the offers made by the farmer and thereby eliminate any difference between private and social cost. This, as Coase recognized, would not be true if the cost of negotiating could not be assumed to be negligible. We shall return to this problem later.

It is not generally appreciated that Coase's reasoning has legal applications that extend beyond problems of the divergence between social and private cost as these typically are conceived. What is at issue in the farmer-rancher case is which party has a particular property right. In the one case the farmer has the right to allow or prohibit cattle grazing on certain specified lands, while in the other case it is the rancher who has the right. Private property takes the form of a bundle of rights, of which different components may be held by different persons. In the absence of significant negotiating cost, the use to which these property rights is put is independent of the identities of the owners since each owner will be given market incentives to use his property right in the most valuable way. Just what is the most valuable way depends on market conditions and not owner identities.

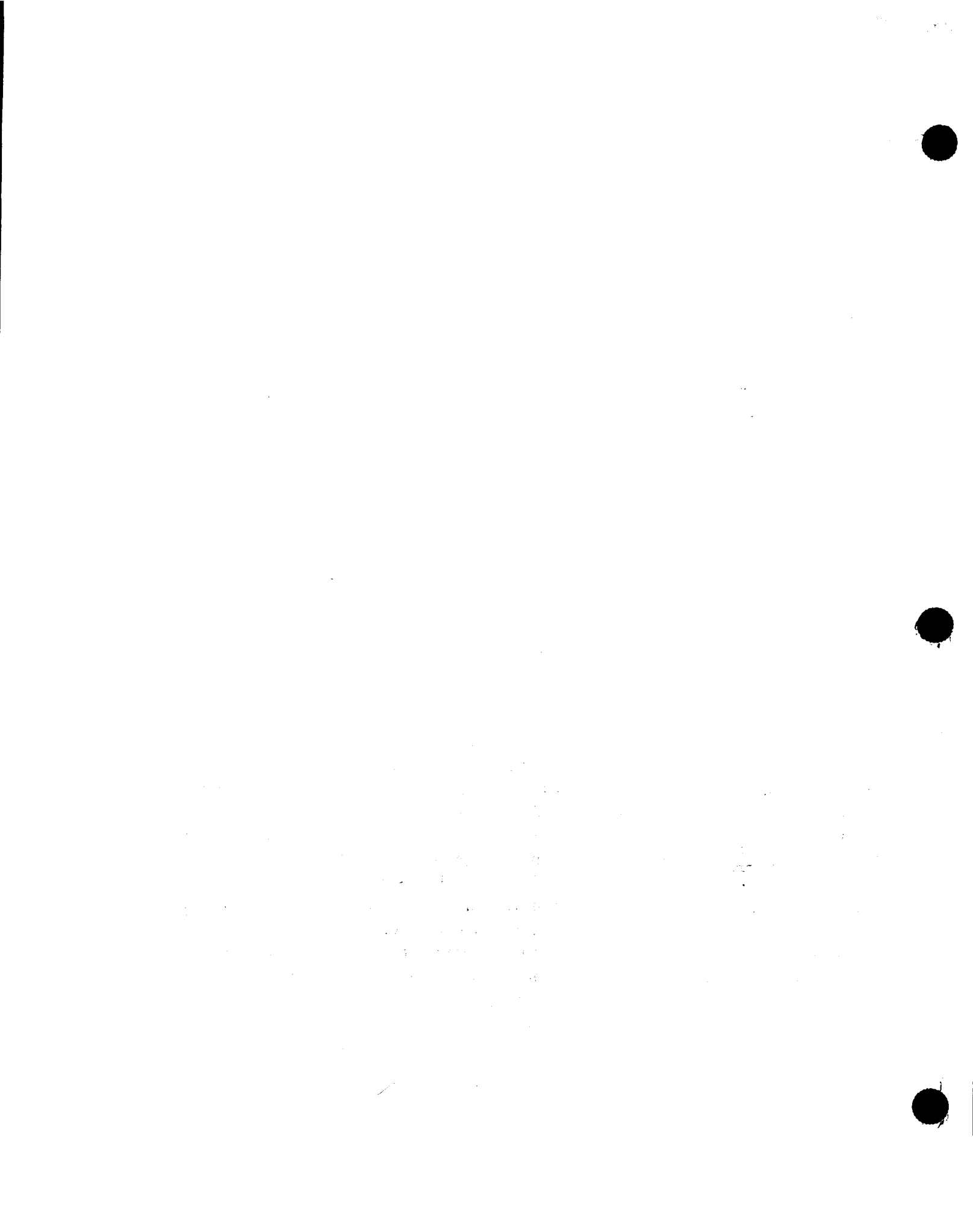
## II-24

7. Coase's Theorem has a principal limitation: It assumes no "transaction costs". Coase does not define that term. Presumably he meant the costs of carrying out necessary negotiations, or making good a particular legal claim. (A society without transaction costs would constitute a society with a perfectly competitive market. It may be that Coase merely used "no transaction costs" as a code word for a perfectly competitive market). In practice, of course, transaction costs characterize every transaction. That does not make Coase's Theorem necessarily useless. To study the speed of falling objects in the real world we use a formula that deals with the presumed rate of change of velocity of falling objects in an absolute vacuum -- although no absolute vacuum exists or in principle could exist in the real world. The question is what we learn from the model, and how we use it to study the real world.

8. Robert C. Ellickson sought to test Coase's Theorem. He found some range land in California where, under California law, in some cases the landowner had the obligation to fence out, and in others, where the cattle owner had the obligation to fence in. He then inquired, whether this made a difference in the allocation of resources. Transaction costs aside, Coase would predict they would not.

Ellickson began by putting forward two alternative paradigms about how people behave. With roots in neoclassical economics, the "law and economics" scholars (Coase is one of these) explain human behaviour in terms of marginal rewards. The "law and society" scholars, on the other hand, have intellectual roots in sociology, anthropology, history, and institutional rather than neo-classical economics. They tend towards skepticism about models that wring the complexity out of human affairs. They look for a variety of factors to explain human behaviour -- custom, values and attitudes, conflicting norms, capacity, knowledge and information, and so forth.

After an extensive investigation, Ellickson came to a counter-intuitive conclusion. He did not find a single instance in which the legal norms affected how the residents resolved a trespass or straying animal dispute. Had the residents of the range followed the law and economics model, actors favoured by the law would have sought to enforce it. (Even insurance adjustors paid no apparent attention to the formal legal rules). All these actors looked to informal norms -- what Ellickson called "the Code of Good



Neighbors. "Of Coase, Cattle, and Cooperation: Dispute Resolution among Neighbors in Shasta County" (Unpublished MS 1984).

9. Does Coase's Theorem apply to all legal interventions, or only to changes in rules defining liability between individuals? For example, a minimum wage statute does not affect liability between individuals for tortious acts, as did the liability rule that Coase discussed. Can one properly extend Coase's Theorem to say that no law will affect total economic costs that Coase assumed)?

10. W. J. Chambliss and R. B. Seidman, *Law, Order and Power* (2d. Ed.; Reading, Mass.: Addison Wesley, 1982) 33-37:

#### Consensus and Conflict

Any theory of choice must ask, Who makes the choices for the society? If everyone in the society really has the same set of jural postulates ("values"), then the choices anyone in the society makes will not differ from those that anyone else in the society makes who faces the same difficulties with the same range of constraints and resources. If not consensus but conflict best models society, however, then *society* has no jural postulates. "Society" makes choices only metaphorically. Particular persons—appellate judges, legislators, administrators, presidents, and so forth—make law. Whose demands get embodied into law, and why, becomes a fundamental sociological question.

The rules of law invariably respond to demands made by some part of the population, mediated by circumstances. Demands invariably call for new rules that require some other part of the population to behave differently. In the United States, black people's demands for the right to vote require white voting clerks to change their discriminatory behaviors. Newspaper demands for a harsher law against student protestors require students to moderate their protests. Business demands for tax advantages require tax collectors to permit them to retain more of their earnings, and to require other segments of the population to increase their tax contributions. Women's demands for equal rights impinge on men's legal right to suppress women.



Every law, therefore, expresses a valuation. It embodies an idea about how people ought to behave. Even the law that commands us to drive on the right-hand side of the street expresses value-choices: of order over chaos, of the property interests of car owners over the interests of car manufacturers and car dealers. (How much would your present car, with its steering wheel on the left-hand side, fetch in the secondhand market the day after we changed to a left-hand driving system? When Sweden changed from left-hand traffic to right-hand traffic, the government set aside a substantial fund to recompense car owners disadvantaged by the change.) As Philip Heck puts it: "The fundamental truth is that each command of the law determines a conflict of interests; it originates in a struggle between opposing forces. . . . It operates in a world full of

competing interests, and, therefore, always works at the expense of some interests. This holds true without exception.'<sup>20</sup>

A society comprises individuals occupying roles engaged in repetitive behavior patterns. Every change in the rules to the extent that it in fact leads to changed behavior, therefore, to that extent changes society. Because every rule entails a valuation, consciously inducing social change through law entails a valuation. By the same token, a decision to retain a given rule in the face of demand for change also entails a valuation. How do societies make these valuations?

On the highest level of generalization, jurists and social scientists offered two sorts of answers. One perceived the state and the legal order as comprising a value-neutral framework within which struggle takes place. The other perceived the state itself as an integral part of the unending social struggle between society's antagonistic interests and classes. The one assumed that the state's lawmaking, law-applying, and adjudicating machinery reflects a fundamental value-consensus. The other proposed that control of the state and its awesome machinery of compulsion itself becomes the prize for which antagonistic interests struggle.

This question becomes crucial to a study of law and society. If people share a basic set of domain assumptions—that is, propositions that explain generally what makes the world go, and what considerations ought to guide our choices—then the state might, and plainly should, represent that consensus. As its central problem the legal order must assure only that individuals do not substitute their own, deviant motivations and behaviors for those the polity prescribes. If, on the other hand, consensus does not exist, then the issue becomes: whose interests does and ought the state represent?

In a more innocent era, perhaps one could understand a naive belief that upon every important issue every polity has a value-consensus. The law's ineluctably normative nature, however, falsified that naive view. If so wide-reaching a consensus existed, demands of new law would not always take the form that somebody else change their behavior. Why do demands for new law always create conflict?

A variety of social theorists offered a modified form of the value-consensus position to answer this question: even if conflict does rack society generally, the state itself embodies value-neutrality. In this view, the state represents all-of-us, but only to a limited degree. Every specific law of state activity has a value-content, but the machinery by which the state comes to decide whether to create and enforce a particular law itself retains value-neutrality, permitting conflict to work itself out peaceably. This pluralist position held that while particular laws contain a burden of values, the legal order as a whole remains value-neutral.

Of these two perspectives of society, which does Samuels adopt? Which does Buchanan adopt?

10. For a conflict theorist, a key question concerning legislation becomes in Cicero's famous words--cui bono? Whom does it benefit? Consider the Resolution on Acquainting Citizens with Basic Knowledge of Law: who benefits?

11. Coase's Theorem holds that whatever the liability rule between two parties for a tortious act, given freedom from transaction costs the net social product will remain the same. It responds to the question: Does a liability rule for a tortious act affect the net social product? Does not Buchanan ask the identical questions about the consequences of the Virginia Cedar Rust Statute? What question does Samuels ask of the statute's consequences? What relationship do you see between their general perspectives of society as based on conflict or consensus, and the questions they ask?

12. "The social sciences have developed very largely through the criticism of proposals for social improvements or, more precisely, through attempts to find out whether or not some particular economic or social action is likely to produce an expected or desired result. This approach...is what I have in mind when I refer to the technological approach to social science...."

"A prima facie objection against what we call the technological approach is that it implies the adoption of an 'activist' attitude towards the social order....and that it is therefore liable to prejudice against the anti-interventionist or 'passivist' view: the view that if we are dissatisfied with existing social or economic conditions, it is because we do not understand how they work and why active intervention could only make matters worse. Now I must admit that I am certainly out of sympathy with this 'passivist' view, and that I even believe that a policy of universal anti-interventionism is untenable--even on purely logical grounds, since its supporters are bound to recommend political intervention aimed at preventing intervention....On the contrary, I think that anti-interventionism involves a technological approach. For to assert that interventionism makes matters worse is to say that certain political actions will not have certain effects--to wit, not the desired ones; and it is one of the most characteristic tasks of any

technology to point out what cannot be achieved." Karl Popper, *The Poverty of Historicism* (2d ed.) (London: Routledge & Kegan Paul, 1957) (someplace between pp. 58-70)

D. THE DOMAIN OF STUDY OF THIS BOOK

Griffiths, Singer and Kidder argue that to one or another degree, we cannot systematically understand the impact of law. If we cannot understand the impact of law, we cannot use it to bring about changed behavior. If we cannot change behavior through law, we cannot use law or the State to solve social problems. (The State invariably acts through the legal order, the law and the State constitute only opposite sides of the same coin.) These theorists tells us to give up the enterprise of trying consciously to use the state machinery and the legal order to improve or change things.

Buchanan reaches the same result. He tells us that even if we change the law, it makes no difference in overall social product, so why change anything? Like Griffiths and Kidder, Buchanan ends up as advocate of non-intervention.

In this book we take a contrary view. Law does affect behavior, although not necessarily as the law prescribes. Why it induces the behavior it does constitutes a principal issue for sociology of law.