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LAW AND SOCIAL SCIENCE

*Richard D. Schwartz**

AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES, AND DISTRIBUTION. By *Richard Lempert* and *Joseph Sanders*. New York & London: Longman. 1986. Pp. xiii, 528. Cloth, \$39.50; paper, \$21.95.

Professors Lempert and Sanders have written an important book. In five creatively cogent chapters, comprising Part I of the work, they offer a way to describe legal logic that reaches across all substantive fields of law. This discussion is followed by two major efforts at application. In Parts II and III, the authors develop and illustrate their approach by applying it to the settlement of disputes and the potential uses of law as a redistributive mechanism. All three parts are interesting and well-written.

Part I is more than interesting: it provides a blueprint for the long-needed bridge between law and the social sciences. In developing and illustrating what they call rule and case logics, the authors achieve two results. First, they offer an analytic language that lawyers will easily understand and that others interested in law can learn. Second, by introducing this language they provide a way to interrelate developments in society with the processes of legal decisionmaking.

In this review, I will address each of these contributions. In doing so, however, I intend to illustrate rather than to describe their approach and its potential uses. The book itself must be studied by those who would use it to maximum advantage. This review is designed merely to encourage readers to do so.

I

Of greatest importance in developing the connection between law and social science is the analytic language that the authors provide. The crucial concepts are called rule logic, answering process, and case logic. Although these terms are nowhere explicitly defined, their meaning is effectively conveyed.

A rule logic is a highly general legal principle which specifies the elements that, in a given legal domain, are prerequisites for legal liability. In the example Lempert and Sanders offer, the intent of the actor controls legal liability in particular areas of law but is irrelevant in

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others. One obvious contrast is found within criminal law, between common-law offenses mostly characterized as *mala in se* and those *mala prohibita* offenses, typically regulatory, which require no showing of intention. Intent is also an important element in contract law, which rests on the assumption that the essence of a contract inheres in the shared understanding of the contracting parties. By contrast, liability may be imposed on a tortfeasor in the absence of an intention to act toward the end of doing damage — failure to exercise reasonable care being sufficient. Thus, in contracts and common-law crimes, the intention of the actor is closely scrutinized, while in regulatory offenses and garden-variety torts it is not.

Similarly, the presence of an available alternative or “ability to do otherwise” enters differently in the rule logics of these classes of offenses. For *malum in se* offenses, the rule logic pays heed to the absence of alternatives. This consideration may enter in the prima facie case, as in the definition of the act. For example, automatism, if established, precludes a physical movement from being construed as a voluntary act; or where an individual is picked up and thrown physically, the individual becomes the instrument rather than the agent of an action. The same principle applies in torts where liability is generally not imposed if the actor could not avoid the action no matter how prudent or imprudent the actor. By contrast, the ability to do otherwise is less significant in the case of contract. While that principle has its limits — e.g., in an act of God — its general application is attested to by the significance of that phrase, which conveys the meaning of an extraordinary circumstance so bizarre as to permit the exception without undercutting the rule.

For each of these rule logics, one expects to find categories of answers. Here the authors begin to specify some of the psychological properties that support the original rule logic, and outline the concept of the answering process. In each rule logic, the dynamic is rooted in the human tendency to generalize across a range of similar but not identical events. So fundamental is this tendency that it is noted in the thoughtful observations of young children described originally by Jean Piaget. Thus the capacity for “matching” identical objects is extended to “pairing” where the similarities are more limited, to “grouping” where different elements are abstracted to achieve a common status. In legal thought, all three modes of categorizing are infused with normative significance — making Piaget’s work on moral judgment particularly relevant to the legal logics. In the answering process, a range of categories begins to emerge which establish themselves by their relevance to the rule logic. These answering categories vary in their frequency. If a characteristic that precludes responsibility is found very commonly, it may be regularized either in a modification of the rule itself or as part of a well-developed exception to the rule which typically takes the form of an affirmative defense. If the distinctive char-

acteristic approaches the status of unique, however, it is likely to require justification in terms of a precise precedent with whose facts it is virtually identical (i.e., "on all fours") or an original policy-oriented argument that seeks to relate the unique facts to the rule logic.

Lempert and Sanders proceed from this general level to discuss the degree of attention paid to the distinctive characteristics of an individual case. The terms they use to describe these degrees are "deep case logic" and "shallow case logic." Deep case logic depends on detailed information about the case; a shallow case logic tends to assimilate the case into a large set of cases, ignoring the distinctive differences among them.

In practice, law operates somewhere between these two extremes. A perfectly deep case logic would find the individual case utterly unique. Incomparable to any other case, judgment would in principle have to depend on the reaction of the decisionmaker to the entire unique combination of facts revealed in the deep case description. To the extent that cases are compared, and like cases treated alike, Lempert and Sanders' case logic becomes more shallow, *i.e.*, some distinctive differences are disregarded as irrelevant to the outcome. At the extreme, a perfectly shallow case logic would treat all cases alike, disregarding every distinctive aspect. The Queen of Hearts, in Lewis Carroll's classic, illustrates the most shallow possible logic when she calls for judgment before hearing the facts. "First the sentence," she cries, "then the verdict."

Current legal thinking does not accept either of these extremes. In fact, the law is full of distinctions that make a difference. But the law also insists, in principle, on like cases being treated alike. Differentiations that are not generally supposed to be considered — such as the race of the parties — are resisted as legitimate bases of differentiation or admitted only after strict scrutiny.

II

The relationship between rule and case logics plays a central role in legal development. As new kinds of behavior become subject to legal control, for example, the tendency is to apply established rule logics to determine liability. Whether that application requires a specific legislative act or is the product of judge-made law, its acceptability to those who make and interpret the law is affected by the compatibility between the decision and the rule logic of the legal area into which the case fits. But rule logics are themselves not immune from change. In the system of thought proposed by the authors, two dynamics of change in rule logic are suggested: internal and external.

Internal processes of legal change can be nicely described in terms of rule and case logic interaction. As cases arise in which rule logics lead to awkward case results, there is a tendency for doctrines to de-

velop that distinguish a new category. Thus, a deeper case logic will be used to distinguish those characteristics that, if ignored, will seem to produce anomalous results. The characteristic intralegal system response is to enunciate a new doctrine that categorizes the anomalous cases and provides in those cases a different result. A familiar example is found in the limitation of liability of the employer (under *respondeat superior*) in the event that the co-worker has behaved negligently. But the "fellow servant" rule itself came to be subject to a set of expectations such as these: Where the fellow servant as "vice principal" had some authority over the injured worker, where the negligent co-worker was not employed in the same department, and where the employer assumed certain nondelegable duties to insure the safety of its workers.

The process of internal doctrinal elaboration may be interpreted as a way of protecting the basic rule logic. In the example cited above, some responsibility for the employee's safety continues to be attributed to the employer, at least in principle. But the principle is maintained only at the cost of a whole series of compromises that leave the law floundering in deep and deeper case logics, approaching the point where the outcome in any given case is increasingly likely to be determined not by the law and the facts but by the skill of opposing counsel, the willingness of the parties to settle, the disposition of the appellate bench, and so forth. As the applicable law becomes more complex, its value as a predictor of outcomes declines. With the lack of predictability, case law comes to be seen as incapable of successfully expressing the rule logic of employer responsibility originally enunciated in the doctrine of *respondeat superior*. The answer is eventually found through worker compensation legislation which radically alters the traditional rule logic by awarding compensation for injury under procedures that virtually eliminate considerations of fault.

These changes can be interpreted quite differently. Whereas the first approach emphasizes the internal dynamic of the legal process — in which predictable decisions become ever less possible — the second interpretation views the shift to workers' compensation as a product of extralegal changes in the society, affecting the legal system in several ways. This externalist approach emphasizes the concomitants of industrialization (including the drive of corporations toward predictability of costs), the growth of the labor movement, and the political pressure arising from populist and progressive politics. These developments created forces that unsettled traditional conceptions of responsibility and set loose political forces that created an incentive to move the problem of employee injuries out of the courts, and into a regulatory mechanism that would minimize company losses through risk spreading, while ensuring an injury-related compensatory award to most injured workers.

In much writing on law and society, there has been a tendency to favor the externalist approach illustrated in the second mode of interpretation. This tendency arises in reaction to the extreme internalist legal position that treats law as a self-contained system, a seamless web that carries within itself a dynamic of its own. This view, expressed in John Austin's jurisprudence, has been continued in subtler form by Kelsen, H.L.A. Hart, and Dworkin. By contrast, American jurisprudence has generally been alert to the external forces that have affected law — some of the most cogent formulations coming from such scholars as Holmes, John Chipman Gray, Llewellyn, Fuller, and Hurst. By now, we have developed a substantial company of academic lawyers and social scientists who take as their principal task the tracing of the connections between external societal developments and legal responses.

What has been needed in this effort, more than any other single element, is a way of tying together the internalist and externalist approaches. Internalists are properly attentive to the interrelation of rule and case logics. In the glacial development of legal doctrine, the impressive fact is the steadiness of the system. Rule logics are not readily altered in the work of the courts, nor do judges accept without hesitation rule-logical changes in enacted statutory law. The rule logic of Anglo-American jurisprudence finds a supplementary source of justification in the Constitution, beyond the common law tradition which was its matrix. The stability of our rule logic is expressed and reinforced by the "steadying factors" insightfully described by Karl Llewellyn in *The Common Law Tradition: Deciding Appeals*. These include the conditioning of legal training, the limitation and sharpening of issues, and the tempering effect of a multi-judge appellate bench. Thus, a Robert Jackson takes the occasion on behalf of a unanimous court to reverse *Morissette's* conviction (342 U.S. 246), lest the rule logic of intentionality be further diminished through the encroachment of strict liability into areas traditionally requiring intent. The conservatism thus shown is not to be taken lightly. It gives stability to the society; it embodies the central tenets of our social and moral order; it is the armature around which the society is built.

When a normative structure is so strongly set in place, can it be changed? One of the important issues for law and social science is whether and how case-logical changes contribute to change in rule logics. Before this question can be examined systematically, we need clearer definitions of the two terms. But even with the definitions we have, it seems clear that many case-logical changes serve merely to stabilize and reaffirm rule-logical principles. The development of liability to a remote purchaser, for example, traced by Edward H. Levi in his *Introduction to Legal Reasoning* did not alter the rule logic of tort law but only extended it by a common-law process from *Winterbottom v. Wright*, where the manufacturer was insulated, to *McPherson v. Bu-*

ick, where he was not. If a change in rule logic is to occur — as in the workers' compensation example — it seems likely to require not only a shift in case logics but also an impetus from the political and economic side of the society.

That does not mean, however, that the externalist can afford to ignore the internal legal process. Whatever the origins and direction of legal change, it can only be implemented in a limited number of ways. The court system, with its balance of rule and case logics, provides one of the most important devices for expressing and implementing society's values. Alternatively, the courts may resist and deflect the expression and implementation of society's values. When the relationship between rule and case logics falters — as it may by virtue of untimely or erratic judicial decisionmaking — the rule logic may lose its vitality, or it may be better able to function for having lightened its burden. In other words, we do not yet know, in Pound's phrase, the "limits of effective legal action."

Questions of this kind can now be well addressed, by lawyers and social scientists, with the help of the new language provided by Lempert and Sanders. Their book is perhaps the best contribution thus far to the task of integrating internalist and externalist approaches to legal change, because the book describes law from the inside, in ways understandable both to those who study and practice law *and* to those who want to study it as a product of external forces. As a result, lawyers and social scientists may be able to understand each other better and to cooperate in shaping law as a more effective instrument for attaining societal ends. While there is still a long way to go, the authors have given us an invitation to law and social science. It is an invitation which I hope many scholars will find worthy of acceptance.