

THE RESILIENCE OF LAW



Joseph Vining

One of the striking developments in academic law in the past half century is the reconception of law as one of the social sciences. The idea at work in this movement, as Joseph Vining says in this essay, is not that the law should use the findings of other disciplines for its own purposes and in its own way, but that in some deep way law itself—legal thinking, legal life—can and ought to proceed on the premises of social science, indeed of science itself. This is in one sense obviously impossible: a scientific rule is a prediction of future events based upon prior experience; a legal rule is the expression of a mind speaking to other minds—to other persons—seeking to affect their behavior by shaping their sense of the meaning as well as the consequences of what they do. Law works by an appeal from mind to mind.

Yet in academic law, as in the culture more generally, the image of science as the paradigm of thought, including legal thought, has enormous presence and force. The inherent dehumanization of this kind of thought—the erasure of the human person, the voice, the mind, the elimination of human value and hope—threatens both law and democracy at their core. Vining's deep claim is that even in the face of these forces of dehumanization and trivialization law retains a life and vigor, a resilience, upon which we can found our hopes and seek to build.

After my first year in law school and a summer at a New York law firm, which I loved, I was home for a bit before returning to my second year. It was 1962. My father, an economist who had studied under Frank Knight and Oskar Lange at Chicago in the 1940s, came into my room with the manuscript of a book he was working on. Its title was *On Appraising the Performance of an Economic System: What an Economic System Is, and the Norms Implied in Observers' Adverse Reactions to the Outcome of Its Working*. This was going to be my legacy, he said. If he did not finish it, he hoped I would.

The book's argument was that an economic system was in fact a sys-

tem of legislated rules, within the bounds of which economic actors made their decisions, responding of course to incentives and disincentives and others' actions under these conditions. It was a "mechanism," the behavior of which, in the sense of outcomes of its overall action over time, was to be described statistically. What the economist participating in the legislative process was to do was to determine and set out for legislators considering a change in a rule what the statistical consequence of the change would be, with respect to one or another parameter such as income inequality or employment in which legislators were interested because they were dissatisfied. For clarity he proposed a notation: "The modifiable operating mechanism, the thing for which *economic system* is the name . . . , I shall denote by $\{\theta, S\}$." The S represented the collection of statistical mechanisms that depended upon the θ , and "the θ ," he said, "is to represent a set of constraining and prescriptive rules," that part of the thing that is "directly" modifiable, a "system" of "statutory law and administrative rule." To be useful or even relevant, economists were to start with the set of rules that could be so denoted by the abstract symbol θ .

I read into the manuscript and eventually came to my father and said I could not help him. I could not help him because my sense of a "law" or a collection of "laws" was so very different. Law, I had already seen, was expressed in words spoken by responsible human beings to one another, who were listening to one another, and it was reexpressed and respoken over time. The meaning and effect of a "piece" of human law in the world, its very existence beyond the shadow existence a "dead letter" has, depended upon its authority, which came from constant mutual work with it. Laws might have systematic qualities but law was alive in a way rules that make a system are not. Law could die as well as live. There is a world of difference, I might have said if I had been older, between the authoritative and the authoritarian.

My father took the manuscript away. The problem I had was too central, the difference between us unbridgeable. He published the book twenty years later,¹ two years before I published *The Authoritative and the Authoritarian*,² and in one of those strange encounters of life, indeed as something of a sign of what has happened, his editor at Cambridge University Press came to where I was working, to head up the University of Michigan Press.

The gulf between human law and rules that can be represented by an abstract symbol remains as large today. My father's work was a chapter in

the history of those who were involved in economics waking up to law, which was then in time followed by those in law waking up to economics. If they were academic lawyers—rather than practitioners, judges, or prosecutors and attorneys general carrying on the everyday work of law—larger and larger numbers of them entered a period of trying to accede to the claims of economics upon our thought, and beyond economics, the claims of social science, and beyond social science, the claims of scientific thought generally. The last were claims to a total occupation of the mind that grew so much over this same period, connected, I think, to twentieth-century experimentation with totalisms of various other kinds.

James Buchanan, whose *Calculus of Consent*³ appeared in 1962, the same year as my conversation with my father, and who received the 1986 Nobel Prize in Economics for “public choice theory,” speaks of the “economic theory of politics” involving “the extension of *homo economicus* to behavior under observed institutional rules.” He treats my father’s work as its precursor in several ways, principally in “initiating what was to become a centrally important component . . . , the stress on rules as contrasted with the then universal stress on policy alternatives within rules.”⁴ Like “public choice theory,” “mechanism design theory” in current economics also has evident affinities with what *On Appraising the Performance of an Economic System* was seeking to achieve in its focus on law.⁵ I do not think my father, in his work, participated in the elimination of public value and the melding of the premises of social science with those of natural science that is encapsulated in Buchanan’s phrase *homo economicus*. My father’s choosers and modifiers of rules legislatively or administratively still acted on behalf of a larger entity. But he was first of all a statistician. He repeatedly presented the true form of a rule as the rule of an ordinary game and was enamored of game theory which was then new.⁶ He was himself a “player,” to use that term for a successful academic lawyer heard commonly in law schools now—he was devoted to football. He thought of mathematics as the ultimately serious form of thought—hence the abstract symbol θ precisely denoting the “set” of rules. While he might have demurred in life, he would have understood in his professional capacity how the geneticist and Nobelist François Jacob could say in his *Logic of Life*, published contemporaneously with *On Appraising the Performance of an Economic System*, that there is “no longer a difference in nature between the living and the inanimate worlds,” that “statistical analysis and the theory of probability have supplied the rules for the logic of the whole world,” and that “large numbers