

LAW AND SOCIAL CONTROL: NORMATIVE AND NON-NORMATIVE APPROACHES**Albert James Bergesen, University of Arizona****INTRODUCTION**

How does law act as an agent of social control? Probably the most widely held understanding is based on Weber's definition of law: "... when conformity with it is upheld by the probability that deviant action will be met by physical or psychic sanctions aimed to compel conformity or to punish disobedience, and applied by a group of men especially empowered to carry out this function." (Weber 1947 129)

This view of law as normative rules is seen in much of the present research in the sociology of law (Gibbs 1975, 1977; Friedman, Macaulay 1977; Black, Mileski 1973; Schwartz, Skolnick 1970). "Law is governmental social control ... It is the normative life of a state and its citizens, such as legislation, litigation, and adjudication." (Black 1976 2) But normative rules are only one means of social control. While they may apply particularly to questions of criminal law, the formulation of law in solely normative terms is being questioned (Kelson 1961; Hart 1961; Freeley 1976). In relying so heavily on the normative model we may exclude much of what is commonly considered law, and severely limit the ways in which we approach the more general issue of social control through law. Much of the law is made up of classifications and definitions, such as city ordinances, zoning laws, and building and electrical codes. Simple definitions and classifications are involved in social control. Too long have we seen the issue of social control *only* in normative terms. The law obviously does control through command-like rules with attached sanctions, but it also engages in changing behavior through the definitions it establishes and the altered social realities we encounter because of these changes.

THE NORMATIVE MODEL

A striking aspect of the sociological study of law as an agent of social control in normative terms is how little the law itself is thought to contribute to either changing behaviors or altering attitudes. Mere legal changes are thought to be meaningless. Their *legal power* always has to be transformed into *social*

power. This requires extralegal arrangements with sufficient sanctions to give legal commands meaning in concrete social situations. The tendency to emphasize institutions which implement law, and to define legal effectiveness in terms of the extent to which these enforcement institutions attain their goals, has shifted the focus of research from the effects of the law *per se* to questions of how conformity with legal dictates can be obtained. Much of the sociology of law is not directed to the function of law, but to those institutional authorities and social processes which give law meaning in actual situations.

Sumner's emphasis on the significance of legislative changes being in accord with community mores is a meaningless criterion given the plurality of heterogeneous groups in modern societies (Mayhew 1968). Assuming that such groups hold different and often opposing values, one cannot assume homogeneity of community mores. Mayhew's model is one of political pluralism where legal outcomes are seen as the product of the power, prestige and influence of the system's composite interests. This rather common pluralist conception appears in Becker's (1963) analysis of the role of the Federal Bureau of Narcotics in the establishment of the Marihuana Tax Act, in Rose's (1967) study of lobbying surrounding the passage of medicare legislation, and examination of the effectiveness of the Massachusetts Commission Against Discrimination (Mayhew 1968).

Reliance on extra-legal institutions is explicit with Mayhew. He considers distinctly legally induced change to mean the use of the state's power to enforce explicit norms stated in terms of law. The law does not act directly; social change is not immediately created by passing any particular law. But law can give normative expression to some values, and can provide the administrative machinery for their enforcement. The issue of a law's effectiveness now becomes one of an implementing organization's effectiveness. The goals of the legislation have become synonymous with those of its enforcing agency. To assume that law is given meaning through implementation shifts the analysis to issues of community power

power, political influence, and organizational processes like cooptation. This is legitimate as a case study of organizational effectiveness, but note that we are no longer dealing with the law *per se*, unless one assumes that the primary conditions for legal effectiveness are the political power and influence processes of implementation.

Duster (1970) asks whether law can alter moral definitions, and considers the essential ingredient for all categories of moral deviance to be its public characterization and the corresponding sanctions of the community. He uses the labeling perspective of the deviance literature (Becker 1963; Erikson 1977; Bergesen 1977a). Of interest are the agencies which apply the labels. For Duster it is not the law which attaches moral stigmas, but being processed by prisons and rehabilitation centers, and through differential association with an already morally deviant group. Duster assumes that the effectiveness of law does not derive from the activity of law *per se*, but as a consequence of other social organizations and other social processes.

"Law does not change attitudes directly, but then by altering the situation in which attitudes and opinions are formed, law can directly reach the more private areas of life." (Berger 1967 218) The study of community power structures seems relevant for changing public institutional behavior, like integrating schools and housing, or creating new job openings. But when the dependent variable shifts to questions of attitudes and opinions, a new set of mechanisms is employed.

A change in the law makes possible various types of enforcement agencies. Depending on the strength of opposing forces, such agencies are able to bring about changes in public behavior with variable success. The second step, altering racial prejudice, requires the introduction of various social-psychological processes which can be activated in the new social context created by the ending of overt discrimination. With attitudes as a dependent variable, the effectiveness of change in law is now *two* steps removed. 1) Enforcement organizations end discrimination in schools. 2) The newly constituted set of social relations, such as new reference groups, changes in interaction networks, or equal status interaction, act to change attitudes and beliefs. These

altered patterns of interaction effect attitudes. The law simply enables these situations.

In all these cases the function of law is limited to legitimating or authorizing activity by other social agencies, or allowing some other psychological or political process to be activated. This in turn, creates the desired effect. Questions of enforcement and conformity with changes in the law, as the way in which the real social change is effected, are largely a result of conceiving law in normative terms. When the model of social control is predicated on the assumption of a normative regulation of social action, the issue of conformity and the necessity of sanctions are *automatically* built into the formula.

An important characteristic of the Weberian model of social control which we call the *normative model* is the requirement of non-normative elements to give the model operational meaning in actual situations, namely, its inherent *uncertain nature*. As norms represent proscriptions or expectations for action, they inherently admit the possibility of non-conformity and deviance. As such the situation of actor and normative order is problematical. Given this initial framework of an actor and a normative order presenting the actor with various kinds of moral proscriptions, the issue becomes one of generating conditions under which conformity with these norms will occur — the problem of creating a valid order. Normative rules have no consequences for behavior in and of themselves. They require added arrangements to guarantee their validity as a means of managing social action.

To explain how conformity with the order is attained, Weber (1947) generated two concepts: 1) the emergence of a formalized social structure, an administrative staff authorized to sanction deviation from the normative order; 2) the definitional status of the order, or its legitimacy. For Weber, normative rules were interchangeable, so that what was a norm or custom or convention could easily be a matter of law. *A norm in this sense is not a variable; it does not take on different values, each with different implications for social control.* Law conceived as a Weberian norm also is not a variable in that mere changes in law have no direct implication for changes in social action. What do take on different values and are the relevant variables for social

control, are the organization of the external guarantee, or sanctions, and the legitimacy of the norms in question. Weber applied his general idea of rationalization to the comparative organization of external guarantees. These become the distinguishing criteria for differing normative orders. Moving from mere *usage* through *custom* and *convention* to *law*, two things happen which act to distinguish social from non-social patterns of action.

1) Action moves from mere repetition, based on habit and unreflected imitation to being socially meaningful. 2) Externally guaranteed rules emerge. Weber uses the idea of social meaning to distinguish social from non-social action, but its usage as an explanation of patterns of action stops. The primary emphasis is shifted to normative rules, and the different ways they are externally enforced. Thus, *convention* is a normative order similar to law, but its structure of enforcement is quite different. Convention is enforced through approval and disapproval of the actor's *environment*, while law possesses an explicitly formalized set of positions authorized to enforce the legal order.

Changes in substantive content of the normative rules, and therefore, changes in the content of law have no direct effect on changes in an actor's behavior. The normative rule remains merely a proscription for action, and the basic question is how to obtain conformity with that proscription. What does vary, and alters the probability of conformity, is the nature of the structure of external coercion. The effectiveness of this variable is the key to achieving conformity with the normative rules. The effectiveness of enforcement institutions is the key to whether law can be considered an effective agent of social change. The same applies to the legitimacy of a normative order. It is the *belief* in the appropriateness of the rule which varies, not the rule itself. The same rule can be more or less legitimate, or lose its legitimacy, and it is the *change* in this belief which causes the normative proscription to effect social control.

Norms themselves, and law itself, cannot guarantee conformity and compliance, and hence norms and law are not by themselves a source of social control. They require action of supplemental variables — a Weberian structure of external coercion and a belief in the legitimacy of the law. The effectiveness

of a normative order depends on the effectiveness of these supplemental variables, and thus, study of the effectiveness of a law requires study of these factors. The development of a sociology of legal phenomena based on the actions of the law will require formulating a non-Weberian theory of legal processes. If we continue with Weberian terms, sociological research will focus on various means available to attain conformity, and the role of the law itself as a means of social control will remain quite limited.

NON-NORMATIVE APPROACHES TO LAW

Much of the sociology of law has been a sociology of community pressure groups, enforcement practices of police, and various psychological processes thought to affect attitude change. But can the law have a more direct effect? Can mere changes in the law that are not of a normative character, and do not have sanctions for non-compliance, also change behavior? We can examine some non-normative laws to see if they can also be said to engage in social control without having to resort to command and sanction to attain their effect. In criticizing the normative model, Freeley (1976 505) suggests three kinds of non-normative law which engage in social control. The ability of the law to define, and confer rights, and distribute incentives is an important means of social control and should be considered along with the ever popular normative approach.

Laws of *definition* simply define; they do not command. Nor are sanctions necessarily directly attached to them. To get a valid driver's license one must be over 18, have good vision, and pass a driving test. Legal rules spell out these conditions, which must be followed to obtain a license. City ordinances fall into this category. They establish what kinds of structures can be built, where, and with what kinds of materials. Such laws control and shape the urban landscape.

Another kind of law confers special rights on certain persons and groups. Such laws involve certifications, professional licenses and degrees. Legal requirements limit access to certain areas of service. *Status-conferring rights* enable some, exclude others, and involve various institutions in the practice of teaching, law, medicine, and engineering.

They constitute a direct means of social control. The government can control the supply of certain professionals and limit or expand the social groups who can participate. We include political rights, and it has been argued that the extension of citizenship to wider areas of the population resulted in controlling the political activity of certain groups and mobilized others to take an active political role. The social control and politicization of the working class by extension of the franchise is an example (Bendix 1964; Tilley 1975; Bergesen 1977b). The role of law in certain legal acts, such as the Supreme Court ruling on abortion influences medicine, health care, and legislatures, and its effects reach the labor market, the size and composition of families, population growth, and changes in class and ethnic composition of society (Freeley 1976 506)

Distribution of incentives through tax breaks, and subsidies to farmers, home buyers, students, and others help change the country and the people.

CONCLUSION

Considering the fact that the great bulk of law on the books is probably not of the command-with-sanctions variety, but more of the definitional and classificatory variety, we are missing much of the social control that is actually being effected on a daily basis by the vast majority of existing law. We do not yet fully comprehend all the ways in which a simple change in law affects status, identities, and external social reality of daily social intercourse. There appear to be at least three kinds of law: definitional, right-conferring, and incentive-creating. These directly engage in social control without applying commands and negative sanctions. But the process whereby all this occurs is complex and little understood. I suspect that the processes center around the ability of law to redefine our social reality, and thereby alter both the substantive content of our roles and our selves, such that we become different kinds of people with the mere passage of a law, before it is enforced. The understanding of social control associated with the idea of *social construction of reality* probably provides the most fruitful place to begin serious consideration of non-normative

legal effects. In modern societies, much of the world we inhabit is encoded in law, and much of the way in which law may be controlling our lives is probably by the almost invisible means of constituting the social reality in which we conduct our daily lives. We have just begun to suspect that there are other ways in which law engages in social control.

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