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THE SOCIOLOGY OF LAW\*

The sociology of law proceeds upon the assumption that law occurs in a social context and can only be understood in that context. The word "occurs" is important here because, from a sociological point of view, law is not to be considered as only a static set of rules, but as a process. Law occurs in courts, in administrative agencies, in law enforcement agencies, in attorney's offices, in business offices and in negotiations between private citizens in all walks of life. It occurs as people use, interpret, apply and create social norms with legally binding validity, that is, social norms which are enforceable by politically organized society.

The sociologists is concerned with explaining order and coherence in social life, and, to that end, sociologists often stress the importance of social norms, of the established social rules which serve to coordinate human activity. However, the sociologist can not stop there, for he understands that norms do not operate automatically by their own power. People use norms, appeal to them, interpret them, and apply them. It is only by understanding this process that we can understand how legal norms function in social organization and how social organization shapes and constrains the legal process.

For example, it is not enough for the sociologist to know that there is, in the American legal system, a "right" to trial by jury. He wishes to know what sorts of people, from what social locations are called upon to serve on juries and how

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juries organize their deliberations. He wishes to know under what circumstances juries try to apply the formal law and when they rely on their intuitive sense of justice. The sociologist wants to know the consequences of trial by jury on the operation of the legal system and he seeks to understand how the organization of social life accounts for these consequences.

Thus, the sociology of law has roots in sociology, for sociologists are interested in any human activity with a social character. At the same time, to understand the course of development of sociology of law in America, it is necessary to appreciate that sociological inquiry into legal institutions has occurred in the context of the discussion of intellectual issues that transcend academic sociology. The strengths and limitations of our efforts to bring sociological insight to the study of law derive from the fact that three polemical issues have animated discussion of the role of law in society.

First, America's historic experience with prohibition and our current attempts to use legal tools to solve racial problems have placed the question of the relations between law and morality in very sharp focus. Concern with this problem leads to repeated posing of such questions as "Can law legislate morals?" or "Can law produce social change in the face of contrary attitudes in the community?"

Second, American intellectual discussion has not escaped the world wide battles between exponents of "conceptual" and "interest" or "functional" jurisprudence. Since the nineteenth century the critics of purely conceptual jurisprudence have

alleged that law is not merely a system of logically related concepts and rules. To pretend that it is leads to failure to use law to secure important social ends. Only by recognizing that judicial interpretation is a creative activity, necessarily responsive to social needs and pressures, can we channel and control this creative activity to make it serve crucial social functions.

Third, American thought about law has been especially concerned with the concept of the rule of law. We have wondered how the legal process can be organized so as to insure that the power of the state is controlled by law and the rights of citizens are protected in all strata of society.

There are several broad areas within the sociology of law and progress in all of these areas has been affected by these three vital issues. It is convenient to divide the broad concerns of sociology of law into four major categories:

First, there is the study of the functioning of legal agencies, second, the study of the development of legal order in the private sectors of society, third, the study of the impact of law on conduct and finally, the study of law as a normative system, defining and contributing to the coherence of the major institutions of society. In each of these areas sociological investigation has revealed regularities and increased our verified knowledge of law as a social institution. At the same time, in each area many important questions remain uninvestigated and unanswered. As we look at these areas in more detail we will see that in a number of instances both the successes and

failures of sociological inquiry can be attributed to the stimulation and the blind alleys provided by the surrounding intellectual controversies.

The students of the sociology of law have been most successful in illuminating the functioning of legal agencies. The "debunking" features of functional jurisprudence have supported interest in demonstrating non-legal elements in the legal process. Those who would attack the sterility of conceptual jurisprudence are very receptive to documentation of realistic influences on legal action. Again and again sociologically enlightened investigators have demonstrated the impact of social pressures on courts, attorneys, bar associations, juries, administrative agencies and other legal agencies. Repeated investigation has shown that legal activity cannot be understood as a mere expression or reflection of legal concepts and rules. In some instances these studies have been merely polemical. It is relatively easy to show that legal officials are influenced by various realistic exigencies; the crucial task is to show that these exigencies are themselves systematically organized and understandable as elements in an ongoing, functioning system. Further, we have no reason to assume a priori that norms and rules do not play a part in organizing this functioning.

For example, in recent years students have developed very sophisticated mathematical techniques for isolating regularities in judicial decision making. Many of these studies have shown in a very rigorous manner that the variability in the way judges respond to situations cannot be accounted for by mere reference

to legal rules and concepts. However, in many instances investigators have not gone beyond such explanatory concepts as "judicial attitudes" to elucidate the organizational sources and consequences of variations in judicial decisions. Such questions as "How are judges with particular attitudes recruited to the bench?" and "What are the consequences of variations in judicial decision on the operation of the legal system?" have not been investigated with an equal degree of sophistication and rigor. Nevertheless, efforts have been made to discuss problems of this type. For example, one student has shown that the amount of variation in opinion in the Supreme Court has not been constant over time and has suggested that increasing judicial dissensus is not necessarily a sign of breakdown of legal order but an indication of ongoing attempts to adapt legal norms to rapid social changes.<sup>1</sup>

The polemical character of work on the functioning of legal institutions can also be blamed for some of the limitations of sociological work on the legal profession. Although we have a growing number of works on the legal profession we have had few empirical studies of the role of the attorney as an agent of social control. It has been suggested that the attorney, by transforming the client's concrete demands into normatively defined demands and by insisting that clients face reality, acts as an agent of social control.<sup>2</sup> Most of the work on the legal profession has been more concerned with the non-normative influences operating on legal practice. It is as if investigators were worried lest they be charged with a naive conceptual jurisprudence.

The failure of sociological research to clearly articulate the normative elements in the functioning of legal institutions should not blind us to the real achievements of sociological research in this area. We are beginning to see an impressive body of documentation of some principles of general significance. For example, numerous studies provide support for this general proposition: At each point at which the legal system is linked to the larger society the legal processes at that point reflect the structure of the larger society. For example, the larger society is structured by a division into social strata with varying layers of prestige. At each point where the law is linked to the larger society the legal process shows the impact of stratification. Thus the jury is an institution designed to link the legal process to the community; it is specifically conceived to provide protection from arbitrary action by unresponsive officials. Research indicates that although the jury is conceived as a democratic institution, the stratification of the community is reproduced in the jury and through the jury the stratification system of the society affects the legal process. Middle class persons are more likely to be selected to serve on juries, and, once selected, they are more likely to be elected foreman and more likely to have disproportionate influence.<sup>3</sup> Stratification has also been shown to influence the legal process at other points at which the legal system is linked to the larger society. The selection of members of the legal profession and the selection of claims to be litigated are both influenced by social stratification and, for this

reason, stratification shapes the entire legal system by shaping the raw materials with which it operates.<sup>4</sup>

It is important to recognize that social influences on the legal process are not limited to the social pressures brought to bear on the makers of legal decisions. Sociologists have been equally interested in the forces that determine which claims are to be litigated. It has been shown that organized group interests play an important role in determining the issues that come to be presented to legal agencies, and the forms in which these issues are presented. Thus, the field of race by the strategic plans of the National Association for the Advancement of Colored People. This association selected cases quite carefully in order to present pioneering claims in a cogent sequence and then placed considerable resources behind strategic claims.

There is no guarantee that important social interests will be well represented by the group organization which is essential to their effective legal presentation. Thus, a crucial task of sociology is to undertake studies designed to show how some claims come to be more effectively represented than others. The sociologist is interested, for example, in the impact of the professional ethics of attorneys, which often prohibit the organized channeling of personal injury cases by arrangements between unions or hospital employees and lawyers specializing in personal injury litigation.<sup>5</sup> Does the prevention of such arrangements lead to a situation where insurance companies are more effectively organized to suppress claims than are injured parties to press them?



At this point we can clearly see the intimate connection between the study of the functioning of legal agencies and the problem of the rule of law. Sociologists tend to be skeptical of the power of rules or norms to achieve social ends without the support of social organization. One of the major concerns of political sociology has been to examine the sociological supports that make democracy possible. In this respect students of politics have stressed the importance of a rich associational life to insure the maintenance of political education and concern, and the effective protection and representation of a broad range of social interests. By the same token the rule of law is not guaranteed by the mere existence of a written constitution or an accepted tradition of the supremacy of legal norms. An operating rule of law requires the organized representation of claims in order to insure that they are brought to the attention of legal agencies and effectively presented. In the legal context one particular type of organized group is particularly important--the organized legal profession. To what extent can a well organized legal profession insure adequate training for legal practitioners, the maintenance of professional standards, the maintenance of a qualified and ethical judiciary, and adequate representation of the legal claims in all strata in the society.

Again the debunking tradition has not found it hard to demonstrate the failings of the American bar. There are glaring examples of the use of bar associations to restrict legal practice or to oppose the appointment of qualified judges for

political purposes. A number of studies have shown that the bar is itself stratified.<sup>6</sup> Law schools, law firms, and types of legal practice are arrayed in strata of varying prestige in such a way to insure that highly placed interests are well represented. The same system of stratification also tends to place lawyers of low social status in positions where they face great pressures to engage in professional practices of a dubious nature. There seems to have been less interest in documenting the role of professional organization in supporting the rule of law. Accordingly the mechanisms by which legal ideals have been realized to some degree are not well understood. Again we see the weak side of functional jurisprudence as a stimulus to sociological research on law. The notion of a rule of law presumes that legal rules or concepts can in fact guide legal decisions so as to insure a degree of protection for citizens against the organized centers of power in society. Approaches that stress the sociological limitations on conceptual jurisprudence appear to contradict approaches which search for the organizational supports that permit conceptual rules to operate in legal life.

Fortunately we are beginning to see the emergence of careful and balanced studies of the problems of professional organization. For example, one recent study carefully demonstrated the measure of success which the American Bar Association has achieved in reducing the political elements in the selection of federal judges. But the same study also shows that the Association's success has given more power to the upper strata of the profession to insure the selection of candidates who conform to their

interests and values.<sup>7</sup> At the conceptual level the problem has been attacked by attempts to draw a more careful distinction between "legality" and "legalism". The former concept refers to the establishment of procedural fairness and normatively regulated decision making, while the latter refers to the ritualization of the pretence of logical certainty and the consequent insensitivity to pressing social demands and problems.<sup>8</sup> The sociological problem is to outline the social conditions that support responsible autonomy and the conditions that permit intrusions on the independence of the legal system on the one hand or unresponsive ritualism on the other.

Sociological interest in the rule of law has not been limited to the role of the law of the state in the total society. Spurred by an interest in bureaucracy, sociologists have studied the development of analogues to legal procedures in large scale organizations. In studying such phenomena as the establishment of grievance procedures the sociologist can attempt to illuminate the functions of legal rules and formal procedures. Such work can be illustrated by a recent study indicating that the more bureaucratic an organization is the more its employees see themselves as protected by rules.<sup>9</sup> Studies of this type show that we have made progress in demonstrating that the development of systems of rules may enhance rather than prevent freedom for the participants in organizations.

These studies come under the heading described earlier as the study of the development of legal order in the private sectors of society. Interest in this range of problems has

also been enhanced by functional jurisprudence, for in one of its forms, (the sociological jurisprudence of Engen Erlich),<sup>10</sup> this brand of jural thought insists that any viable legal order must reflect the "inner order" of society as it emerges in social groups and associational. Attention is now turning to concrete studies of the development of "living" normative orders as they develop within and between the associations and groups which form society. Such studies become particularly interesting when they include investigation of how private groups use the law of the state as a tool in the course of negotiating private legal orders. One current student of the use of legal instruments has provided us with an extensive documentation of the relations between automobile manufacturers and their dealers.<sup>11</sup> His investigation shows that private, informal systems for planning relationships and settling disputes were prevalent and could not be ignored by any student seeking to understand the effect of the formal law. At the same time, the organized efforts of the National Automobile Dealers Association brought about changes in the law which dealers were able to use effectively as counters in informal negotiation and which influenced the forms of private arrangements. Additional studies of this type are crucial for if we are to understand the influence of law on human relations we must look beyond the use of law in official agencies to the use of law in private interaction. Indeed the very issue of the rule of law might be redefined as a problem of whether the official legal structure is organized so as to lend powerful support to the use of legal norms as effective weapons in private negotiation between unequal parties.

For similar reasons the study of the use of law is also important in the study of the impact of law on conduct. The impact of a law is not confined to the results of enforcement by official agencies. It is necessary to see whether private groups are utilizing the existence of the law as an instrument in securing their interests. It is surprising that sociological study has paid so little attention to mechanisms of this type. The weaknesses of our accounts of legal impact must be ascribed to the effects of the historic polemic on law and morality. The argument has been so intense that the participants have been driven to surprisingly extreme positions, including, for example, the view that law can only ratify norms or patterns of behavior that are already established. Thus, sociologists find themselves required to expound such elementary propositions as that the American Federal Government would probably not be able to maintain its present level of activity on the basis of voluntary contributions. Nevertheless, sociologists are now coming to realize that the question is not "Can law affect conduct?" but "Under what conditions does law affect conduct and by what mechanism is the influence of law established?"

There is mounting evidence that the effectiveness of law in changing patterns of conduct does not depend entirely on the degree to which law corresponds to attitudes in the community or the severity of the sanctions used to enforce law. In the first place it is clear that the notion of community attitudes is a complicated one. We must distinguish between community beliefs as to the necessity or desirability for a law, the

fairness of a law, the right of the lawmaker to pass the law, and the fairness of the law as applied to particular instances.<sup>12</sup>

The willingness of the community to obey the law must be distinguished from its desire to obey the law. People may not like to pay taxes but the right of the government to impose them is not generally challenged in the United States. Adequate explanation of patterns of non-compliance must involve reference to patterns of belief about the illegitimacy or unimportance of particular provisions and patterns of loopholes in the organization of enforcement.

Further, it is important to recognize that the community is not a homogenous set of individuals but a complicated network of variegated interests, beliefs, and patterns of conduct with varying degrees of organization. What to one segment of the community is an illegitimate and onerous demand is to other segments a necessary condition for the effective and ethical functioning of the community. Hence, any meaningful account of the effect of law on conduct must try to isolate the relevant features of the organization of the community in order to answer such questions as whether certain specialized groups have an interest in implementation of the law, whether such groups are organized to press demands for enforcement, and whether if they are organized they have clear channels of influence on the administrative machinery of the state. By the same token it is necessary to specify the location in the community of groups of potential violators and the access of such groups to defensive strategies. In sum, the inadequacy of defining the problem of law and conduct as a problem in whether law can act against community attitudes lies in failure

to recognize that law is a response to attitudes somewhere in the community. Thus, the task is to determine the degree ethical and political leverage available to the supporters of a law as a consequence of their position in a network of social organization.

Even if one is examining the problem of enforcement from the point of view of an enforcement agency, social organization is the crucial object of study. We cannot, for example, understand the success of the U. S. Government in collecting income taxes in terms of such simple concepts as public acceptance. The government's high level of success has clearly depended on the development of highly organized systems of access to taxpayers through the systematic withholding and reporting of the income of other people by private citizens at major control points in the society.

In three of the four major areas of sociology of law the combined impetus of sociological interest in social organization and jurial interest in functional jurisprudence has stimulated sociological investigation of law, but in the fourth area, the study of law as a normative system, these sources of stimulation have had a contrary effect. This effect has involved more than framing issues in inappropriate ways. In their zeal to show that law is more than a system of norms or rules sociologists have tended to ignore the sense in which law is a set of norms, and in consequence, the study of law as a normative system has suffered. Investigators have become so sensitive to the dangers of taking enunciated rules for granted, without reference to how they are used and interpreted by legal agencies or whether they correspond to the living law actually in force in society, that they have neglected to examine

the content and function of sets of legal rules. How do various types of organizational problems lead to different sorts of legal rules? How do the values of society affect normative solutions to organizational problems? It is unfortunate for sociology that such problems have been neglected, for the founders of sociological theory were very interested in broadly comparative problems in the structure and content of law as a normative system.

Fortunately, with the growth of our knowledge of the uses of legal norms and the functioning of legal institutions it is becoming easier to recognize how general statements of the contents of legal rules must be qualified. Given this capacity students may feel more free to develop accounts of the significance of the contents of systems of rules. Indeed, one influential student of legal institutions has seen that functional jurisprudence is not, in the last analysis a mere critical attack upon rigid conceptualism, but a positive attempt to understand how legal rules function to implement social aims through the imposition of normative controls. Guided by this insight, Professor Hurst and his students and associates have been producing monographs which describe and interpret trends in the development of legal norms. Professor Hurst, a teacher of law by profession, has pointed the way for sociological study with stimulating accounts of the development of law in the United States. His work may be illustrated by his interpretive discussion of the relations between law and the conditions of freedom. American law has continually reflected a fundamental valuation of the release of human creative energy, but the conditions for the release of creative energy have changed as



the organization of society has changed. Thus, as large scale organization and concentrations of wealth became more prominent in America, American law shifted its emphasis from a concern with control over the environment to a concern with control over social power.<sup>13</sup> Hurst did not come to this conclusion by merely speculating as to the meaning of the content of legal rules. He studied the origins and the uses of rules in different sectors of society and the political contexts in which rules emerged.

From the sociological point of view law is to be understood as a social process, but it is becoming increasingly clear that to understand law as a social process is to understand the operational meaning of legal norms as they are used, applied, interpreted and ultimately, through regular patterns of use, embodied in the institutional structure of society.

Indeed, sociologists hope that the sociological study of law will ultimately make its most important contribution by illuminating the structure of the institutions of modern society. A complex society such as the United States is organized around fundamental institutions which provide coherence to organized social life. The institutions of political, authority, property, contract, incorporation, and marriage provide ready-made means of establishing purposive and binding relationships among men. These institutions are defined and regulated by law. It is the task of sociology of law to provide an account of how legal agencies and private groups use law to establish and regulate conduct through the formation of social institutions.

REFERENCES

1. Snyder, Eloise, "Uncertainty and the Supreme Court's Decisions," American Journal of Sociology, LXV (1954), pp. 241-245.
2. Parsons, Talcott, "A Sociologist Looks at the Legal Profession," in Essays in Sociological Theory, Revised Edition, Glencoe, Ill.: The Free Press, (1954), pp. 370-385.
3. Robinson, W. S., "Bias, Probability, and Trial by Jury," American Sociological Review, XV (1950), pp. 73-78 and Strodtbeck, Fred L., et. al., "Social Status in Jury Deliberations," American Sociological Review, XXII (1957), pp. 713-719.
4. Mayhew, Leon, Law and Equal Opportunity, Cambridge, Mass.: Harvard University Press, 1966.
5. The emergent response of the law to this sort of problem can be seen in Brotherhood of Railway trainmen v. Virginia ex. rel. Virginia State Bar 377 U. S. 1, 1964. See Reichstein, Kenneth, "Ambulance Chasing: A Case Study of Deviation and Control Within the Legal Profession," Social Problems, XIII (1965), pp. 3-17.
6. See for example Carlin, Jerome, Lawyers on Their Own, New Brunswick: Rutgers University Press, 1962 and Ladinsky, Jack, "Careers of Lawyers, Law Practice, and Legal Institutions," American Sociological Review, XXVIII (1963), pp. 47-54.
7. Grossman, Joel B., Lawyers and Judges, New York: John Wiley and Sons, 1965.
8. Skolnick, Jerome H., "The Sociology of Law in America: Overview and Trends," Law and Society, a supplemental issue to Social Problems, Summer, 1965, p. 38.
9. Selznick, Phillip and Vollmer, Howard, "Rule of Law in Industry," Industrial Relations, I (1962), pp. 97-116.
10. Erlich, Eugen, Fundamental Principles of the Sociology of Law, Cambridge, Mass.: Harvard University Press, 1936.

11. Macaulay, Stewart, "Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers and the Legal System," Wisconsin Law Review, Volume 1965, pp. 483-575, 770-858.
12. See Ball, Harry, "Social Structure and Rent-Control Violations," American Journal of Sociology, LXV (1960), pp. 598-604.
13. Hurst, James Willard, Law and the Conditions of Freedom in the Nineteenth-Century United States, Madison, Wisconsin: The University of Wisconsin Press, 1956.