RESEARCH IN LAW AND SOCIOLOGY

A Research Annual

Series Editor: RITA J. SIMON, *Director*
Program in Law and Society
University of Illinois

Guest Editor: STEVEN SPITZER
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FOREWORD

Within the last decade, the sociology of law has been shaken by the same kind of crisis of confidence and purpose which has called into question the direction and assumptions of the sociological enterprise as a whole. Increasingly, those who are studying and writing about the relationship between law and society have come to ask how the development of law, theorizing about law, popular conceptions of law, and contemporary legal pratices are related to the underlying conflicts, contradictions, and structural transformations which give shape and substance to modern social life. No longer content with the view that law is a simple by-product of a cohesive social whole and dissatisfied with traditional depictions of law as a normative or "idealistic" phenomenon, investigators have given more and more attention to the political and economic context within which law and legal "behaviors" are generated and changed.

While these efforts have not yet coalesced into a unified theory of law and society or a single "school" of legal analysis, they clearly represent a novel and refreshing direction in the exploration of law as a social phenomenon. The styles and methods that distinguish the proponents of this "new" sociology of law are many and varied; but the one characteristic that they all seem to share is an interest in and search for a "critical" perspective. What makes this perspective "critical" is neither its commitment to iconoclasm *per se* nor its loyalty to a single social theorist (e.g., Marx). The critical character of this work seems to flow, rather, from its unrelenting desire to penetrate the appearance or facade of legal relationships, to pierce the legitimations and mystifications in which the law has been clothed, and to discover the most deeply-rooted connections between power, economic relationships, ideology, and the organization of the legal system. Moreover, critical investigations of legal relationships place a high priority on estab-

lishing theoretical points of reference and methods of inquiry which are not forced to justify themselves in terms of their immediate "usefulness" or contribution to existing relationships, organizations, or practices. To be critical means to be able to step outside (and sometimes inside) the "context of justification" and refuse to allow instrumentality to become a criterion of truth. For this reason, a critical sociology of law depends upon both "external" strategies of inquiry (e.g., historical and comparative methods) and "internal" forms of analysis (e.g., exegesis)—methods of investigation which allow for the penetration of "common sense" understandings of legal relationships and forms without forgetting that these phenomena are forged out of a process that is bounded by time, place, cultural meanings, and structural imperatives.

If there is a single theme or focus of this second volume in the annual series, it is to be found in the "critical" character of the essays and their attempt to transcend the boundaries which have traditionally defined the territory of the sociology of law. The nine essays in this volume all address, in one way or another, the problems which have been placed on the agenda by those who are interested in building a more "reflexive" sociology of law. Although they differ widely in their styles, levels of analysis, and analytical content, each of these papers seeks to contribute to the development of a more critical understanding of law as a phenomenon *of* as well as *in* society. In this sense, this collection attempts to join and extend the debate through which the "paradigmatic crisis" which has afflicted modern social science over the last several decades can both be turned into a new source of creative intellectual energy and be made to serve the ends of building a more humane society.

The papers could most easily be organized into three major sections. The first section includes essays which address the problems involved in understanding the complex interplay between political, economic, and legal organization in capitalist societies. Each of these papers tries to explore, at varying levels of generality, the ways in which legal phenomena are tied to the underlying structures, contradictions, and priorities surrounding the distribution of power, privilege, and access to economic resources. In "Contradictions and Conflicts in Law Creation," William Chambliss explores the advantages of a dialectical paradigm over simplified versions of "ruling class" and "normative" theories. Defining a dialectical paradigm as one which "sees law creation as a process aimed at the resolution of contradictions, conflicts, and dilemmas which are inherent in the structure of a particular historical period," Chambliss goes on to construct a specific model describing the interaction between contradictions, conflicts, dilemmas, and resolutions. This model is then applied to an understanding of the Special Area Acts (1934–1937) in Great Britain, pollution laws in the United States, laws pertaining to the organization of labor in colonial societies, laws governing working conditions in England and the United States, and law

creation in socialist societies. In sum, Chambliss tries to stress the importance of basic contradictions in the political economy as a starting point for a sociological understanding of law creation.

The political economy of law also provides the context for Wolf Heydebrand's essay on "The Technocratic Administration of Justice."In this paper, Heydebrand argues that technocratic administration emerges out of a synthesis of two historically and analytically separate forms of organizational control: professional-collegial dominance and bureaucratic administration. The main characteristic of technocratic administration, according to the author, is a comprehensive and totalizing concept of rationalization as, on the one hand, a productive organizing force oriented toward increased organizational capacity, and, on the other, a means of social control and systems engineering. In applying these concepts to the study of public service organizations such as courts, Heydebrand concludes that there is a tendency, generated by the fiscal crisis of the state, toward increasing rationalization of both work procedures and control mechanisms. Four modes of rationalization in the American judicial system are singled out as examples of technocratic strategies, and some of the contradictory consequences of technocratic administration for the ideology of the "rule of law" are also discussed.

In the final paper in the first section, Warren Samuels examines the relationship between "The State, Law, and Economic Organization." Through this analysis, Samuels asserts that the study of government as an economic variable has been dominated by emotional and ideological factors. Attempting to supply a corrective to the fact that "the burden of economists' emotional and ideological baggage has been visited upon and made operative through their treatment of government," the author sets forth what he claims to be "an objective, descriptive, positive, and even agnostic approach to the study of government as an economic variable." The argument is developed to demonstrate the validity of the proposition that government, and therefore the legal system through which it operates, is an instrument or vehicle available for the use of whomever can get into a position to control it. Critically examining the work of the scholastics, mercantilists, John Locke, the physiocrats, the orthodox economists, and Max Weber, Samuels outlines and develops supporting evidence for his "instrumentalist" conception of the state and legal institutions. On the basis of this investigation, he concludes that the principle of the use of government can provide the basis for a clearer understanding of legal systems by facilitating better identification, analysis, and understanding of the economic significance of government.

The second section is devoted to papers on the work of theorists who have tried to interpret the role of law in society. Each of the essays confronts the problems associated with assessing the contributions of theorists whose attempts to understand law embody widely different assumptions about

man in society and "society in man." While each paper arrives at different conclusions with respect to the validity and implications of the theories examined, they all lend support to the argument that a truly critical sociology of law must have a sound and thoroughly articulated theoretical base. In "Ideology and Rationality in Max Weber's Sociology of Law," Piers Beirne undertakes a sophisticated exploration of the philosophical roots, theoretical presuppositions, and political consequences of Max Weber's sociology of law. Basing his analysis upon the assumption that the current crisis in the sociology of law stems, in large part, from the influence of Weberianism, Beirne attempts to situate Weber's methodology and theoretical insights within the context of bourgeois philosophy, values, and attitudes toward social reality. Through a careful consideration of German philosophical idealism, materialist philosophy, and the issues surrounding social actionism in Germany, Beirne excavates the foundations of Weber's sociology of law and, in the process, explains Weber's ultimate commitment to the "politics of disenchantment." This analysis gives us a deeper understanding of how Weber arrived at his conclusions about the inner workings of legal systems and why he, in contrast to Marx, "condemned the *irrationalities* of the capitalist order whilst fundamentally resigning himself to the permanence of its historical reality."

The next essay in this section is Gary Young's paper entitled "Marx on Bourgeois Law." In this analysis, Young undertakes an intensive examination of the contours of Marx's writings on law in bourgeois society. Of particular concern to Young are Marx's discussions of wage labor, contract law, the Factory Acts, and the law governing the transition from some pre-capitalist formations to capitalist production. Through an investigaton of Marx's studies on these forms of bourgeois law, Young concludes that contract law and the Factory Acts provide Marx with illustrations of the ideological nature of bourgeois law as well as the law's coercive role in class struggle. He also suggest, however, that the general thesis that law is superstructural should be expunged from Marxian legal theory. Arguing in favor of a more "concrete" analysis, Young focuses attention on the fundamental changes law can work on production and class relations. Moreover, he reasons that "if the thesis of superstructurality is rejected, there emerges a Marxian approach to bourgeois law which regards as an empirical question in every case the extent to which law has been created and molded by capitalist class and production relations, and the extent to which the reverse has occured." The most tangible benefit of such a position, according to Young, is that it is "both truer to Marx's own theoretical practice and more likely to result in an understanding of bourgeois law."

The final paper in this section is "The Sociology of Law of Gurvitch and Timasheff: A Critique of Normative Theories of Law" by Alan Hunt. In this essay, Hunt explores the writings of Gurvitch and Timasheff as two

theorists whose work, despite its failure to have a lasting impact on the sociology of law, provides a concentrated expression of the theoretical problems that beset current practice. According to the author, the weaknesses and deficiencies that are found in the theories of Gurvitch and Timasheff are the enduring weaknesses of mainstream sociology of law. More specifically, Hunt argues that both authors, in spite of important differences in their terminology, theoretical objectives, and analytical styles, embrace the view that social action is determined through normative processes. Criticizing the tendency of such normative theorists to import a set of evolutionist, teleological, and equilibrium assumptions into their conceptions of law and society, Hunt makes a case for the reorientation of theoretical development toward a sociology of law which begins to more adequately address the processes of domination and power as well as the structural and institutional features of the state.

The third major section includes three papers which explore a number of important issues surrounding the nexus between law and social change. These issues are investigated differently, depending on whether law is seen as a cause or a consequence of social change, but in each instance an effort is made to depict the relationship in question as both empirically complex and decisive to the advancement of theory in the sociology of law. In each essay, the central question that is asked, either explicitly or implicitly, is: How does our understanding of law as a social phenomenon reflect the assumptions we make about the ways societies solve the problem of achieving *both* social order and social change? In the first essay, Spitzer examines the prospects for developing a general theory of punishment and social change. He pursues this objective by delineating and critically evaluating four hypotheses relating the form and intensity of punishment to the transformation of social arrangements: (1) the organic differentiation hypothesis, (2) the political centralization hypothesis, (3) the political legitimacy hypothesis, and (4) the labor control hypothesis. Drawing on anthropological, historical, and sociological evidence, and giving special attention to the interplay between political, economic, and ideological foundations of control, Spitzer tries to explore the fit between these propositions and actual patterns of punitive development. In sum, he concludes that if we are to make progress toward a better understanding of the relationship between punishment and social change, we must redefine both legal coercion and social development in ways which acknowledge the diversity and complexity of social regulation as well as the multidimensional features of change in what we call the "evolution" of societies. Some specific suggestions are made as to how much of this reconceptualization and empirical investigation might begin to take place.

In "Public Interest Law: Crisis of Legitimacy or Quest for Legal Order Autonomy," Shirley Castelnuovo examines the current proliferation of critical legal order literature and how it relates to questions of law and social

change within liberal capitalist society. In addressing the debate between two legal order critics who have been influened by Marx (Isaac Balbus) and Weber (David Trubek), Castelnuovo asks whether the public interest bar can become an instrument of significant change in the United States or whether it is merely a legitimating instrument in post-liberal capitalist society. Through a consideration of the dialectics of "legal form," "moral and political entrepreneurs," and the concept of legitimation in its Marxian and Weberian treatments, she concludes that we must reconstruct and combine the contributions of both Marx and Weber. We must, in other words, accept both Marx's vision of a more human society and Weber's means-ends calculus as a way of exploring reasoned choices.

The final paper in the collection is Joseph R. Thome's "Legal and Social Structures and the Access of the Latin American Rural Poor to the State Allocation of Goods and Services." In this analysis, Thome focuses on "the problems faced by the rural poor of Latin America in gaining access to public programs or services whose avowed purpose is to achieve a redistribution of wealth and income or at least to provide the rural poor with a service structure that will provide opportunities for increasing their relative share of the national wealth." Thome explores the constraints facing the rural poor in gaining access to goods and services as well as the effects of such constraints on their perceptions and behavior. He undertakes this exploration through a systematic survey of existing literature and a case study of the redistribution of water rights during the Frei administration (1964–1970) in Chile. Developing a distinction between constraints to access that arise from the socio-economic structure and those that arise from the legal-institutional structure, Thome points out that we have avoided for too long looking at the interdependent features of the socio-economic structure in favor of more narrow investigations of problems arising from or within legal institutional structures. While remaining critical of the "access" approach to the study of law and social change, Thome does note that "the dynamics and contradictions within capitalist development can produce legal and institutional structures which permit, within certain limits, the type of political action that can lead to redistribution of resources and other basic structural changes."

Taken in its entirety, this volume represents an attempt to explore the contours of several new directions in the sociology of law. But like its predecessor, volume 1, this anthology has not restricted itself to the work of sociologists alone. The insights of law, political science, economics, anthropology, and philosophy have been integrated into and provided substantial support for this effort.

Finally, this volume would not have been possible without the encouragement and confidence in me demonstrated by Rita Simon. I sincerely thank her for the opportunity. I am also greatly indebted to Pam Jenkins, who

provided invaluable assistance in performing the sometimes less than stimulating editorial chores. Without her help, my students and colleagues would have had to face a far more irascible and far less good-natured professor over the last several months.

STEVEN SPITZER
Guest Editor

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PART I:

THE POLITICAL ECONOMY OF LAW

CONTRADICTIONS AND CONFLICTS IN LAW CREATION

William J. Chambliss, UNIVERSITY OF DELAWARE

There are literally thousands of laws enacted each year. In the United States, with fifty state legislatures passing laws, thousands of municipal and county ordinances, and the federal government, the sheer magnitude of law is overwhelming. In addition, there are court decisions at the state and federal level which often constitute the creation of new laws as well. Other nations, such as most European countries and Scandinavia, where the law-making function is more centralized, do not produce quite the magnitude of new law each year that the United States does, but it is nonetheless a very prolific enterprise, this business of making law.

It is not surprising, then, that attempts to generalize about the processes that lead to the creation of law should be wanting. Some laws are clearly passed for the specific interest of an individual; others emerge out of lobbying by groups representing substantial portions of the population; yet others, perhaps the majority, are no more than an expression of the views and interests of legislative committees.

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Despite this, however, there remains the need for generalization to aid understanding. Fortunately, we are not hopelessly mired in an endless number of laws, for as it happens, not all laws are equally significant. In fact, most of the bills and statutes passed by legislators are concerned with tinkering and diddling with existing law. What we should thus be concerned with is not the mountain of minutiae produced as law but the critical events: the points at which laws are produced which provide a new approach to a problem, a basic revision of the existing relationships between state, polity, government, and basic insitutions; new innovation in the conception of legal contracts or the rights of children vis à vis parents; of women and work, etc. These laws are the ones that comprise the important turning points in the historical process and are therefore the ones about which we should be concerned to develop adequate sociological theory:

> Most cases, to be sure, are merely cumulative in their effect, moving in well-beaten paths, with some inevitable deviation but by and large within the lines laid down. Occasionally, however, comes a case of tremendous importance (Hall, 1952, pp. 3,4).

These are the cases, which "strike out in a new direction."

EXPLAINING THE CREATION OF LAW

Social theories differ markedly on the relative weight they give to the ideological and the material aspects of society. Theories which place greatest emphasis on ideology see the beliefs people have—their ideas of right and wrong, the things they value, and their culture—as the most important configuration of elements shaping the way people and their history behave. Theories which emphasize the importance of the social structure stress the way people organize the production and distribution of resources (i.e, food, shelter, clothing, money, and power) as the proper starting point for sociological analysis. There is a sense in which the entire history of western social thought can be seen as a struggle between exponents of these conflicting traditions.

In their zeal to defend one or the other theoretical paradigm, it is not uncommon to find one side accusing advocates of the opposing position of having "completely ignored" or "relegated unimportant" those features of reality seen by the writer to be "salient." Those who attack ideological or normative theorists accuse them of neglecting entirely facets of social structure that are not part of the ideology of the times. Conversely, those who argue against structural interpretations that de-emphasize the importance of culture or ideology like to characterize such theories as devoid of any emphasis upon ideology as a moving force. Attacks on Marxist theory are among the clearest examples of this erroneous construction of straw men to strengthen one's own argument. Critics of Marxism invariably

accuse this tradition of ignoring ideology and culture as forces shaping society. They also accuse Marxism of being "reductionist" and attributing everything to the force of economic determinism. No careful reader of Marx, Engels, or those who have followed in that tradition could honestly make such an error. As Engels (1968) points out to a friend in a letter:

> . . . because we deny an independent historical development to the various ideological spheres which play a part in history (we do not therefore) deny them any effect upon history.

The point is given more concrete manifestation when it is observed that those nation-states that have based their political and economic organization on Marxian ideas have been among the most concerned to develop and foster an ideology among the people supportive of the state.

Critics of Weber and Durkheim have often made the same oversimplification in the other direction, accusing them of emphasizing culture, norms, and ideology to the exclusion of social structure. The reduction of these complicated theories to such simple mistakes is as fallacious as is the characterization of Marxism as economic determinism.

This is not to say, however, that there is no significant difference in emphasis between sociological traditions. There are differences in emphasis which make for profound differences in the claims and explanations put forth. If one sees the most important force behind the development of the state in modern societies as resulting primarily from a tendency towards increasing rationalization and only secondarily from the demands and machinations of material conditions, then a theory is suggested which is quite different from one that sees the state as developing primarily as a means of furthering the interest of those who control the means of production and only secondarily as being influenced by the ideology and norms extant at the time.

There was a time, not too long ago as a matter of fact, when theories trying to answer the question of how laws are created followed rather directly from the two paradigmatic traditions discussed above. One theory suggested that the law represented "societal consensus." Durkhein, Sumner, and Hall (to mention the more obvious samples) saw the law as primarily a reflection of the "collective consciousness," the "norms and values" and the "customs" of a people. In opposition to this view was the "ruling class" model, which argued that the law reflected the ideas and the interests of those who controlled the material and power resources of the society, those who sat at the top of the political and economic institutions.

One is hard pressed to find examples of modern social scientists defending the pure forms of either of these models. Everyone, it seems, recognizes that there is some truth in both claims. Thus Richard Quinney (1974, p. 138) invokes the idea that the law reflects extant ideology, but integrates into this

hypothesis the notion that extant ideology is largely a reflection of dominant class interests:

> As long as a capitalist ruling class exists, the prevailing ideology will be capitalistic. And as long as that ruling class uses the law to maintain its order, the legal ideology will be capitalistic as well.

Lawrence Friedman (1977, p. 99) has expressed a similarly eclectic view of the relationship between ideology and economic structure, but his emphasis is on the role of consensually held values rather than economic structure:

> What makes law, then, is not "public opinion" in the abstract, but public opinion in the sense of *exerted social force*.

Friedman goes on to recognize that there are differentials of power which make it more likely that some groups (and social classes) will be successful in "exerting social force to create law" than will other groups. The "explanation" proffered, then, is one of competing interest groups with different power bases as the moving force behind the creation of laws.[1]

These two views, of which the works of Quinney and Friedman are representative, characterize the current debate over law creation. They are quite logically derivative from the earlier, less subtle characterizations of "ruling class" and "normative" theories of law. It is to the credit of the sociology of law as a scientific endeavor that the more sophisticated theoretical formulations take account of the empirical research and theoretical discussions which revealed the shortcomings of the more simplistic interpretations.

Several criticisms are nonetheless appropriate to the paradigms suggested by Quinney and Friedman. For one thing, neither is amenable to empirical test. As Friedman recognizes, if the test of whether or not one "interest group" has more power than another is that one is successful in its efforts to effect legislation while the other is not, then the theory is a mere tautology which tells us that those groups whose interests are represented in the law are the groups who succeed in having their interests represented in the law. On the other hand, the view that the law represents the ideology of capitalism so long as there is a capitalist ruling class begs the question of how this comes about. Is there an automatic response of all law or is there a process involved? Furthermore, this theory is also subject to the dangers of tautology. If we discover the passage of laws that are opposed by the "capitalist class," then does this contradict the theroy? (See, for example, Hopkins, 1979.) Perhaps it should, but if we invoke the idea that "in the long run these laws turn out to either be unenforced or to in fact represent the interests of the capitalist class," then we have once again suggested a paradigm which becomes true by (a) definition and (b) the invocation of auxiliary hypotheses (see Popper, 1959, and Hansen, 1958).