

LAW and DEVIANCE

Edited by
H. LAURENCE ROSS

SAGE Annual Reviews of Studies in Deviance, Volume 5

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H. LAURENCE ROSS



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**SAGE ANNUAL REVIEWS OF
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SAGE ANNUAL REVIEWS OF STUDIES IN DEVIANCE

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The City College of the City University of New York

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H. Laurence Ross

PREFACE

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The relationship between law (and social control more generally) and deviance, or nonconforming behavior, has been a classic subject of debate in philosophy and jurisprudence as well as in traditional social science. The hallmark of the classic discussion was the assumption that the basic question to be addressed is the origin and persistence of deviant behavior. Deviant motivation and nonconforming behavior were assumed to be rare and peculiar, requiring explanation where conforming behavior did not. Conventional social science does not challenge this assumption; it merely brings scientific theory and technique to the enterprise of explaining deviance and to the policy concern of eliminating it. Such concepts as social disorganization and social pathology are representative of the explanatory variables used in this enterprise by traditional social scientists.

Some change in this perspective was presaged in functionalist sociology, which noted that deviance when punished could contribute to the strength of group morality and to social cohesion. In consequence, according to the functionalists, some level of deviant activity is normal and necessary, and not subject to elimination by ameliorative programs.

A more radical change in the view of deviance among social scientists has been brought about by the development of conflict theory and of labeling theory in recent years. Thinkers of these persuasions have pointed out that deviant motivation and nonconforming behavior are common and that explanations of the existence and rates of deviance may be better obtained by studying the control system than by studying those people who are labeled as deviants.

Recent thinking thus suggests that identical behavior may be viewed as deviant in some circumstances and as conforming in others, depending on who makes the rules and what they are trying to achieve. Which individuals are caught in the control system to account for their behavior and which escape the net may also be explained less by behavioral differences among the individuals than by the structure and process of systems of social control, especially the law. This line of thought helps make sense of facts such as that nine of ten American adults admit in interviews to having done things for which they could be put in jail, and also helps explain the widespread use of illegal substances, engaging in variant forms of sexual activity, and even blatant violation of certain clearly criminal laws among large and prestigious segments of American society. In addition, contemporary thinking finds policemen and psychiatrists to be more important in the legal process than lawyers and judges, and it sees parallels and exchanges between legal and other forms of social control, especially medicine. Transfers among various forms of social control and decontrol are also central to this line of thought.

This new viewpoint is popular, if not unchallenged, in contemporary social science, and it is slowly obtaining influence on matters of policy. For instance, an apparently bankrupt policy of conviction and imprisonment for Skid Row alcoholics has been replaced by efforts at diagnosis and treatment; conditions such as homosexuality, previously considered to be signs of sickness, are being reconsidered as improper subjects for any kind of social control. On the other hand, previously unnoticed behaviors like environmental polluting are newly being defined as deviant and subjected to legal strictures.

The authors represented in this book are not necessarily committed to either labeling theory or conflict theory. However, their specific contributions cumulate to demonstrate the power and promise of a viewpoint premised on an emerging synthesis of these positions. My hope is that this volume will serve, not as a definitive statement of this synthesis, but as a resting place in its development, at which point some notable contemporary accomplishments can be acknowledged and from which further development will continue.

This preface sketches the nature of the contributions made by each author, in order to guide the reader briefly through the materials, pointing out the highlights as I see them and the linkages that support the theme of the book. In general, the book is organized to begin with consideration of the nature of law, as contrasted with custom and morality. Subsequent chapters discuss the relationship between deviance and the criminal law and then that between deviance and noncriminal law. Another contribution addresses the issue of deviance within the legal system. The final chapter places the view of law and deviance represented in this volume in the context of theoretical developments in both social science and legal scholarship.

Chapter 1, "Morality, Responsibility and the Law," by Edward Sagarin and Robert J. Kelly, is an essay on the nature of legal obligation and, hence, the nature of legally punished deviance. The core of the essay is the distinction, in the thought of various writers, between the violation of legal rules and the violation of other kinds of rules, especially those of morality. The question, although relevant to the social scientific understanding of deviance, has been addressed primarily by moral philosophers and students of jurisprudence. Sagarin and Kelly show the import of the philosophical debate for the social scientist.

Much moral and legal philosophy (and much social scientific theory in the mold of William Graham Sumner) conceives of law as a codification of moral consensus. In that writing, law is merely an institutionalization of the mores, a passive precipitate of other social factors. Conformity to the law is normal and deviance is a sign of social or personal pathology. However, Sagarin and Kelly note that if one admits the possibility of morally based criticism of the law then the identity between law and morality is severed and the differences demand explanation.

The discussion of the differences between law and morality is centered on the ideas of responsibility in these two rules systems. A variety of perspectives on responsibility are reviewed and criticized. One of the common themes running through the discussion is the relationship between morality and thoughts, motives and intentions, whereas law relates to behavioral choices. An implication of this discussion is that the legal deviant may be morally inspired; indeed, that there may be a moral duty to violate the law in some instances.

Chapter 2, "The Criminalization of Conduct," by William J. Chambliss, is concerned with explaining the creation of major rules of law. The central theme of this chapter is that legal rules may not be understood by mere assumption. The rules of law are culturally and historically variable, and any particular system requires explanation. This theme also applies to deviance

from the law. The nature of deviance is conditioned by the rules against which it is judged, and deviance is in part explained in terms of the same considerations that explain the law.

One explanation of law stresses its embodiment of social consensus, which is held to be formalized in legal rules. This ideologically based interpretation does not fit the reality of complex societies, which are segmented and stratified in values as well as social interaction. Even the extension of this theory into "radical pluralism" fails to explain why some segments of society are successful in appropriating the claim of social consensus in support of their version of necessary and proper legal rules. On the other hand, social structural theories of the "instrumental Marxist" sort, which explain law as the imposition of a ruling class, also oversimplify reality. These theories fail to recognize the diversity and segmentation of power and interests among the powerful as well as the lowly, and do not explain why particular ruling interests prevail over others. Cheap labor, for example, is advantageous to some "rulers" but harmful to the interests of others, and laws that favor cheap labor will be differentially endorsed by different segments of a ruling class.

Chambliss endorses a conflict theory of law which allocates explanatory power not only to the basic economic institutions cited by Marxists but also to other factors, including ideology, which are considered "superstructure" in traditional Marxist thought. These factors often exist in contradiction to each other, presenting members of society with the experience of conflict and dilemmas that they struggle to resolve. Creation of law represents a momentary resolution of the contradictions, but in turn it generates new contradictions. This gives to law, and hence to deviance, dynamic and adaptive qualities which are evident in modern societies, both capitalist and socialist.

In Chapter 3, entitled "Labeling Criminals," Stephen J. Pfohl joins conflict theory to labeling theory. Applying the criminal label to a deviant is a ritual of exclusion that turns a person in a situation of conflict into an offender beyond the pale of acceptable society. This ritual helps to define the limits of permissible behavior and to rally the community in defense of this definition as well as of the totality of existing social relations.

According to Pfohl, there is no crime, nor is there a criminal, without the application of an appropriate label to certain behavior. The purpose of this labeling is to control social trouble or disorder by identifying a troublemaker. Labeling is undertaken in times of trouble and manages the troublemaker without really getting at the underlying anomia and conflict. The latter are found—following Michalowski—to reside in social conditions

such as high population density, complex divisions of labor, stratified and unshared values, economic inequality and related frustrated expectations, and challenges to the legitimacy of the established authority.

Criminal labeling is only one possible response to trouble among several possibilities. Alternatives are rituals of inclusion or reconciliation, which maintain order by removing trouble between members of a society and restoring cooperative interaction. Examples of such rituals, typical of "primitive" or stateless (acephalous) societies, are symbolic satisfaction and restitution and—more rarely and less obviously—retribution and blood revenge. Rituals of exclusion, including the labeling of criminals, are typical of state societies, which are extremely vulnerable to the conditions that foster trouble, and in which rituals of reconciliation are difficult to effectuate.

The criminal labeling process reduces the crime problem to the problem of "the criminal" and focuses attention upon the peculiarities of the offender rather than the strains and conflicts within the larger society. Although this process is functional in the short run, it operates at a considerable unrecognized cost borne by unfortunate minorities and permits the perpetuation of inherently troublesome social conditions.

The labeling perspective is continued in Chapter 4, "The Interpretation of Evil in Criminal Settings," by Keith Hawkins. This work specifically concerns the decision to grant parole, which may be viewed as positive labeling. The parolee gains, in addition to freedom, a new and less pejorative status as compared with that of prisoner or convict. In this essay, based on participant observation of parole boards, Hawkins reviews the factors entering into parole decisions and shows how they relate to other, more traditional, deviant labeling.

The parole decision, like the sentencing decision, may be based on one of two alternative theories of imprisonment. "Positivistic" theory assumes that criminality can be cured and that prison may provide a means to effect this cure. "Classical" theory assumes that the purpose of imprisonment is to provide the criminal with just deserts, without regard to whether the prison experience is reforming. The decision whether to imprison or to release the offender depends, in the positivist view, on whether the offender is changed so as not to repeat the crimes. From the classical viewpoint, the decision depends on whether the offender has suffered sufficiently to pay for the crimes. Both views, however, imply that underlying the decision is a diagnosis of the offender as good or bad.

The decision in question is based on "facts" or data from files and interviews which are in themselves morally neutral. The moral diagnosis involved in the parole (or, by extension, the sentencing) decision requires

interpretation of these data, depending in part on the dynamics of the interview situation, the personal predilections of interviewers, and the politics of the group decision process among the members of the board. The decision causes the data to be reinterpreted to support the ultimate decision.

Hawkins finds that evidence is structured by several mechanisms. Through "simplification," attention is limited to certain data and others are discarded. Through "presumption," attention is focused on evidence from sources defined as credible, and evidence from noncredible sources is discounted. Through "characterization," evidence is taken as clues to the essential nature of the person being judged. Through "organization," the data are related and interpreted in the context of individual history. A "career" is fabricated for the person being judged in such a way that the decision being reached appears reasonable and appropriate. The decision makers or labelers need to regard their decision as rational and to present it as such to their interested audiences, including the prisoner whose freedom is determined by it.

Some scholars have taken the uncertainty of labeling decisions as evidence that the process is fundamentally irrational and arbitrary, but Hawkins finds that, though not strictly determined, the decision is to an important degree predictable and understandable, and deeply integrated with prevailing standards concerning what constitutes goodness and evil.

In Chapter 5, "Beyond Crime: Seven Methods to Control Troublesome Rascals," Malcolm Spector surveys a variety of social control mechanisms, identifies a general historical progression among them, and offers predictions about their relative development in the future.

The mechanisms of social control can be viewed as ways in which a society disposes of its "troublesome rascals." Spector offers a categorization including sin, tort, crime, disease, "streamlining," ineligibility, and toleration. He shows how these categories are related to social conditions generally, and to each other.

When the "rascals" are defined as sinful, it is the religious institution that sets the rules and offers the procedures and punishments for handling them. This mode of control predominates at times when the state is weak and religion is strong.

With tort mechanisms, the aggrieved party is conceived to be an individual or social subgroup. Redress for the troublesome behavior is compensation of the offended party. The state may intervene in providing facilities for the determination of wrongfulness and collection of the compensation, but it is not an active party and its participation is not a burdensome obligation upon state machinery.