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PART III
LEGISLATING OBEDIENCE: PRIMARY ADDRESSEES

CHAPTER V
WHY DO PEOPLE OBEY THE LAW?
-oOo-

Law performs many functions: settling disputes, authoritatively allocating power, prescribing procedures., symbolizing worth, legitimizing power. On its face, whatever its other functions, all legislation aims at changing behavior. For most legislation, this seems unproblematic. Even legislation against flag-burning -- surely as symbolic as law can become -- aims at preventing unwanted behaviors. Some legislation, however, does not seem to fit this pattern. This applies particularly to legislation aiming to fulfill law's salvage function. The criminal law plainly lays down rules that we expect citizens to obey, subject to sanctions. Divorce law, however, seems only to fulfill law's salvage function. A marriage has become a social mess; divorce law provides a mean for tidying it up. Even divorce law, however, defines behaviors for a variety of actors: The parties, with respect to alimony, custody of children, and child support, for example.

All legislation may aim at affecting behavior, but a fair amount of it misses the mark.¹ How to affect an addressee's behavior depends, of course, upon the explanation for behavior in the face of a rule of law. This Part examines that question.

The Realists left us all with the understanding that behavior systematically differs from the prescriptions of the law; the law-in-action always varies somewhat from the law-in-the-books. The Institutional model we looked at in Chapter IV gives a very general explanation for that, but leaves as an unspecified grab-bag the various arenas of choice of the several actors in the legal order.

Recall the heuristic function of theory: Theory aims to guide research. The categories we choose guide research by serving as the basis for hypotheses, which the researcher can then test against the data of the case in question. Scholars have disagreed about the relevant categories. This Chapter discusses these different theories.

Before reaching that issue, of course, the researcher must determine whose behavior and what behavior constitutes the social problem that falls for examination. The drafter must then explain that behavior, taking (as we have seen²), the legal order itself

¹ See above, p. I-2.

² Supra, p. IV-xx

as the manipulable variable. To do that requires some guidelines -- a theory -- about behavior in the face of a rule of law. Here we first present a case study in behavior in the face of a rule of law -- here a stop sign -- and then discuss in turn some sociological theories, Law and Economics, and the Institutional categories.

Feest, "Compliance with Legal Regulations:
Observation of Stop Sign Behavior"
2 Law and Soc. Rev. xx (1967)

2 Law and Society Rev. (1967)

COMPLIANCE WITH LEGAL REGULATIONS

Observation of Stop Sign Behavior

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THEORETICAL FRAMEWORK

Assessing the Impact of Legal Regulations

THERE IS AN AGE-OLD CONTROVERSY over the relative importance and feasibility of formal and informal controls of human behavior. One body of theory, most notably the Sumner tradition, has held that control by formal laws is unimportant and dependent compared to controls by other means: "Acts of legislation come out of the mores. . . . Things which have been in the mores are put under police regulation and later under positive law. . . . The regulations must conform to the mores, so that the public will not think them too lax or too strict."¹

Others have argued, that formal law can and does increasingly become an agent of social control. Gunnar Myrdal has voiced "grave scepticism" toward Sumner's approach² and Edwin Lemert has contrasted Sumner's "passive" social controls with "active" social control.³ There have been, however, relatively few attempts to discover the actual

1. W. G. SUMNER, *Folkways* 55 (1906).

2. G. MYRDAL, *AN AMERICAN DILEMMA* 103ff., 104ff. (1964).

3. E. LEMERT, *Social Structure, Social Control, and Deviation*, in *ANOMIE AND DEVIANT BEHAVIOR* 28ff. (M. B. Cressel ed. 1964). See also *The Folkways and Social Control* 7 *AM. SOCIOLOGICAL REV.* 2129 (1932).

impact of formal legal regulations.⁴ The main reason for this seems to be that it is extremely difficult to assess the net impact of such regulations. In most everyday life situations, legal norms carry a social stigma, i.e., they are paralleled and backed by non-legal norms. But there are also certain legal regulations which carry little or no such social stigma. As a consequence they are backed only or at least mainly by legal sanctions. Their violation has been labeled "folk crime," which includes all "illegal acts which are not stigmatized by the public as criminal."⁵ Typically, these are regulations of technical character and recent origin. Examples are: traffic violations, white collar crimes, and chiseling in unemployment compensation. The regulations that "create" folk crime have not yet received an overall name. Because of their supposed lack of social stigma, I will refer to them as "unstigmatic" regulations. Unstigmatic regulations offer a chance to measure the effect which formal legal regulations per se have on human behavior.

Compliance With Legal Regulations

Compliance as it is understood here, is more than outward conformity with a regulation. Behavior which externally (objectively) conforms with a certain regulation may not coincide with internal (subjective) intention to conform. In performing the prescribed behavior, the actor may not be aware of the existence of the regulation, or he may be forced to conform for reasons that have nothing to do with the norm or its sanctions. The concept of compliance has, therefore, three essential elements: (a) norm-awareness, (b) intention to conform, and (c) conforming behavior.

Norm-awareness cannot always be assumed to exist. Especially at times when the law is constantly changing, many people will not know of the existence and/or the content of a particular regulation. Norm-awareness can, however, be assumed in the case of self-explicatory signs, announcing the content of the regulation. With respect to the intention to conform, two reasons can be distinguished: the actor may have

internalized the norm (compliance for its own sake) or he may fear sanctions (enforced compliance). Both are included in the concept of compliance as it is used here. There will be a few remarks on the special problems of enforced compliance at the end of this paper.

Observation of Stop Sign Behavior

Of the many possible unstigmatic regulations, I have selected stop signs for study. They are easily observable and quite self-explicatory. The language of the sign is simply and unambiguously "Stop," and frequently a white line indicates where to perform the required act. In California, where I made the observations for this study,⁶ the relevant legal regulation is the California Vehicle Code Section 22450. All California drivers must have come across the pamphlet *California Vehicle Code Summary*, since it is distributed to everybody who wants to take the driver's examination.⁷ In three different paragraphs of this pamphlet, the driver is told to bring his car to a "full stop back of the limit line."

I have distinguished above between compliance and conformity. As an observer, however, I had to use conformity as an indicator for compliance.⁸ But I tried to make this indicator more sensitive by excluding some typical cases in which norm-awareness or the intention to conform are highly doubtful. With respect to stop signs such cases are:

a. *Stopping during cross traffic.* In such a case, it is unclear whether the regulation or the perceived "impossibility" to proceed makes the driver stop. I have excluded all cars that stopped or slowed down during cross traffic (i.e., all cars that let cross traffic cars pass before they themselves proceeded). This method has one shortcoming: it may exclude cars driven by overcautious

6. For details on the collection of data see Appendix.

7. DEPARTMENT OF MOTOR VEHICLES (ed.), 1966, at 54. Section 22450 reads:

"The driver of any vehicle upon approaching any entrance of a highway or intersection, or railroad grade crossing signposted with a stop sign provided in this code, except as otherwise permitted or denoted in this code, shall stop:

(a) At a limit line, if marked, otherwise before entering the crosswalk on the near side of the intersection or, if not, then before entering the highway or intersection."

Comparable regulations are assumed to exist in other states and thus, they are likely to be familiar to out-of-state drivers.

8. Another indicator, but again only an indicator, would be a statement of the actor as to whether he knew the norm and/or conformed voluntarily.

4. Recently, interesting attempts have been made by so-called legal "impact studies" along quasi-experimental lines. These studies involve the comparison between actual behavior patterns in jurisdictions having a certain law, and the behavior patterns which would have existed in those same jurisdictions, had the law in question never been enacted. The main flaw in the ingenious research designs developed is, that they rely mainly on official statistics. See R. Lempert, *Strategies of Research Design in the Legal Impact Study*, 1 L. & Soc'y Rev. 111ff. (Nov. 1966).

5. H. L. Ross, *Traffic Law Violation: A Folk Crime*, 8 SOCIAL PROBLEMS 232 (1961).

drivers, who stop and wait until finally cross traffic appears. The number of strict conformers will be slightly reduced by this method.

b. *Stopping for staying.* Some people stop at stop signs in order to stay there rather than to cross the intersection. They are usually easy to distinguish from the true compliers, and can be excluded from the sample.

c. *No stopping because stop sign has been overlooked.* This is much harder to distinguish. I saw only one case where the observable evidence could be most easily interpreted that way (relatively high speed; near collision with cross traffic; double check and slow proceeding).

The most severe limitations of the so specified indicator of conformity are the following two:

a. Some people may slow down or stop neither because of the sign nor because of actual cross traffic, but because they anticipate cross traffic. The ideal research design would be the following: to observe the patterns of behavior before and after the regulatory sign has been installed. This turned out to be impossible in the present study because the Berkeley Department of Public Works informed me that no new stop signs were to be installed during this period.

b. Although the stop sign regulation is extremely clear, there may still be differential perceptions or interpretations as to what the norm prescribes. The people who violate the strict official interpretation of the norm may, in doing so, comply with a less strict interpretation which they regard as the relevant one. This limitation is, however, less damaging for my present purposes, since I am interested in the amount of compliance with the regulation-as-announced. More important is a variation of this same limitation: some drivers may experience their maneuver as a full stop. This possibility cannot be excluded, and will again reduce the number of observed compliers.

PRESENTATION OF FINDINGS

The only empirical data on stop sign behavior published to date was published in 1934 by Floyd H. Allport in a paper on conforming be-

havior.⁹ These data have been reprinted in at least one major textbook as an example for the generalization that "the majority of persons conform to the prescribed standard and that small deviations are more frequent than large deviations. This generalization appears to hold true for many kinds of social behavior."¹⁰ Whatever may be true for other kinds of social behavior, this generalization is not supported by the data gathered here for stop sign behavior, if we separate cross traffic from other sorts of traffic.

TABLE 1
CROSS TRAFFIC AND STOP SIGN BEHAVIOR

Type of Stop	Type of Traffic Included		Total Traffic Including Cross Traffic	Total Traffic Excluding Cross Traffic
	Cross Traffic Only			
	ALLPORT	FEEST	FEEST	FEEST
	%	%	%	%
Full Stop (Stop) * _____	75.5	78	34	15
Rolling Stop (Very slow) _____	22.0	21	47	58
Half Stop (Slightly slow) _____	2.0	1	16	22
No Stop (Same speed) _____	0.5	0	3	5
N _____	2114	72	241	169

* The categories in brackets are Allport's.

Table 1 compares Allport's data with equivalent data from my sample. He used only such cases "where there was traffic coming at right angles to the direction of travel of the motorists concerned; so that a double incentive to stop was presented in the possibility of a collision and the presence of the stop sign."¹¹ Such a procedure, as I have discussed above, obscures completely the subjective side of the compliance with a norm. The conformity figures will rise and fall with the amount of cross traffic. When I follow Allport's procedure of data collection (Column 2), my results are strikingly similar to his. But when I use

9. F. H. Allport, *The J-Curve Hypothesis of Conforming Behavior*, 5 J. Soc. Psych. 141-83 (1931). Quoted after the abridged version in *Readings in Social Psychology*, 55-67 (Newcomb *et al.*, eds. 1917).

10. G. A. Lundberg, *et al.*, *Sociology* 311 (1958).

11. F. H. Allport, *supra* note 9, at 57.

my own procedure, compliance with the norm (*i.e.*, a full stop in the absence of cross traffic) goes down from 78 per cent to 15 per cent.

My complete data on compliance, *i.e.*, with cross traffic always excluded, are shown in Table 2.

TABLE 2

Type of Stop	Location of Stop Sign			Type of Crossing			Total %
	Russell & Ellsworth %	Rose & Shattuck %	Russell & Adeline %	Left Turn %	Straight On %	Right Turn %	
Full Stop	11	15	20	16	14	14	14
Rolling Stop	72	50	50	75	63	46	62
Half Stop	16	28	25	9	19	32	21
No Stop	1	8	4	—	8	8	4
N	227	99	68	68	246	77	391

Table 2 shows that 14 per cent of the observed drivers bring their cars to a full stop without being forced to do so by cross traffic (*i.e.*, regardless of whether the driver makes a right or left turn or whether he goes straight on). The type of crossing makes a difference only when the car is not brought to a full stop. Left turners are least likely and right turners are most likely to make a half stop or no stop at all. This can presumably be explained by the fact that such maneuvers are most risky in left turns and least risky in right turns. An additional factor may be the California Vehicle Code Section 21453 which permits right turns against red lights. I think that these variations can be seen quite independently from compliance or non-compliance with the stop regulation. It is not surprising that the number of stop violators goes up in locations with a good range of vision (field of sight). It is also more puzzling that the number of strict compliers varies directly with range of vision: from 11 per cent at Russell & Ellsworth (smallest range of vision) to 20 per cent at Russell & Adeline (widest range of vision). But I think the explanation is as follows: In order to see into the cross street at Russell & Ellsworth one has to proceed deeply into the intersection, while at Russell & Adeline one can get a fairly good view into the cross street right from the stop sign (see Appendix).

TABLE 3

STOP SIGN BEHAVIOR: DAY AND NIGHT; ACCOMPANIED AND SINGLE

Type of Stop	Day			Night			Total	
	Single %	Accompanied %	Total %	Single %	Accompanied %	Total %	Single %	Accompanied %
Full Stop	9	20	13	17	24	20	10	21
Rolling Stop	70	62	66	48	41	45	66	57
Half & No Stop	22	18	21	36	35	35	24	22
N	227	84	311	48	29	77	275	113

I expected lower compliance during the night hours, because the drivers might feel less observed and inhibited by official and unofficial law enforcers. This turned out to be only partly true: the number of half stops and no stops goes up, but so does the number of full stops (Columns 3 and 6). I tried to reduce the latter phenomenon to the different composition of the population of nightly drivers. Night drivers are more likely than day drivers to be young, male, and accompanied, but neither of these differences explains the decrease in compliance. My best guess is that at night the cautious are even more cautious and the daring even more daring.

Much clearer results derive from a comparison of single and accompanied drivers: accompanied drivers are consistently more norm-abiding than unaccompanied ones. This can be interpreted as a measure of social pressure, and it could show that the stop regulation is not purely unstigmatic. The difference between single and accompanied drivers is more marked during daytime than at night. This again seems to indicate that there are factors operating at night that do not show up in this analysis. Because of this, and because of the relatively small number of night cases, I have excluded the nightly stop sign behavior from the following tabulations. Since, on the other hand, the single-accompanied distinction seems to yield fruitful results, I have retained it throughout the following tables. Official statistics have often been quoted to the effect that the Negro crime rate is higher than that of whites. One of the exceptions to this rule is drunken driving where whites predominate, but with respect to all other traffic regulations Negroes are supposed to be more often delinquent than whites.¹² But official statistics refer only to the

12. C. Mendenhall, *supra* note 2, at 973.

number of arrests and convictions, not to the number of actual violations. Our data indicate that whites predominate among the stop sign offenders.

TABLE 4
STOP SIGN BEHAVIOR BY RACE AND SES

Type of Stop	Low SES*			High SES			Total	
	(1) Negro %	(2) White %	(3) Total %	(4) Negro %	(5) White %	(6) Total %	Negro %	White %
Full Stop	30	12	18	4	11	10	15	11
Rolling Stop	65	74	71	76	63	64	72	66
Half Stop & No Stop	5	14	11	20	26	26	13	23
N	20	42	62	25	199	224	46	263

* Indicated by cars which I classified as "old."

Table 4 shows that 23 per cent of whites and only 13 per cent Negroes are in clear violation of the norm. If that is true not only for Berkeley but for the United States, and if the official statistics are correct, this could only be interpreted as a case of differential law enforcement along racial lines. In accordance with previous studies,¹³ Table 4 indicates that "folk criminality" is associated with high rather than with low social standing (Columns 3 and 6).

Wholesale compliance was observed by 18 per cent of drivers with low socioeconomic status as opposed to only 10 per cent of those with higher status. There is a question whether the relationship between race and compliance can be reduced to one between class and compliance. Table 4 offers no clear evidence on that point. With respect to Negroes, the factor class makes a big difference: while only 4 per cent with high SES show strict compliance, the percentage for those with low SES is 30. With respect to whites the factor class does not seem to make much of a difference: strict compliance of those with old cars is about as frequent as of those with new cars. This could be interpreted to mean that class makes a difference only with respect to Negroes: one could speculate about "ritualism" on the part of lower class Negroes, and about "successful integration" on the part of middle class Negroes. But I am more inclined to think that the age-of-car indicator for social class, valid as it may be for Negroes, is quite misleading among whites in Berkeley. There are not too many lower class whites in Berkeley, but there are many middle class students with old cars.

13. See H. L. Ross, *supra* note 5, at 233.

TABLE 5
STOP SIGN BEHAVIOR BY RACE AND SOCIAL PRESSURE

Type of Stop	Single		Accompanied		Total	
	Negro %	White %	Negro %	White %	Negro %	White %
Full Stop	0	10	41	13	15	11
Rolling Stop	87	68	53	66	75	67
Half Stop & No Stop	13	22	7	21	11	22
N	30	194	17	70	47	264

The relationship between race and compliance is modified considerably by introduction of the single-accompanied variable. It turns out that social pressure (as distinct from legal pressure) makes a considerable difference for Negroes while it hardly makes any difference for whites. This lends some empirical support to my assumption that stop signs are unstigmatic norms; at the same time the assumption is shown to be correct for whites only.

TABLE 6
STOP SIGN BEHAVIOR BY SEX AND SOCIAL PRESSURE

Type of Stop	Single		Accompanied		Total	
	Male %	Female %	Male %	Female %	Male %	Female %
Full Stop	6	12	18	25	9	16
Rolling Stop	73	65	60	63	70	61
Half Stop & No Stop	21	23	22	12	21	20
N	130	96	50	40	180	136

Table 6 shows that women consistently comply more strictly with the legal regulation than men do. Social pressure (indicated by the single-accompanied variable) seems to have about the same influence on men as it has on women as far as strict compliance is concerned.

Table 7 shows that the age of the driver consistently makes a difference with respect to compliance. The youngest and the oldest drivers are more likely than others to comply strictly with the stop regulation. At the same time, however, we find a positive relationship between age and

TABLE 7

STOP SIGN BEHAVIOR BY AGE OF DRIVER AND SOCIAL PRESSURE

Type of Stop	Single			Accompanied			Total		
	-30 %	35-55 %	60- %	-30 %	35-55 %	60- %	-30 %	35-55 %	60- %
Full Stop	11	6	16	29	18	(17)	17	9	16
Rolling Stop	59	74	64	54	61	(75)	57	70	68
Half Stop & No Stop	30	19	20	18	20	(8)	26	20	16
N	54	144	25	28	49	12	82	193	57

the clearer types of violation. One can speculate, that age indicates two quite different things; on the one hand younger people may be more daring, on the other hand they have learned the legal norm more recently and may not yet have reinterpreted it. This would seem to be confirmed by the breakdown in single and accompanied drivers. Single drivers under thirty are much more likely than accompanied ones to go through stop signs. There is no difference for older drivers in this respect.

Summary

The data presented above indicate that the number of people who strictly comply with the formal legal regulation is about 15 per cent. This figure is subject to some variation relative to time, place, and the type of people involved.

It seems likely that the number of strict compliers is slightly higher than the data would indicate (see earlier discussion on pp. 451-2). But the fact that more than four-fifths of the people observed violate the legal norm (in its strict, official interpretation), is certainly striking. We have to consider, however, two things:

(a) The official enforcement of stop sign regulations appears to be rather lax in Berkeley.¹⁴ The police, more concerned with speeding, apparently cite stop sign violators mainly in connection with other violations, and particularly as a result of accidents.

14. Out of a total of 22,158 moving violations in Berkeley, which resulted in cita-

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(b) The data indicate, that most people (62 per cent) make a rolling stop, and one can very well argue, that the "living law" permits this type of behavior. This would bring the number of people who comply, to some extent, with the law to 76 per cent (79 per cent during daytime). Only 4 per cent (2 per cent during daytime) go through stop signs in a truly reckless manner ("No Stop"). While this may be reassuring, it does not invalidate my findings which are concerned with the regulation, as it is announced and reiterated, rather than with the "living law."

ON THE GENERALIZABILITY OF THE REPORTED DATA

The data presented in this paper can hardly be generalized even for Berkeley, since they stem from observation of only three arbitrarily chosen intersections. But how far could data of this kind be generalized if their reliability were beyond doubt? Three factors seem to make generalizations even to other "folk crimes" difficult and hazardous:

1. We have already mentioned the problem of enforcement. This is of particular importance for unstigmatic norms as the one here under consideration. Clearly, our results cannot be generalized to regulations that are more strongly enforced. For the purposes of generalization and comparison it will be necessary to devise some sort of "enforcement coefficient."¹⁵

2. Another decisive variable is norm-awareness. With respect to stop signs, we have assumed that knowledge of the regulation is relatively high. This is certainly true in the sense that the norm is clearly announced and propagated. Our results cannot be generalized to norms where this is not the case. On the other hand, I suspect that even very clearly announced regulations can be reinterpreted or misinterpreted by those to whom they apply if enforcement is lax.

3. The last factor is the perceived reasonableness of the norm. Our data indicate that most drivers regard the strict version of the stop

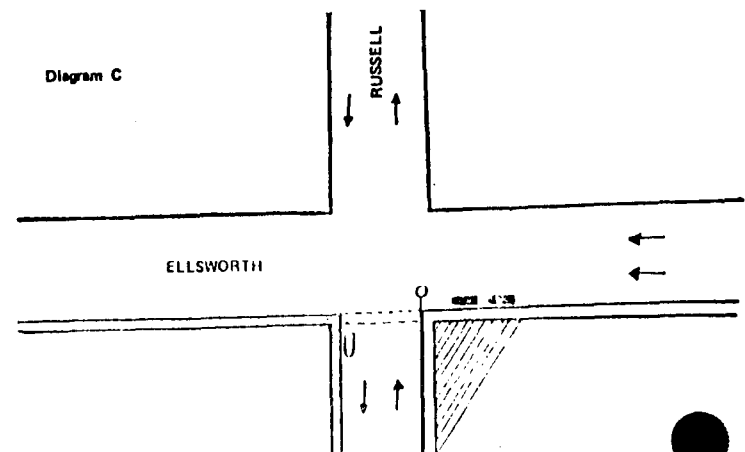
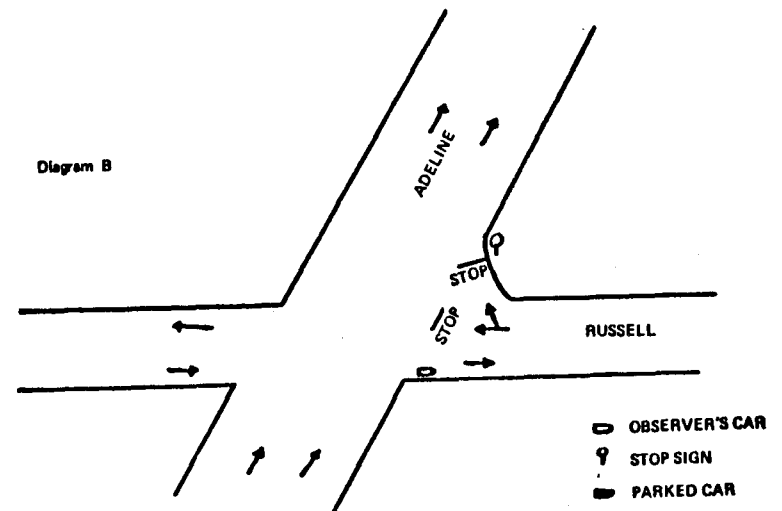
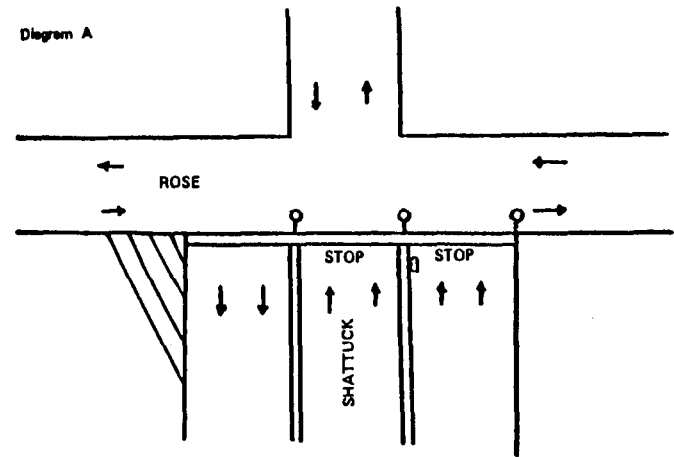
15. Some such measures for traffic law enforcement have been devised by John A. Gardiner. As to the impact of enforcement, however, he claims that "while few empirical studies have been made on this point, there is some evidence that police enforcement rates have no influence whatsoever on the rate of traffic violations . . ." in *Police Enforcement of Traffic Laws: A Comparative Analysis*, Sept. 1966, at 17 (paper presented at the Annual Meeting of the American Political Science Association, New York).

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regulation as unreasonable. In order to see whether there is any danger, the driver has to proceed into the intersection, and if there is no visible danger, there is no good reason to stop. The perceived unreasonableness is more marked in locations where the limit line is drawn too far back and the driver's field of vision is very limited (see Table 2).

Widespread violation is less likely in the case of norms that have all the trappings of reasonableness. In order to be able to generalize from our results to other types of folk crime, we would have to know how reasonable the different norms are supposed to be from the point of view of a certain population.

APPENDIX Collection of Data . . .



LAW AND SOCIETY REVIEW

2. *Recording of Observations.*

I recorded the following informations on the cars that passed the stop sign under observation:

- (a) Type of car,
- (b) Estimated age of car: old (ten years and older); middle; new (last two to three years),
- (c) Sex of driver,
- (d) Race: Caucasian, Negro, Oriental,
- (e) Estimated age: 20, 25, 30, . . .
- (f) Single/accompanied,
- (g) Type of stop (see below, 3),
- (h) Type of crossing of intersection: left turn, straight on, right turn.

3. *Types of Stop.*

The police brochure *Required Stops*¹⁶ defines "Stop" as "cessation of all forward motion." "A cessation of forward movement even though it is momentary will satisfy the legal requirements." The brochure advises police officers to watch the wheels of the vehicle: "If they do not cease their motion at any time, your testimony to this effect will usually be sufficient."¹⁷

The brochure lists 5 types of "stops":

- (a) Complete stop. Vehicle comes to a full stop before proceeding.
- (b) Rolling stop in which the vehicle goes through the stop zone at 2-10 mph.
- (c) Half stop, in which vehicle slows but goes through stop zone at 10-20 mph.
- (d) No stop. Vehicle does not slow but continues on through the stop zone at a constant rate.
- (e) Over speed limit. Vehicle goes through stop zone in excess of the speed limit.¹⁸

4. *Sampling.*

- (a) Cars.

I have attempted to observe and report the stop sign behavior of all cars that passed the sign during the time of observation. This was not always possible, e.g., when more than one car approached the intersection. In such cases, I made it a rule to take the first one, and to disregard all others until I had finished recording the information on it. At one point, I tried to replace

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this somewhat unsystematic procedure by recording only every third car. This worked well, but I dropped it because it took too much time.

- (b) Intersections.

I did not sample intersections. The three intersections which I observed were chosen for the following reasons: Rose & Shattuck because it gives the driver a relatively wide range of vision (field of sight); Ellsworth & Russell, since it gives the driver relatively little range of vision; Russell & Adeline, to make up for the total lack of Negroes at Rose & Shattuck.

5. *Unobtrusiveness.*

Ideally, one should presumably stay at some distance from the stop sign and use binoculars. I observed the cars from within my own car which I had parked near the stop sign. I do not think, however, that my approach was in any way obtrusive, since I was just another person sitting in a parked car. The only "danger" was to come into eye-contact with the approaching drivers. This can, however, be avoided by choosing a good location (see maps of intersections, Diagrams A, B and C, on page 459).

NOTES

1. Consider Kidder's comments (Robert L. Kidder, *Connecting Law and Society* (Englewood Cliffs: Prentice Hall, 1983) 119-124:

LEGAL IMPACT: PROBLEMS OF MEASUREMENT

The question of legal impact is basically a problem of explaining behavior. We want to know whether the changes or patterns we see in people's actions can be explained as a response to changes in the law.

Now, imagine yourself sitting high on a cliff overlooking a vast desert. Crossing the desert are two highways which intersect at a point where a person can see twenty miles in all directions. As you watch, a car comes into view and twenty minutes later it approaches the intersection. It comes to a complete stop and then proceeds. As you watch, five other cars, spaced out over a two-hour period, do the same thing. But you notice that cars coming along the other highway go right through the intersection without stopping. What do you conclude? There must be a stop sign on the one highway and not on the other. Your binoculars confirm your suspicion. Cars stop because the stop sign (the law) says they must. You have just observed "legal impact."

16. TRAFFIC INSTITUTE OF NORTHWESTERN UNIVERSITY, *REQUIRED STOPS* (Traffic Law Enforcement Series, Pub. No. 2541, 1958).

17. *Id.* at 5.

18. *Id.* at 10.

Or have you? Is there any other way of explaining why those cars stopped? If there is, then law may not be the decisive cause of the behavioral pattern you have observed.

Obedience vs. Self-Interest

First, ask yourself this: Would I stop like that if I could see for twenty miles on both sides that nothing was coming? Research shows that if you are a typical driver, you probably would not stop under those conditions.

At most, you would probably slow down and "roll through," stopping just enough to look both ways. As a typical driver, you would stop completely, as the law says you must, only if trees, a hedge, or a hill obstructed your view of the crossing highway, so that you had to stop to be safe. The only other reason for stopping would be if you saw a police car parked near the intersection.

Here, then, is our first major obstacle in answering the question Does law make any difference—does it account for the observed behavior? How can we know that people's actions are a response to law if their behavior also conforms to their own self-interest? Whenever we try to explain behavior as stemming from the operation of a norm, whether legal or not, we must show that the behavior has been channeled away from obviously self-serving behavior toward action which is more socially acceptable.

We would not say, for example, that people are obeying the law if they avoid scaling the outer wall of the World Trade Center in New York because they are afraid of heights, or know nothing about mountain-climbing techniques, or prefer frisbee throwing as recreation. The law may say that it is illegal to climb that building. But we can see that most people don't do it because they are afraid of falling.

To conclude that the law has an impact *because it is law*, then, we must show that people are choosing actions which, but for the law, are incompatible with their self-interest. We must show that if people do act in their self-interest in conforming with the law, it is because the law, not other circumstances, has made the action self-serving.

* * *

Our first major difficulty in demonstrating impact, then, comes from the problem we have sorting out self-interested behavior from law-following behavior.

Law vs. Morality or Habit

Getting back to our stop sign example, another complication in concluding that the law makes people stop shows up in evidence that people with passengers in their cars stop consistently more often than people driving alone. What does this mean? Are the drivers with passengers trying to be more careful because of their added responsibility? Or are people with passengers in less of a hurry? Perhaps (and here is the rub) people with passengers feel some kind of *moral pressure* on them, either to be more careful, or to obey the law. Another possibility is that people who drive alone are just a different group of people (loners, angry young men, hot rodders, etc.) who have different driving habits.

Feest was not able to test all these variations, but his observations certainly complicate the simple *vaccine model*, which holds that the stop sign, and the law enforcers represented by the sign, make people stop. These observations point out the necessity of considering the *social context* within which the law operates. Does compliance indicate obedience to the law? Or is it produced by the simple compatibility between what the law says and what people customarily do anyway? If a neighborhood stormed city hall after the death of a local child at a dangerous intersection, demanding a

stop sign there, how would we explain it when we then observed them stopping at the new stop sign? We would at least have to consider the possibility that they stop because neighborhood morality, and their own inner convictions, make them stop. This problem applies to all impact studies: The behavior we observe might prove that the law is just a symbol restating what people have already chosen to do rather than a "vaccine" which impels them to conform to an unwanted directive.

The effect of passengers on stopping behavior also raises the possibility that people sometimes obey the law *because it is the law*—people feel moral (not just legal) pressure to obey laws, and therefore are more likely to do so in the presence of other people, even if those people are not empowered to enforce the law. In other words, the law may have a halo of legitimacy which interacts with public opinion to produce compliance. An alternative to this process is the theory that people only stop because they fear being caught by the police. Careful observation of many law-related situations would be needed to sort out whether people who stop fully, even when there is obviously no cross traffic, do so out of respect for the law or out of fear of prosecution. People may even differ in this respect, some stopping for one reason and others for the other.

Related to this issue of moral pressure is the possibility that a law creates a situation where people feel liberated to do what they could not before. If racial hatred and prejudice create pressure on business operators, for example, to exclude blacks, then a law requiring equal treatment in business places could liberate those merchants who wanted to have the additional business from blacks but feared losing white customers. Such a law could also liberate those who wanted to act decently towards blacks but feared reprisals. In such a case, the law would be having an impact, but our measure of that impact would be complicated by the fact that it produces compliance because it fits with self-interest or moral preference rather than violating them.

Returning again to our stop sign example, another complication is caused by the fact that people may stop at stop signs out of sheer *habit*. They have ridden in cars all their lives. As children, they watched adults stopping. When they learned to drive, they probably began obeying stop signs out of fear, or the desire to please teachers and parents, or some general belief in the need to obey the law. But as people become older, these original reasons may drop away, leaving habit as the explanation. Drivers who stop out of habit would be difficult to distinguish from all others who stop for other reasons.

Obligation vs. Information

Still another complication, connected with the issue of self-interest, is that the stop sign provides *information*. It announces that you are approach-

place and concluded that you must stop in order to be sure you don't drive into danger.

Some laws are more obviously designed primarily to give information than others. Laws against homicide do give information about what law enforcers will do to you if you murder someone. But their primary purpose is normative—they are made on the grounds that murder is wrong, despicable, and therefore to be punished. But consider legal doctrine which requires cigarette manufacturers to warn you that cigarette smoking is dangerous to your health. Here is a law at the other end of the spectrum. It does not prevent you from making or selling cigarettes, and it permits you to smoke them. But it insists that the message be repeatedly announced. The question is whether a study of the impact of these messages is a study of *legal impact*. While it is government which is producing the announcement, there seems to be an important difference between this kind of "law" and one which punishes lawbreakers. The information function is not much different from the commercial presentation of advertisements for vitamin pills, fire prevention week, or exercise bicycles. We don't even begin to ask whether those messages have "legal" impact.

The problem is that many laws are a mixture of *command* and *information*. Helmet laws not only *inform* people about the dangers of unprotected cycling; they also *punish* people who don't protect themselves. So, when a researcher demonstrates that states with helmet laws have fewer motorcycling fatalities and higher rates of helmet use, the interpretation problem comes in sorting out whether the law had its effect because of its threat of punishment (a true legal impact); because it was the law and the law should be obeyed (also a true legal impact), or because the law alerted people to the dangers of cycling. The informational impact of law is not such a pure case of legal impact, because it is not clear that its effect is any different from the effect we might get from a high-powered Madison Avenue media blitz.

Positive vs. Negative Impact

One last possibility must not be overlooked—that the law will have its impact by tempting people to break it *because it is the law*. This is the opposite of legitimacy. Some people may roll through stop signs just to prove their independence or their willingness to dare. If we can show that they fail to stop where they otherwise would have, then we have shown *negative impact*. During the 1960s and 1970s it was often argued that drug use was increasing *because* the law forbade such use. As a reaction against the Vietnam War and Watergate, the argument went, young people smoked pot and used other drugs. It was a way of symbolizing their denial of legitimacy to the authorities which were responsible for unwanted political conditions. Note that these users were choosing to ignore the informational content of narcotics laws, which claimed that drug use would produce mental and

physical health problems. But can we say that they became users because the law told them not to? That is a question of impact.

Stop sign behavior may not strike you as an earth-shaking problem. It is used here to show that even in such a simple legal impact setting, complex problems plague our attempts to measure the law's impact. The same issues arise when we want to know what effect a farm subsidy bill has on wheat production, or whether a gun-control law in a particular city reduces rates of violent crime, or whether a Supreme Court verdict in favor of abortions has any effect on their frequency. Our basic problem is to show either that legal action produces behavior that would not otherwise have happened, or that the behavior commanded by law has not been forthcoming. To do so, we must somehow demonstrate that other nonlegal explanations for the behavior we observe cannot better account for that behavior.

Does Kidder make a comment about the principal article that has relevance to our present study? Or does his observations about the difficulty of assessing "legal" impact fall wide of the mark?

(2) What explanation for stop sign behavior could you suggest, using the Institutional model discussed in Chapter IV?

II THE 'SOCIOLOGICAL' VOCABULARY

How we perceive a domain determines what data we search out. Many scholars defined the problem of obedience to law as one of obligation or of self-interest.

TYLER, WHY PEOPLE OBEY THE LAW (1990)¹

¹ Pp. 20-26.

Legitimacy as a Theoretical Issue

Judges, lawyers, legal scholars, and social scientists interested in the exercise of legal authority all know how important it is to secure public compliance with the law and with the decisions of legal authorities like police officers and judges. To be authoritative, legal rules and decisions must affect the actions of those toward whom they are directed. A judge's ruling means little if the parties to the dispute feel they can ignore it. Similarly, passing a law prohibiting some behavior is not useful if it does not affect how often the behavior occurs. To be able to act as an authority, "The lawgiver must be able to anticipate that the citizenry as a whole will . . . generally observe the body of rules he has promulgated" (Fuller 1971, 201),¹ because "the ability to exert influence is the major operational quality of authority" (Hollander 1978, 45). Effective leadership requires compliance with the leaders' decisions from "the bulk of the members [of society] . . . most of the time" (Easton 1975, 185).

Because they are interested in securing compliance with the law, legal authorities want to establish and maintain conditions that lead the public generally to accept their decisions and policies. This is not easy. Anecdotal evidence suggests many types of behavior that police officers and judges have been unable to stop, ranging from tax evasion to drunk driving and drug abuse. On the national level, when Supreme Court justices make controversial decisions about school prayer or desegregation, they cannot take public compliance for granted (Dolbeare and Hammond 1970).²

This book is not about noncompliance with particular controversial laws or decisions. It examines the general level of noncompliance with everyday laws regulating behavior. Its concern is with the degree to which people generally follow the law in their daily lives. Why is securing compliance difficult? The nature of the behavior for which compliance is needed makes compliance with legal decisions problematic. Laws are passed and enforced to mandate behavior that people would prefer to avoid, such as paying damages to an injured party, or to discourage people from doing certain things that might benefit them, such as stealing.

Although securing compliance with legal restrictions is difficult, it is important. It is often argued that a society cannot function effectively unless citizens' desires are curbed to some extent (Cohen 1966; Gamson 1968). It is a basic tenet

of political theory that any society restricts some behavior and fails to provide its citizens with some things they want and feel they deserve (Gamson 1968). For this reason societies develop the governmental and legal institutions needed to formulate rules of acceptable conduct. They also organize and support the legal authorities needed to interpret and enforce these rules. Effective societal functioning requires that citizens obey the decisions of the legal authorities.³

Recent research on solutions to social dilemmas provides an example of the positive value of regulatory authorities. In a social dilemma a society must prevent citizens from engaging in actions that are individually beneficial in the short term but that hurt society in the long term. Studies suggest that one solution that groups voluntarily adopt when faced with social dilemmas is to designate formal leaders who are empowered to control the behavior of the group's members (Messick et al. 1983; Samuelson et al. 1984). Similarly, groups develop rules governing members' conduct to preserve valuable social relationships (Thibaut and Faucheux 1965). These informal rules are the precursors of formalized law (Fuller 1971).⁴

It is also important to recognize the potential dangers of giving authorities the power to affect public behavior. Authorities may use that power to advance their own interest, or the interest of a particular group or individual, over the interest of others. It cannot be assumed that authorities will be benevolently motivated and will use their power and legitimacy to promote the positive objectives outlined above. Although they can facilitate the productive exchange of resources to the benefit of all members of society, it is not inherent in the nature of authority that it will function in this way. The effects of authority depend on the motives of those exercising it.

Legal authorities are among the most visible agents functioning to restrict citizens. For example, a major role of the police is to enforce rules that restrict citizens' behavior, often through the use of negative sanctions. The civil and criminal courts also function in this manner. In addition, civil courts must settle disputes arising between citizens through misunderstandings or incompatible desires and goals. In each case, legal authorities must often deliver negative outcomes to parties that the parties may feel are not fair.

Given the importance attached by the legal system to securing citizens' compliance with the law, it is not surprising that social scientists interested in the law should have tried to understand why people comply. Answering this question involves exploring the psychological nature of the citizen—that is, understanding the factors that motivate the citizen's behavior.

Much traditional social theory is built on the assumption that behavior is motivated by rewards and punishments in the external environment. This instrumental perspective is often referred to as the study of social control (Krislov et al.

1972; Wood 1974). It assumes that the nature of the immediate environment influences people's actions (Fishbein and Ajzen 1975; Friedman 1975; Muller 1979; Wrong 1980).

Social control refers specifically to altering citizens' behavior by manipulating access to valued social resources or by delivering or threatening to deliver sanctions. Such social control has been viewed as achieving influence by "changing the nature of the situation" (Parsons 1963, 1967), and as effecting change by securing compliance (Kelman 1958). In either case, legal authorities attempt to modify behavior by rewarding compliance with the rules and punishing or threatening to punish the violation of rules.

Recently the social control approach to compliance has received strong impetus from the emergence of the public choice perspective in policy studies. The public choice perspective represents the extension into the legal arena of economic models of the person. It assumes that the behavior of people in relation to the law is governed by the same types of instrumental judgments that shape behavior in relation to decisions in their private lives.⁵

Like models of social control a public choice perspective suggests that people are intrinsically motivated to maximize their personal gain in their behavior toward the law. Public choice theory has been refined, however, by more complex approaches to modeling judgments of gain and loss, and to combining such judgments with personal utilities recently developed in the field of economics (Laver 1981; Mueller 1979; Tyler 1986b).⁶

The social control and public choice perspectives have led those concerned with securing compliance with the law to focus on the ability of authorities to influence the personal costs of rule breaking. This focus has brought about a large literature on deterrence (Blumstein, Cohen, and Nagin 1978; Gibbs 1975; Tittle 1980; Zimring and Hawkins 1973), which has established that variations in deterrence (primarily variations in the likelihood of punishment) do affect citizens' compliance with the law.⁷

If rewards and punishments alone produced sufficient compliance for society to function effectively, the authorities would find their task simple and straightforward. They would need only to control societal resources and could focus their attention on how best to deploy them. Such a deterrence-based strategy for securing public compliance is very appealing to political and legal authorities. Social control requires very little effort to communicate with the public or be responsive to it; it focuses on the rewards and punishments associated with obeying and disobeying the law, and allows the authorities to control their own agenda. In contrast, a normative focus on compliance emphasizes the voluntary aspects of compliance, placing a considerable power over the effectiveness

ultimately the key to successful leadership: it is they who decide whether or not to comply.⁸

The dominance of the social control and public choice perspectives can be seen in the selection of issues considered important enough to study, and in the way these issues are examined. In studying general compliance with the law, attention has been directed to instances where compliance cannot be easily explained using a simple deterrence perspective. Citizens have been found to obey the law when the probability of punishment for noncompliance is almost nil and to break laws in cases involving substantial risks. Neither form of behavior makes sense from a strictly instrumental perspective. An example of an effort to examine such an issue is that of Ross (1981) to explain why publicity campaigns against drunk driving decrease law breaking, even though they have little or no influence on the likelihood that a person will be punished.

In the public policy arena the economic perspective has directed study toward behavior that appears paradoxical or problematic when viewed from an economic perspective (Tyler 1986b). One such area is the problem of noncompliance with laws that place on citizens such burdens as taxes. The probability of being severely punished for avoiding taxes is low, making equally low the negative utility to inhibit nonreporting of income. From an instrumental perspective people should frequently avoid paying their taxes. In reality, the rate of nonreporting of income is relatively low.⁹ This has been called the "free rider" problem, and it appears particularly likely to be a serious social problem if citizens are viewed as motivated solely by personal gain (Barry and Hardin 1982).

In addition to shaping the issues considered important enough to study, public choice perspectives have shaped the way these issues are thought about. People have been viewed as seeking favorable outcomes from the legal and political system and behaving toward it in a manner designed to obtain such outcomes. This perspective suggests that people will break rules when they feel that the likelihood that they will gain from doing so outweighs the potential costs of being caught and punished.

Normative Issues and Compliance

Although the idea of exercising authority through social control is attractively simple, it has been widely suggested that in democratic societies the legal system cannot function if it can influence people only by manipulating rewards and costs (Easton 1965, 1968, 1975; Engstrom and Giles 1972; Gamson 1968; Kelman 1969; Parsons 1963, 1967; Sarat 1977; Scheingold 1977). This

benefits or exercise coercion every time it seeks to influence citizens' behavior. These strategies consume large amounts of public resources and such societies would be "in constant peril of disequilibrium and instability" (Saphire 1978, 189).¹⁰

The problem of the drunk driver (Ross 1981) illustrates the difficulties of altering public behavior through incentives and the threat of punishment. Policymakers concerned with combating the problem have used various strategies of deterrence. Ross examines these and shows that an extremely high investment of societal resources is needed to have any noticeable effect on citizens' assessments of their likelihood of being caught and punished for driving while drunk.

Ross finds that massive public campaigns have been successful in the past in temporarily decreasing the rate of drunk driving. He however suggests that such effects occur because the high visibility of public education campaigns leads citizens to overestimate the actual probability of being caught and punished. As the massive publicity declines and citizens' experiences lead them to estimate their risks more accurately, the rate of law breaking increases.

Ross's treatment of drunk driving illustrates the practical difficulties of implementing a policy based only on the increased use of threatened or delivered punishment. This is especially true in democratic societies, which minimize governmental intrusiveness into people's lives. For example, the public has resisted the random stopping of motorists at roadblocks to detect drunk drivers. Although control through reward and punishment may be theoretically possible, the government cannot afford to undertake many such expensive efforts to shape how citizens behave.

Given that the regulation of behavior through social control is inefficient and may not be effective enough to allow a complex democratic society to survive, it is encouraging that social theorists have recognized other potential bases for securing public compliance with the law. Two such bases are commonly noted: social relations (friends, family, and peers) and normative values. Concerns about social relations reflect the influence of other people's judgments; normative values reflects a person's own ethical views.

These two influences on behavior have been widely recognized by social scientists. They have emerged in studies by social psychologists on attitudes (Ajzen and Fishbein 1980; Fishbein and Ajzen 1975) and on the changing of attitudes (Kelman 1958), by sociologists on power (Wrong 1980), by political scientists on discontent (Muller 1979), and by psychologists on moral development (Hoffman 1977).

Influence by the social group can be instrumental. Like authorities, social groups reward and punish their members (Wrong 1980), either by withholding or conferring signs of group status and respect, or more directly by channeling

material resources toward or away from particular members. Such variations in rewards and costs are not under the control of public authorities, but they function in the same manner as do public incentives and disincentives. In focusing on peer group pressures, the deterrence literature has recently documented that law breaking is strongly related to people's judgments about the sanctions or rewards their behavior elicits from members of their social group. People are reluctant to commit criminal acts for which their family and friends would sanction them.

Group influence may also exert normative pressure on people, because individuals look to their social groups for information about appropriate conduct. Such normative influences are similar to the influence of personal morality (see below). People's behavior is strongly affected by the normative climate created by others.

The final influence on social behavior is the person's own set of normative values—the sense of what is right or appropriate. Normative influences respond to factors different from those affected by considerations of reward and punishment. People focus not on personal gain or loss within a given situation but on the relationship between various kinds of potential behavior and their assessments of what behavior is appropriate.

The key feature of normative factors that differentiates them from considerations of reward and punishment is that the citizen voluntarily complies with rules rather than respond to the external situation. Because of this, normative influences are often referred to by psychologists as "internalized obligations," that is, obligations for which the citizen has taken personal responsibility. This sense of the internalized quality of moral norms is captured by Hoffman: "The legacy of both Sigmund Freud and Emile Durkheim is the agreement among social scientists that most people do not go through life viewing society's moral norms as external, coercively imposed pressures to which they must submit. Though the norms are initially external to the individual and often in conflict with his desires, the norms eventually become part of his internal motive system and guide his behavior even in the absence of external authority" (1977, 85).

Voluntary compliance is of course important only to the extent that compliant behavior is different from behavior derived from self-interest. Moral influences would be substantially less important if people typically viewed the behavior that most benefited them as normatively appropriate. The suggestion that citizens will voluntarily act against their self-interest is the key to the social value of normative influences. Given this assumption, leaders can gain voluntary compliance with their actions if the actions are consistent with people's views about right and wrong, even if not personally beneficial.

If the effectiveness of local authorities ultimately depends on voluntary accep-

tance of their actions, then authorities are placed in the position of balancing public support against the effective regulation of public behavior. Legal authorities of course recognize their partial dependence on public goodwill, and are concerned with making allocations and resolving conflicts in a way that will both maximize compliance with the decision at hand and minimize citizens' hostility toward the authorities and institutions making the decision (Murphy and Tannenhaus 1969; Scheingold 1974; Wahlke 1971).

The dilemma faced by legal authorities is not unique to law. All leaders need discretionary authority to function effectively in their roles. Industrial managers must direct and restrict those who work under them. They also require support and cooperation from those they manage. When managers lack the legitimacy they need to secure the cooperation of workers, inefficiencies such as those caused by slowdowns and sabotage occur. Similar problems of authority are encountered by teachers, political leaders, army sergeants, and any other authorities who need legitimacy to function.

The compliance literature has recognized two important types of internalized obligation. First, citizens may comply with the law because they view the legal authority they are dealing with as having a legitimate right to dictate their behavior; this represents an acceptance by people of the need to bring their behavior into line with the dictates of an external authority (Friedman 1975; Gerstein 1970). Easton makes this the essential component of his definition of authority, suggesting that legitimacy exists when the members of a society see adequate reason for feeling that they should voluntarily obey the commands of authorities (Easton 1958).

A second type of internalized obligation is derived from a person's desire to behave in a way that accords with his or her own sense of personal morality. Like views that accord legitimacy to authorities, personal morality is an internalized sense of obligation characterized by voluntary compliance. It differs from legitimacy in content, however. Personal morality is not a feeling of obligation to an external political or legal authority. It is instead an internalized obligation to follow one's personal sense of what is morally right or wrong.

Consider a specific illegal activity such as using cocaine. What is a person's motivation for complying with the law prohibiting its use? If people refrain from using drugs because they think laws ought to be obeyed, then legitimate authority is influencing their behavior. If they do so because drug abuse violates their convictions, then personal morality is influencing their behavior. If they fear being caught and sent to prison, deterrence is influencing their behavior. And if they do not use drugs because they fear the disapproval of their friends, the social group is exerting its influence.

From the perspective of the authorities in a political or legal system, legitimacy

is a far more stable base on which to rest compliance than personal or group morality, for the scope of legitimate authority is much more flexible. It rests on a conception of obligation to obey any commands an authority issues so long as that authority is acting within appropriate limits. Leaders with legitimate authority have open-ended, discretionary authority within a particular range of behavior. They may act in ways that will most effectively advance their objectives, expecting to receive public support for their actions.

Unlike legitimacy, personal morality is double-edged. It may accord with the dictates of authorities and as a result help to promote compliance with the law, but on the other hand it may lead to resisting the law and legal authorities. The distinction between personal morality and legitimacy suggests that two dimensions underlie the different motivations that can influence compliance. The first is whether the motivation is instrumental or normative; the second is whether the normative motivation is linked to a political authority. (Legitimacy is linked to a political authority, but personal morality may or may not be.)

Because of its value as a normative base for authorities, legitimacy has been an important concern among social scientists. It has been prominent in treatments of law by sociologists beginning with Weber (see Weber 1947), and by psychologists (French and Raven 1959), political scientists (Easton 1965, 1968, 1975; Gamson 1968), and anthropologists (Fried 1967). In each case citizens who accept the legitimacy of the legal system and its officials are expected to comply with their dictates even when the dictates conflict with their self-interest. Legitimacy is regarded as a reservoir of loyalty on which leaders can draw, giving them the discretionary authority they require to govern effectively.

Because they are concerned with securing compliance, legal authorities are interested in public evaluations of the legitimacy of police officers, judges, lawyers, and the like. Interest in these issues is reflected in Roscoe Pound's famous address of 1906 on public dissatisfaction with the courts, as well as in more recent efforts to understand this dissatisfaction (Fetter 1978). Efforts to explore public opinion about the police, the courts, and the law reflect the belief among judges and legal scholars that public confidence in the legal system and public support for it—the legitimacy accorded legal officials by members of the public—is an important precursor to public acceptance of legal rules and decisions. To the extent that the public fails to support the law, obedience is less likely.¹¹

This focus on public views of the law and legal authorities has heightened concerns about the extent of public support. A number of social scientists and social commentators have noted the low levels of public support in recent public opinion polls for legal and political authorities. Studies of the public's evaluation of national leadership of such institutions as the Supreme Court and the pr

dency, suggest that large segments of the public have little confidence in their legal and political authorities (Lipset and Schneider 1983; Miller 1979; Wright 1981).¹² There is an implicit belief that these low levels of confidence in authority will lessen compliance with the law.

More recently, researchers in political science, sociology, and policy studies have shifted their attention away from theories of the state and issues of legitimacy and toward citizens' assessments of the benefits and burdens of participation in society. The assumption that legitimacy is an important element in the exercise of authority has however remained an essential element in theories of the relationship between citizens and legal authorities.

QUESTION

Tyler dichotomizes the explanations for behavior in the face of a rule of law into social control explanations (by which he means explanations in terms of the pursuit of self-interest), and normative explanations (by which he means explanations in terms of the individuals subjective sense of obligation). Does this exhaust the possibilities?

Seidman, "The Memorandum of Law and Legislative Theory", *supra*.

The earliest statement of why people obey a law rested on the assertions of sociologists that in general people behaved in accordance with their subjective values and attitudes.² From that premise, they argued that only those laws that matched people's values and attitudes could change their behavior.³ They

² W. SUMNER, *FOLKWAYS* (1906) 55, 57; cf. Cranston, *supra* n. 3, at 875 (Three reasons for the successful implementation of legal change: Public attitudes, the behavior to be changed, and the nature of those regulated); see also R. CRANSTON, *LAW, GOVERNMENT AND PUBLIC POLICY* (1987) 32 et seq..

³ See *Id* at 89, and Sumner, "....", 67 *Am J. Soc.* 532, 540 (1962) (laws cannot change folkways); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1969) 262; J.P. Roche and M.M. Gordon, "Can Morality be Legislated?" *New York Times Magazine*, May 22, 1955, at 10 ("In the United States. . . no piece of legislation, or judicial opinion, which does not have its roots in community beliefs, has a chance of being effectively carried out."); Plessy v. Ferguson 163 U.S. 437, 551, (social prejudices cannot be overcome by legislation).

predicted, for example, with President Eisenhower,⁵ that desegregation laws would not induce changed white behavior until white attitudes towards blacks changed.⁶ Professor Lawrence Friedman generalized this point of view when he postulated that people behave in accordance with their legal culture: "The values and attitudes which bind the system together, which. . . determine what structures are used and why; which rules work and which do not and why."⁷ That led to a paradox: Laws would not induce changed behavior unless they coincided with already-existing values and attitudes. Since behavior follows values and attitudes, however, if the law conforms to prevailing values and attitudes, no necessity for it exists.

Values and attitudes as the sole determinant of behavior seem inadequate as the only significant categories for investigation, both because of their circularity, and their failure of empirical warrant. First, the "explanation" for behavior, that it responds to values and attitudes, usually rests upon the same empirical basis as the perception of the behavior. For example, suppose that a drafter "explained" the high rate of teen-age pregnancy by teen-age "cultural values". The warrant for that explanation, however, likely consists in the same data that proves the existence of the difficulty -- that is, that many American teenagers become pregnant. That "explanation" chases its own tail. Second, as the psychological theory of cognitive dissonance predicted,⁸ it often appeared that people did change their behavior in the face of a rule of law, although frequently not at all precisely what the law demanded. Bit by bit, schools in the South did desegregate, and attitudes towards desegregation changed.⁹ People do alter their driving behavior in response to the laws against speeding on the highways, although they do not obey them exactly.¹⁰ People pay income taxes, even though when

⁵ B. TAYLOR, PARTING THE WATERS: AMERICA DURING THE KING YEARS 1954-63 (1989) 213.

⁶ Roche and Gordon, *supra* n. 142.

⁷ L. Friedman, "Legal Culture and Social Development", 4 Law and Soc. Rev. 29, 34 (1969).

⁸ Cognitive dissonance holds that if behavior contradicts values and attitudes, the latter will change to conform to behavior. Festinger, *supra* n. 23. In this view, the sociologists have it backwards.

⁹

¹⁰ See L.S. Robertson, "An Instance of Effective Legal Regulation: Motorcyclist Helmet and Daytime Headlamp Laws", 10 Law & Soc. Rev. 467 (1976); but see R.S. Cohen and H.S. Cohen, "Fatal Errors with Fatalities Data: A Comment on Robertson's 'An Instance of Effective Legal Regulation,'" 11 L. & Soc. Rev. 109

the income tax laws first appeared, it seems safe to argue that most people had no conforming values or attitudes. The extreme sociological position, that people will only obey laws that conform to their values and attitudes, seems empirically false.

NOTES AND QUESTIONS

1. Critics have asserted that all these suffer from circularity. Faced by the problem of explaining behavior in the face of a rule of law, the scholar posits some subjective factor in the actor -- "values and attitudes", "residues"¹¹, custom¹², national character (the Volksgeist)¹³, the contradiction between the ends for behavior indicated by the culture, and the opportunities and means available to the individual (anomie theory)¹⁴, and others. To prove the existence of that subjective character, the analyst then points to the behavior that constitutes the difficulty that falls for explanation. The "proof" only restates the difficulty. In effect, the analysis only extrapolates from past behavior and predicts its continuance.

2. Critique the Stop Sign article from the perspective of the sociological school.

3. Vt. St. Ann. tit. 12, sec 519:

"A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others", subject to a maximum penalty of a \$100 fine.

Critique the statute from the sociological perspective.

4. Does the existence of the rule itself change moral sentiments? Consider the following reading:

(1976); A.D.LITTLE, INC., 'THE STATE OF THE ART OF TRAFFIC SAFETY: A COMPREHENSIVE REVIEW OF EXISTING INFORMATION (1970) 170.

11 Pareto

12 SEAGLE, THE QUEST FOR LAW

13 Von Savigny

14 R. Merton

....
Contrasting Conceptions of the Function of Law

Law emerges not only to codify existing customs, morals, or mores, but also to *modify* the behavior and the values presently existing in a particular society.

As an instrument of social change, law entails two interrelated processes: the institutionalization and the internalization of patterns of behavior. In this context, institutionalization of a pattern of behavior means the establishment of a norm with provisions for its enforcement,² and internalization of a pattern of behavior means the incorporation of the values or values implicit in a law.³ Law, as has been noted by others, can affect behavior directly only through the process of institutionalization; if, however, the institutionalization process is successful, it, in turn, facilitates the internalization of attitudes or beliefs.⁴

A CONTINUUM OF RESISTANCE TO LAW

These opposing views of the function of law suggest a hypothetical continuum of the amount of potential resistance to the enactment of a new law. When there is likely to be zero per cent resistance to a law, one would obviously question the need for it, since complete agreement between the behavior required by the law and the existing customs or morals apparently exists. In this situation, there would be no need to codify the mores into law. At the other extreme, when there is likely to be 100 per cent resistance to a law, one would expect the law to be totally ineffective, because nobody would enforce it and the authority of the lawmaker would be undermined.⁵ ...

Whenever a law is enacted in the face of any appreciable resistance, that is to say, whenever it falls somewhere in the middle of our hypothetical continuum, the legal system becomes involved in an educational as well as in a social control task. If the educational task is not accomplished, a situation exists in which individuals are obligated to obey a law at the threat of punishment, while, in fact, not believing in it. This situation produces what Festinger calls "forced compliance", viz., a discrepancy between public behavior and private belief.⁷ So long as behavior involves forced compliance, there is no internalization of the values implicit or explicit in a new law. The resulting tension may lead to disobedience of the law, depending on the nature of the sanctions and the consistency and efficiency of enforcement. If law is to perform an educational function, it is necessary to convert forced compliance into voluntary compliance.

¹⁵ In A.W.GOULDNER AND S.M.MILLER (eds.), APPLIED SOCIOLOGY
-- OPPORTUNITIES AND PROBLEMS (19XX) xx.

Necessary Conditions for Law Performing an Educational Function

Under what conditions can law succeed, not only in institutionalizing a new pattern of conduct, but also in generating the internalization of new attitudes implicit in the conduct required by the new law? The failure to specify these conditions leaves the theoretical problems of the relation of law to social change unanswered. It also leaves unsolved the administrative problems of the conscious use of law as an agent of social change. As a first approximation to an answer to this problem, we shall consider seven necessary, though perhaps not sufficient, conditions for law to perform an educational function.

Conclusion

In short, we are suggesting that law can potentially act as an educational force in changing people's behavior, even in the presence of appreciable opposition to the projected change implied by the law, if it meets the following seven conditions:

1. The source of the law is perceived to be authoritative and prestigious;
2. The rationale for the new law is articulated in terms of legal, as well as historical and cultural continuity and compatibility;
3. Pragmatic models for compliance are identified;
4. A relevant use of time is made to overcome potential resistance;
5. The enforcement agents are themselves committed to the behavior required by the law, at least to the extent of according it legitimacy if not to the extent of internalizing the values implicit in it;
6. Positive, as well as negative, sanctions are employed to buttress the law; and
7. Effective protection is provided for the rights of those persons who would suffer from evasion or violation of the law.

In our large and heterogeneous society, laws are designed with an educational as well as a social control function. The existence of many organized groups devoting considerable resources to promoting or obstructing new laws means that an appreciable portion of the population will resist a new law if it conflicts with their interests and values.¹⁷ Hence, of necessity, laws of this character must have built-in provisions for performing the educational function which we have been concerned with in this paper. In other words, it is necessary to institutionalize a new pattern of conduct so as to maximize the chances for the internalization of values implicit in it . . .

NOTES

Ask the same questions concerning Evans's article as the Notes asked concerning the Jones and Seidman articles. Which of the three articles seems to you most useful for our purposes?

NOTES AND QUESTIONS

1. Cf. H. Kaufman, "Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of a Moral Judgement", in J. R. MACAULEY AND L. BERKOWITZ (eds.), *ALTRUISM AND HELPING* (1966) 77 (where law required aid, failure to intervene regarded as less moral than when law did not require intervention).

2. Max Weber put forward a theory of governmental legitimacy. He argued that governments may rule through coercion, or through authority. When governments enact rules that obviously benefit role-occupants, winning legitimacy with them poses no problem of coercion. How do governments achieve legitimacy for laws against the interests of their addressees? Weber postulated three ideal-types. Government could legitimate their authority by (a) sacred or traditional legitimacy (the Holy Roman Emperor, the Queen of England), (b) charismatic legitimacy (Lenin, Ghandi, George Washington), or (c) bureaucratic (or legal-rational) legitimacy (the Rule of Law). If this scheme worked, then a legitimate government could win obedience for all its laws. Does that ever happen? Does the fact that most people obey one law (say, the income tax laws) reliably predict their behavior with respect to another sort of law (say, prohibition against the sale and use of alcoholic liquor)?

3. L. Berkowitz and N. Walker, "Laws and Moral Judgments", *30 Sociometry* 410 (1967) reported an experiment with 41 British university students. They concluded:

The implications of this experiment can be summarized fairly briefly. If a number of different forms of conduct and criminal laws are sampled and if a sufficiently broad range of people are studied, relatively sensitive measures should show that knowledge of the existence of laws has modified judgments of the moral propriety of the actions regulated by these laws. There appears to be a comparatively small but nevertheless significant tendency for some people to alter their views of the morality of some actions in accord with laws specifying that these actions are legal or illegal. Knowledge of the existence of these laws, however,

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[Ch.

does not have as much effect in changing the moral judgments as knowledge of a consensus of opinions among one's peers.²²

This distinction between laws per se and peer opinion, while conceptually important, cannot be made in many instances in the "real" world. As we indicated earlier, the extent to which criminal laws are successful in regulating conduct frequently depends upon the magnitude of the social consensus regarding the behavior with which it deals. The passage of fair housing laws may mean there is widespread agreement that racial discrimination is now more likely to be viewed as immoral. But the apparent consensus can also prove to be illusory. A person may see that a given law is frequently violated, and, as probably happened in the case of the Prohibition Amendment, the law then ceases to influence his moral judgment.²³ Sometimes only one violation is enough to break this implied consensus, particularly if it is carried out by someone high in social status.

Other considerations, nevertheless, suggest that the distinction between law effects and social consensus should be maintained. As an example, our findings indicate that the moral judgments of highly authoritarian people, as assessed by the California F scale, are quite susceptible to peer influence, but are not significantly affected by knowledge of the law. Authoritarians tend to be strongly conformistic, perhaps because of an extreme concern with social approval, but they do not necessarily accept the views of legitimate authority, at least as represented by the law. Laws

can be for them just another source of frustration. They will obey the law if they must, if deviation from the law is punished or brings disapproval, but probably not because they truly believe the law is "right." According to our results, it is primarily those persons who are deeply involved in their society, who are traditional and conventional and socially responsible, who are most likely to adopt the judgments implied by the law.

- q. . . ANDENAES, GENERAL PREVENTION, 43 J. Crim. L.C. & P.S. 176, 179-180 (1952): By general prevention we mean the ability of criminal law and its enforcement to make citizens law-abiding. If general prevention were 100 percent effective there would be no crime at all. General prevention may depend on the mere frightening or deterrent effect of punishment — the risk of discovery and punishment outweighing the temptation to commit crime. This was what Feuerbach had in mind when he designed his famous theory of punishment as psychological coercion directed against the citizen. Later theory puts much stress on the ability of penal law to arouse or strengthen inhibitions of another sort. In Swedish discussion the *moralizing* — in other words the *educational* — function has been greatly stressed. The idea is that punishment as a concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crime. Unconscious inhibitions against committing forbidden acts can also be aroused without appealing to the individual's concepts of morality. Purely as a matter of habit, with fear, respect for authority or social imitation

as connecting links, it is possible to induce favorable attitudes toward this or that action and unfavorable attitudes toward another action. . . .

We can say that punishment has three sorts of general-preventive effects: it may have a *deterrent effect*, it may strengthen *moral inhibitions* (a *moralizing effect*), and it may stimulate habitual *law-abiding conduct*. I have reason to emphasize this, since many of those who are most skeptical of general prevention think only of the deterrent effect. Even if it can be shown that conscious fear of punishment is not present in certain cases, this is by no means the same as showing that the secondary effects of punishment are without importance. To the lawmaker, the achievement of inhibition and habit is of greater value than mere deterrence. For these apply in cases where a person need not fear detection and punishment, and they can apply without the person even having knowledge of the legal prohibition.

5. Stanley Milgram, "Behaviorial Study of Obedience", 67 J.

Abnormal and Soc. Psychology 371 (1963) describes the following

experiment: Milgram hired

some forty males, between the ages of twenty and fifty, and paid them for taking part. He told the subjects that he was conducting an experiment on the effect of punishment on learning theory. They used a shock generator with switches labeled from "Slight Shock" to "Danger: Severe Shock." When the victim gave "wrong" answers to questions, the subjects were told to administer greater shock by the "scientist" conducting the "experiment." The victims were actually part of the experimental team, and the shocks administered were fake. The question was, how far would the subjects go in administering shock treatment, before they refused to go further. The general finding was a "surprising . . . strength of obedient tendencies." No subject quit before Shock Level 20, 300 volts; "at this level . . . the victim kicks on the wall and no longer provides answers." Twenty-six of the forty went on to the bitter end—more than 450 volts—administering what they thought to be extreme and dangerous shocks to the victim; despite manifestations of nervousness (including, oddly enough, laughter) and a great deal of reluctance, these subjects *did* obey.

Milgram's experiment was born out of a desire to study obedience, "the psychological mechanism that links individual action to political purpose. It is the dispositional cement that binds men to systems of authority." Many of the people accused of war crimes in Nazi Germany claimed they were merely obeying orders. Milgram's experiment indicated to him that "for many persons obedience may be a deeply ingrained behavior tendency."

In later experiments, Milgram refined his studies further by measuring the effect of group pressure on the disposition to obey. For example, if one introduces into the experiment "confederates" who defy the experimenter's authority, it reduces the propensity of the subject to follow commands blindly. See Milgram, "Liberating Effects of Group Pressure," 1 *Journal of Personality and Social Psychology* 127-34 (1965).

6. Harry v. Ball and Lawrence M. Friedman, "The Use of Criminal Sanctions in the Enforcement of Legislation: A Sociological View", 17 Stanford L. Rev. 197, 220-21 (1965):

The aim of regulatory law is to secure compliance by the regulated. Criminal sanctions are a technique to ensure compliance. Compliance, however, can be viewed in two lights, short- and long-run compliance. When a program of economic regulation is adopted, the attention of the legislature is usually fixed on problems of short-run compliance. The symbolic value of law as law, the fact that most people want to obey the law and will do so, has important consequences for long-run compliance. American social scientists generally agree that social sanctions can be employed deliberately to modify modes of social action—not only overt behavior, but also cognitive, affective, and conative attitudes. Less technically put, social sanctions can be used to change beliefs, attitudes, and personal values and goals; they can effectuate policy considerations by influencing what a person thinks he ought to do or what he wants to do in a particular situation.

William Graham Sumner said, "Men can always perform the prescribed act, although they cannot always think or feel prescribed thoughts or emotions." But he added that by changing conduct one induces new "experiences" that effect further changes in thoughts and emotions. The key technique is to maintain a

sustained demand for "strict compliance with detailed and punctilious rule." Legal institutions are therefore particularly appropriate vehicles for effecting changes in thoughts and emotions in the long run. The law may specify clear and unambiguous requirements, may provide a vigorous enforcement program, and can be equipped to maintain a long-continuing effort. Some authorities have suggested that administrative regulation is an especially useful tool for bringing about social change—it permits detailed specification of required conduct; it can modify the rules to plug loopholes as attempts at evasion appear; and it has great flexibility to adopt tactics and allocate resources toward enforcement of its regulations.

Underlying these propositions is the assumption that people tend to think that what they do is the right thing to do, even if they began to do so because they were forced to. Eventually they begin to expect similar conduct from others and, indeed, are eager to impose it upon others. As conduct becomes formalized, it lays an ideological basis for the extension of similar social norms to situations that are perceived in "analogous" terms. Ironically, some of the participants in the electrical price-fixing case reported that they first experienced price fixing when they served as industry representatives in federal price-control programs during World War II. Less dramatically, filing income tax returns and carrying drivers' licenses have become so commonplace that the public probably accepts these "customs" and, by and large, believes strongly that they are proper.

Other social scientists, however, disagree with the proposition that people learn to want to do what they have to do. Reinhard Bendix, for example, stresses how variable are the effects of coercion on personality. How a person will react to a requirement that he do something he thinks wrong and does not want to do, depends on his whole arsenal of psychological resources. Certainly people are not sheep; the countless revolutions and civil wars of human history are proof enough that law does not always convert its subjects. But surely there is some tendency for persons to provide "public justifications" for what they are actually doing. Thus the public morality must be under some pressure to correspond with required conduct. We should not be surprised to find an intergenerational "drift" toward increased moral justification of required conduct.

6. Do any of these authors give you much help in critiquing the Vermont statute?

7. Critique the Tenants Screening Report article and bill using the categories of the sociological school.

TYLER, WHY PEOPLE OBEY THE LAW (1990)¹

CHAPTER 12

The Antecedents of Compliant Behavior

Authorities in social groups recognize that their effectiveness depends on their ability to influence the behavior of the groups' members. In the case of legal authorities effectiveness depends on the extent to which they are able to influence the public's behaviors toward the law. Laws and the decisions of legal authorities are of little practical importance if people ignore them. Because of the centrality of compliance to effectiveness as a legal authority, understanding why people follow the law is a central issue in law and the social sciences.

Two theories of compliance with the law have been advanced: the instrumental and the normative. In this book I have emphasized the importance of the normative perspective, which focuses on the values that lead people to comply voluntarily with legal rules and the decisions of legal authorities. Such values, if they exist, form a basis for the effective functioning of legal authorities. This is especially true of legitimacy—the belief that one ought to obey the law. If normative values are absent, authorities must use the mechanisms of deterrence that stem from instrumental control over reward and punishments. Such mechanisms are costly and in many cases may be inadequate. The Chicago study supports the normative perspective on compliance. Both personal morality and legitimacy are found to have an effect on people's everyday behavior toward the law, whatever type of analysis is conducted.

Legitimacy is the normative factor of greatest concern to authorities. According to a variety of theories advanced by social scientists, legitimacy is crucial if the authorities are to have the discretionary power they need to fulfill their roles. In the case of legal authorities, legitimacy underlies their expectation that the public will generally obey the law. The Chicago study confirms that legitimacy plays an important role in promoting compliance.

The Procedural Basis of Legitimacy

Given the centrality of legitimacy to compliance, it is important to understand how legitimacy is maintained or undermined among members of the public. The Chicago study explored this issue in the context of people's experi-

¹ Pp. 161 et seq..

ences with legal authorities, and examined the effects of experience with particular police officers and judges on views about the legitimacy of legal authorities. To be concerned with the impact of experiences on views about the legitimacy of legal authorities is to be concerned with the political impact of experience. If legitimacy diminishes, so does the ability of legal and political authorities to influence public behavior and function effectively.

Many aspects of experience could be important in determining the political impact of experience. The Chicago study contrasts the instrumental and normative perspectives on experience. The normative perspective that it emphasizes is represented by psychological theories of justice, according to which people react to social experiences in terms of the fairness of the outcomes they receive (distributive justice), and the fairness of the procedures by which those outcomes are arrived at (procedural justice). In contrast, according to an instrumental perspective people react to their experiences depending on the favorability of the outcomes of the experiences. The normative perspective is better able to account for people's reactions, especially when people use their experiences with particular police officers and judges to generalize about the overall legitimacy of legal authority. Procedural justice is the key normative judgment influencing the impact of experience on legitimacy. Similar evidence has been found in politics and the workplace (Lind and Tyler 1988; Tyler 1987c). Views about authority are strongly connected to judgments of the fairness of the procedures through which authorities make decisions.

That people are concerned with procedure is not a new idea. Past conceptions of the citizen have relied heavily on the principle that citizens evaluate government institutions and authorities in procedural terms (Anton 1967; Easton 1965; Edelman 1964; Engstrom and Giles 1972; Murphy and Tanenhaus 1969; Saphire 1978; Scheingold 1974; Wahlke 1971). The procedural effects found by the Chicago study may contradict the instrumental views now prevailing in legal studies, but they are consistent with a procedural school in the social sciences that is of long standing.

If one accepts the image of the person that is put forth by the Chicago study, one will look in a new way at how people react to decisions in political, legal, and work organizations. In the legal arena citizens will be seen as reacting to the procedures through which court decisions are made, as well as to the decisions themselves. In politics people will react to policies and politicians on procedural grounds. And in the workplace they will be concerned with how decisions are made about pay and promotions. Therefore, decision makers can gain public acceptance for their decisions and rules by making and implementing them in ways that the public thinks is fair.

One clear implication is that authorities are freer than they commonly believe

to follow painful policies that are sound in the long term. Authorities often feel that their legitimacy is linked to their ability to deliver tangible positive outcomes to self-interested citizens. They reflect the assumptions of the economic model, and think that people affected by their decisions will react to the decisions based on the extent of their personal gain or loss. That people attend to matters of procedure gives authorities latitude to pursue long-term policies by stressing the fairness of the procedures through which they came about (Tyler, Rasinski, and Griffin 1986).

The Meaning of Procedural Justice

Given the importance of procedural justice to legitimacy, it is crucial to understand how people define fair procedures. Again, an instrumental perspective contrasts with a normative one. According to the instrumental perspective of Thibaut and Walker (1975), people define fairness primarily by the extent to which they are able to influence the decisions made by the third party. According to a normative perspective, there are many other aspects to the fairness of a procedure, which have little or nothing to do with outcomes or the control of outcomes. The Chicago study reinforces the normative perspective on the meaning of fair process. Judgments of procedural justice are found to be multidimensional. They involve many issues besides favorability of outcome and control of outcome. In fact, the criterion of fair procedure most closely related to outcomes (that is, consistency) is found to be of minor importance. In contrast, judgments about the social dimensions of the experience, such as ethicality, weigh very heavily in assessments of procedural justice. In the context of people's experiences with police officers and judges, the Chicago study found that seven different aspects of procedure independently influenced judgments about whether the procedure was fair.

One important element in feeling that procedures are fair is a belief on the part of those involved that they had an opportunity to take part in the decision-making process. This includes having an opportunity to present their arguments, being listened to, and having their views considered by the authorities. Those who feel that they have had a hand in the decision are typically much more accepting of its outcome, irrespective of what the outcome is. An additional advantage of procedures that allow both sides to state their arguments is that each side is exposed to the other. Because a party to a dispute is often unaware of the feelings and concerns of the other party, this exposure is very important (Conley 1988; Tyler 1987b).

Judgments of procedural fairness are also linked to judgments about the neu-

trality of the decision-making process. People believe that decision makers should be neutral and unbiased. They also expect decision makers to be honest and to reach their decisions based on objective information about the case. As is true of questions of participation, these issues are linked to settling the dispute or policy issue involved. Procedural fairness is also related to interpersonal aspects of the decision-making procedure. People place great weight on being treated politely and having respect shown for their rights and for themselves as people. The way people are dealt with by legal and political authorities has implications for their connection with the social group and their position in the community. It therefore has important implications for self-esteem (Lane 1988) and group identification (Lind and Tyler 1988). People are unlikely to feel attached to groups led by authorities who treat them rudely or ignore their rights. The treatment accorded by public officials is also an indication of the likelihood that people will receive help if they have problems in the future, and so has important implications for feelings of security. People will not feel identified with officials whom they regard as unresponsive to their problems and unwilling to help and protect them.

The importance that people attach to their relationship to authorities is reflected in the importance of another criterion of procedural justice: inferences about the motives of the authorities. The way people assess procedural fairness is strongly linked to their judgments of whether the authority they are dealing with is motivated to be fair. Because motivational inferences require considerably more cognitive effort than assessments of such surface features as honesty and bias, one might expect them to be avoided. Why are they instead central to assessments of procedural fairness? One advantage of inferences of motive or intention is that they reflect dispositional characteristics, that is, features of the person that are likely to predict their future behavior (Heider 1958). The centrality of such inferences to issues of procedural justice reflects people's concern with knowing how authorities will act toward them in the future.

Finally, the fairness of procedures is linked to whether the procedures produce fair outcomes. Procedural issues are not independent of questions of outcome. Fair outcomes are one thing that people expect from a fair procedure, and a procedure that consistently produces unfair outcomes will eventually be viewed as unfair itself.

Although the factors outlined typically emerge as central to judgments about procedural justice, it is also important that the same issues are not used to judge the fairness of procedures with regard to all issues. In different situations people evaluate the fairness of procedures against different criteria of procedural justice: there is no universally fair procedure that can be used to resolve all types of problems and disputes. At the same time, different types of people do not

evaluate the fairness of procedures against different criteria. Within the context of a particular type of problem or dispute, different types of people generally agree about the criteria that should be used to judge the fairness of the procedure. This finding is consistent with other recent evidence that there is a substantial consensus among Americans about what is fair (Merry 1985, 1986; Sanders and Hamilton 1987).

NOTES AND QUESTIONS

1. Tyler based his conclusion on 1575 telephone interviews with a randomly-drawn sample of Chicago residents. In those interviews, a variety of questions aimed to reveal their (self-reported) behavior, and the reasons they gave for their behavior, with respect to six relatively non-controversial laws -- making enough noise to disturb neighbors, littering, driving while intoxicated, speeding, petty shoplifting, and illegal parking. His conclusions base themselves on that survey research.

2. Tyler concluded that obligation had considerable influence on behavior with respect to these six rules of law. Does that imply that self-interested calculation had no influence?

3. How would Tyler explain the stop sign behavior reported by Feest?

III

LAW AND ECONOMICS MODELS

RICHARD A. POSNER, THE ECONOMICS OF JUSTICE
(CAMBRIDGE: HARV. U.P., 1981) pp. 1-2.

This book takes an economic approach to issues—including the meaning of justice, the origin of the state, primitive law, retribution, the right of privacy, defamation, racial discrimination, and affirmative action—that are not generally considered economic. Is not economics the study of the economic system, the study of markets? None of the concepts or activities in my list are market concepts or activities.

Although the traditional subject of economics is indeed the behavior of individuals and organizations in markets, a moment's reflection on the economist's basic analytical tool for studying markets will suggest the possibility of using economics more broadly. That tool is the assumption that people are rational maximizers of their satisfactions. The principles of economics are deductions from this assumption—for example, the principle that a change in price will affect the quantity of a good by affecting the attractiveness of substitute goods, or that resources will gravitate to their most remunerative uses, or that the individual will allocate his budget among available goods and services so that the marginal (last) dollar spent on each good and service yields the same satisfaction to him; if it did not, he could increase his aggregate utility or welfare by a reallocation.

Is it plausible to suppose that people are rational only or mainly when they are transacting in markets, and not when they are engaged in other activities of life, such as marriage and litigation and crime and discrimination and concealment of personal information? Or that only the inhabitants of modern

Western (or Westernized) societies are rational? If rationality is not confined to explicit market transactions but is a general and dominant characteristic of social behavior, then the conceptual apparatus constructed by generations of economists to explain market behavior can be used to explain nonmarket behavior as well.

The Intellectual Foundations of "Law and Economics"

Edmund W. Kitch

33 J. Legal Educ. 184 (1983).

The principal intellectual foundation of "law and economics" has been its relative success in illuminating two fundamental questions: First, what effects do legal rules have upon society? And second, how do social forces shape and determine the law? Law and economics has enjoyed relatively greater success in addressing these questions in a provocative and illuminating manner than have other approaches to the study of the phenomenon of law.

* * * *

I. Analytic Methods

The major analytic methods associated with law and economics are:

1. The subject to be studied is to be conceived of as a system of constraints and rewards interacting with individuals. A central objective of law-and-economics scholarship has been to analyze the interaction between a system of rules and the behavior of individuals in order to determine the effects of the rules. This conception of the agenda of legal scholarship was at the heart of legal realism, but economics, with its developed methods for thinking about the interaction between costs, returns, and individual profit-maximizing, provided an elegant analytic framework adaptable to this inquiry.¹
2. The purpose of scientific analysis is to identify the systematic component of phenomena and separate that component from the random phenomena. A generalization is useful and worthwhile even if it can explain only a portion of the behavior examined. This insight is derived from social science generally and regression methodology specifically. It was a liberating

insight for legal scholarship, because it freed scholars from the burden of explaining every case and problem and directed their attention to the identification of general tendencies. Many of the most interesting and provocative ideas about law advanced in recent years—ideas about the tendency of common law to further efficiency,² regularities in contractual relationships,³ and the interrelationship between criminal behavior and the criminal law⁴—could not have been advanced and investigated without this underlying intellectual conception.

3. A strong regularity of human social behavior is behavior which serves the interests of the actor. This premise is drawn from the behavioral predicates of price theory, where its predictions have proven powerful and useful. It can be used to analyze responses to laws because it leads to the prediction that individuals will alter their behavior to avoid the costs of laws and to obtain their benefits. This prediction is a prolific generator of hypotheses for investigation—for instance, that laws that freeze rents will reduce the supply and increase the demand for rental housing;⁵ that laws that restrict entry into an industry will reduce its output;⁶ and that laws that tax or punish an activity will reduce its frequency.⁷

The emphasis on this premise in law-and-economics work has led to criticism of the work on the ground that it inculcates amoral habits of thought. But the premise that self-interest is a strong regularity of human behavior does not logically require the hypothesis that people will behave in antisocial ways. Rather, self-interest can explain precisely why people do conform to the moral and legal norms of the social community. The gains from trade can only exist if each individual is prepared to cooperate with others, and the moral and legal norms of society can be understood as the framework which makes such trade possible.

2. Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 *J. Legal Stud.* 51 (1977); George J. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J. Legal Stud.* 67 (1977).
3. Anthony T. Kronman & Richard A. Posner, *The Economics of Contract Law* (Boston: Little, Brown, 1979); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. Legal Stud.* 83 (1977); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 *Va. L. Rev.* 1089 (1981); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *Yale L. J.* 1261 (1980); Charles J. Goetz & Robert E. Scott, *Measuring Seller's Damages: The Lost Profits Puzzle*, 31 *Stan. L. Rev.* 323 (1979); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *Colum. L. Rev.* 554 (1977).
4. Gary S. Becker & William M. Landes, eds., *Essays on the Economics of Crime and Punishment* (New York: National Bureau of Economic Research, 1974).
5. Edgar O. Olsen, *An Economist's Analysis of Rent Control*, 80 *J. Pol. Econ.* 1081 (1972).
6. Because the restriction on entry reduces the potential competition. This point only holds if the restriction on entry effectively limits the entry of additional economic resources, rather than simply firms, or when the regulation restrains efficient methods of competition by those firms in the industry. The first effect was, for instance, documented in the taxi cab industry. Edmund W. Kitch, Marc Isaacson & Daniel Kasper, *The Regulation of Taxicabs in Chicago*, 14 *J. L. & Econ.* 285 (1971). The second effect was documented in the airline industry. See the summary of the literature in Stephen G. Breyer, *Regulation and Its Reform* (Cambridge, Mass.: Harvard Univ. Press, 1982).
7. William M. Landes, *An Economic Study of U.S. Aircraft Hijacking, 1961-1976*, 21 *J. L. & Econ.* 1 (1978).

A Marginal rather than gross or average effects are the important effects to analyze in understanding human response to law. This insight is also derived from price theory where it is used, for example, to prove the counterintuitive proposition that a business that loses money will continue to operate.⁸ Past costs are sunk costs and have no bearing on decisions in the present. The cows-and-corn example in Coase's social-cost article is a notable example of the use of this insight:⁹ once the liability system has been established, it is a nonmarginal cost which does not affect production decisions. Marginal analysis is critical to understanding the output effects of price discrimination and thus the effect of antitrust laws that proscribe price discrimination.¹⁰ It is important for analyzing the effect of various transfer and tax programs, whose effect must be gauged in terms of how they affect marginal incentives.¹¹

5. Observed stable behavior is an indicia of an equilibrium that serves the objectives of those who sustain it. There are many versions of this idea but it is presented here in the form that has been most important for legal scholarship: as a guide to inquiry. It is a useful counter to complex predictive models including those generated from price theory, for it guards against the theorist's tendency to disregard, as either aberrational or antisocial, behavior that does not fit his predictions. The richness of the best law-and-economics scholarship reflects the tension between the predictions of rigorous price-theory models and careful investigation and analysis of actual behavior by firms, courts, or legislatures. This guide was pioneered in the antitrust area, where business phenomena such as tie-in sales, restrictive distribution agreements, and long-term contracts that did not fit the predictions of simple spot-market-price theory had been explained as monopolistic. It turned out that by analysis of the actual practices reported in the cases in light of the question "how could the business benefit from this practice?," many of these practices could be understood in light of a multiperiod competitive model.¹² Similarly, phenomena such as the failure universally and uniformly to enforce criminal laws can be better understood if they are studied and analyzed in terms of the costs and benefits of criminal law enforcement rather than simply deplored as a failure of the system.¹³

6. Goods and services are multidimensional, and regulation of one dimension will affect the other dimensions of the good or service. This principle is important because laws frequently affect only one aspect of a complex set of interactions. For example, economic regulation often regulates only the price at which a good or service can be sold without regulating the quality and conditions under which it is sold. Sellers will

8. Because these losses are accounting losses on fixed capital that has no better use.

9. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 2-6 (1960).

10. Richard A. Posner & Frank H. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials*, 2d ed., 98, 144, 988-89 (St. Paul, Minn.: West Publishing Co., 1981).

11. See, e.g., Richard A. Musgrave & Peggy B. Musgrave, *Public Finance in Theory and Practice*, 3d ed., 301-23 (New York: McGraw-Hill, 1980).

12. See the discussion and literature cited in Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 280-309 (New York: Basic Books, 1978).

13. George J. Stigler, *The Optimum Enforcement of Law*, 78 J. Pol. Econ. 526 (1970).

respond to a constraint on price by changing one of the quality parameters. Only if all parameters within the control of the seller are regulated, can these effects be controlled. When this principle is used in conjunction with the earlier principles, it can yield subtle hypotheses. For instance, safety regulation will not increase safety, because the existing amount of "safety" reflects a preexisting equilibrium and if one input to safety is increased by law, the participants will increase other inputs to risk in order to return toward the previous equilibrium.¹⁴ In utility regulation, where many parameters of the service are regulated but price is based on a formula related to investment, this insight leads to predictions about the interaction between output regulation and investment decisions in the form of the Averch-Johnson-Wellisz hypothesis.¹⁵ This insight also helps to explain why particular anticrime measures may have little impact on crime rates.

7. In evaluating the effects of laws, the multiparty, private transactional response is important. It is important to look beyond the reactions of a single individual to a rule of law and look at the systematic responses open to groups of individuals. If zero transaction costs are assumed, the Coase theorem comes into play and generates the corollary that law will not matter.¹⁶ Although the zero-transaction-cost assumption is unrealistic, the theorem suggests that one should be wary of concluding that laws have large effects where the parties affected are in continuing and regular bargaining relationships with each other. Since they have already incurred the costs of bargaining, the marginal cost of adding a new topic—the new law—to their agenda is low, and it is plausible to expect complex multiparty arrangements to offset its effects. For example, one should expect that in response to a tax the parties involved in the taxed transaction will attempt to rearrange the transaction so as to reduce the amount of the tax. Workers and employers will respond to an income tax by converting what would otherwise be income into an expense. Or affected parties may cooperate in the operation of black markets or leave the jurisdiction.

8. In evaluating any market or regulatory arrangements, it is important to compare the arrangement being evaluated against other viable institutional alternatives. It is a simple intellectual matter to demonstrate the imperfections of markets and administration, but it is an intellectual exercise of little interest. Since perfection is not attainable, one should search for the best available.

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14. Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. Pol. Econ. 677 (1975).
15. The effect is the response of the firm to a constraint on its prices based upon rate of return where the firm responds by increasing its capital base. Harvey Averch & Leland L. Johnson, *Behavior of the Firm under Regulatory Constraint*, 32 Amer. Econ. Rev. 1052 (1962); Stanislaw H. Wellisz, *Regulation of Natural Gas Pipeline Companies: An Economic Analysis*, 71 J. Pol. Econ. 30 (1963).
16. Since the effects law has will be costlessly overcome by agreements among the affected parties, returning the arrangements to those they preferred in the first place. From the point of view of a legal scholar, it is unfortunate that most of the literature on the Coase theorem has focused on the hypothetical, tractable world where law does not matter rather than the actual world with which the law struggles.

10. The study of legal history and comparative law is important, because significant differences in the structure of legal institutions will probably only appear where there are significant differences in the cost conditions facing the society. Thus fifty-state American studies may only identify differences that are so small that they do not matter—they are essentially the random component of the process output—while obscuring the dominant and important part of the process. If Massachusetts and Montana are alike in the things that matter, then we would expect them to disagree only on things that do not matter. To understand the really important aspects of our own legal system, we may need the comparative mirror of law generated by a very different culture. This leads to an agenda of study and analysis of institutions as diverse as the medieval commons,¹⁸ property rights in primitive societies,¹⁹ and the organization of socialist economics.²⁰

Legal scholars have, of course, long realized the importance of historical and comparative studies. But these studies have been largely descriptive. Law and economics provides an analytic framework that can provide unifying direction to comparative and historical work. For instance: (a) Contractual relations have had varying scope within societies. What social variables account for the varying scope accorded to social ordering through contract? (b) What effects have different forms of economic ordering had on the productivity of societies? (c) Do legal institutions operate systematically to enhance human welfare; do they operate to protect and maintain the position of those in political power; do they have no effect; or should they be understood in some entirely different framework? If these questions should be answered differently in different societies, or at different times, what accounts for these differences?

II. Factual Insights

Law and economics has also been associated with a series of factual insights that have been important to contemporary American legal scholarship.

1. Markets have strong efficiency properties. Using only price theory it is possible to argue that markets are efficient, or, conversely, that they are beset by fatal imperfections. How well markets operate in practice is a question of fact. Are the theoretical imperfections important in practice or are they

17. John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & Econ. 137 (1958); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 Yale L. J. 1717 (1981).
18. Donald N. McCloskey, *The Persistence of English Common Fields, in European Peasants and Their Markets*, ed. William N. Parker & Eric L. Jones (Princeton, N.J.: Princeton Univ. Press, 1975); Donald N. McCloskey, *The Economics of Enclosure, in id.*; Carl J. Dahlman, *The Open Field System and Beyond* (Cambridge: Cambridge Univ. Press, 1980).
19. Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J. L. & Econ. 1 (1980).
20. John H. Moore, *Agency Costs, Technological Change, and Soviet Central Planning*, 24 J. L. & Econ. 189 (1981).

relatively unimportant? The rise of law and economics has been correlated with a change in the intellectual climate, which has become more receptive to the view that markets are an effective form of social organization in many situations. This change in the general intellectual climate has made academic lawyers more interested in the private-law structures that support the operation of markets and more receptive to policy approaches that use private-market institutions. This has in turn made economics more relevant to law.

Law and economics has itself made only a small contribution to this change. The scholars of the 1930s who viewed markets as producing a situation in which millions were idle and hungry could hardly have been expected to have faith in the inevitable ordering properties of the "invisible hand." Nor did their background include any extensive experience with large-scale government economic management. The Interstate Commerce Commission, which was their most ambitious domestic precedent, was timid by modern standards of economic intervention. No wonder they said to themselves, "There must be a better way."

By contrast, the current generation of scholars has seen the power of markets to generate private production in the post-World War world and experienced first-hand the imperfections of bureaucratic management. On an intellectual level, it has been possible to place the Depression in historical perspective and to come to understand the role of the Federal Reserve Board in sustaining and extending the long downward economic spiral of the early '30s.²¹

Law and economics has played a role in this large and important transformation of perceptions in one respect. The antitrust-industrial-organization work has shown that many of the market failures attributed to barriers to entry, predatory practices, and monopoly extension are not in practice significant problems.²²

It is this element of law and economics that probably accounts for the view of some that it is an intellectual movement hopelessly tainted by ideology. An appreciation of the power of markets to release human energies for public ends inevitably leads to nonsocialist prescriptions. The interesting thing is that the efficiency properties of markets are now so widely appreciated that this finding is seldom challenged. In the days of classic socialist theory, it was possible to argue that the emerging scale of production was so large that all markets would be dominated by monopolies. Ironically, the very technological progress that made large-scale production efficient also led to means of transportation and communication that vastly expanded the geographic scope of markets. This has forced socialist political theorists to abandon price theory to the liberals.

2. Much social behavior can be illuminated through rigorous use of self-

21. Milton Friedman & Anna Jacobson Schwartz, *A Monetary History of the United States: 1867-1960*, 299-419 (Princeton, N.J.: Princeton Univ. Press, 1963).

22. Phillip Areeda & Donald F. Turner, *5 Antitrust Law*, passim and sec. 711b, at 152 (Boston: Little, Brown, 1978).

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interest-maximization models, including such areas of noncommercial behavior as political behavior,²³ family behavior,²⁴ and criminal behavior.²⁵

3. Private-law rules matter and involve policy issues as fundamental and important as public-law rules. One of the reasons that law and economics has been so well received in law schools is that it has addressed in an interesting way the concerns of the private-law lawyer—the rules of contracts, torts, and property.²⁶ For the preceding thirty years public law had been on the rise in American law schools and had attracted the most ambitious minds. In contrast, private law came to be viewed as narrow and technical. Law and economics placed private law in a larger policy context and generated vigorous literatures on liability rules and the nature and structure of contracting and property systems.²⁷ Since private law does in fact matter, this more rigorous and systematic method of approaching issues of the significance of private-law rules was a useful corrective.

4. Economic regulation often has effects which are adverse to social welfare and is often imposed and maintained for the purpose of protecting the interest of the firms regulated. Law and economics, and particularly the industrial-organization literature associated with law and economics, documented a stunning series of failures in the structure of the economic regulation that lay at the heart of the New Deal's faith in economic management. These demonstrations focused on agencies that restricted entry (airlines, trucks, communications common carriers), restricted pricing freedom (railroad, utility regulation, Robinson-Patman Act), or prevented the creation of private property rights (broadcast regulation).²⁷ In case after case it was possible to show, on the basis of rather elementary price theory and economic data, that these supposedly "scientific" regulatory regimes resulted in a social loss, protected politically powerful groups, and did not have the efficiency effects claimed for them.

23. Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957).
24. Gary S. Becker, *A Treatise on the Family* (Cambridge, Mass.: Harvard Univ. Press, 1982).
25. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968).
26. See Henry G. Manne, ed., *The Economics of Legal Relationships: Readings in the Theory of Property Rights* (St. Paul, Minn.: West Publishing Co., 1975); Kronman & Posner, *supra* note 3; Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L. J.* 499 (1961); John Prather Brown, *Toward an Economic Theory of Liability*, 2 *J. Legal Stud.* 323 (1973); Neil K. Komesar, *Toward a General Theory of Personal Injury Law*, 3 *J. Legal Stud.* 457 (1974); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1975).
27. Much of this literature is to be found summarized in Breyer, *supra* note 6, and Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (New York: John Wiley & Sons, 1970). Seminal studies include Richard E. Caves, *Air Transport and its Regulators: An Industry Study* (Cambridge, Mass.: Harvard Univ. Press, 1962); Paul W. MacAvoy, *The Economic Effects of Regulation: The Trunkline Railroad Cartels and the Interstate Commerce Commission before 1900* (Cambridge, Mass.: M.I.T. Press, 1965); Paul W. MacAvoy, *Price Formation in Natural Gas Fields* (New Haven, Conn.: Yale Univ. Press, 1962); George J. Stigler, *Public Regulation of the Securities Markets*, 37 *J. Bus.* 117 (1964); Ronald H. Coase, *The Federal Communications Commission*, 2 *J. L. & Econ.* 1 (1959).

Reflections on Professional Education, Legal Scholarship, and the Law-and-Economics Movement

Frank I. Michelman

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I offer my thoughts about some of the precepts of analytical
method that Kitch has approvingly ascribed to law and economics.

I. Checking the Foundations

1. The subject to be studied is to be conceived of as a system of constraints and rewards interacting with individuals. A central objective of law-and-economics scholarship has been to analyze the interaction between a system of rules and the behavior of individuals in order to determine the effects of the rules.²

I have no quarrel with this formulation of an objective for law-and-economics scholarship, with its value, or with the commitment to it of much

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2. Edmund W. Kitch, *Intellectual Foundations of Law and Economics*, 33 *J. Legal Educ.* 184 (1983).

of the relevant scholarship with which I am acquainted. I pause only to note that the objective will be attainable only insofar as the analyst can rigorously hold apart the supposedly independent behavioral regularities and the observed "effects of the [legal] rules." There is constant danger of the analysis collapsing into tautology through reading of the observed outcomes back into the behavioral suppositions. For example, the prevailing legal rule is that you are not required to put in an appearance at the polls on election day. Still, substantial numbers do so, despite the apparent futility of this expenditure of time and energy from the standpoint of the economizing individual. It would be both tautological and obscurantist to infer from this state of affairs that people have a "taste" for the act of voting as such.

It would be very neat if the central thesis of economic analysis were that its axiomatic presupposition of individualistically "rational" behavior³ were sufficient, by itself or in combination with extra-behavioral facts about resource scarcity, technology, etc., to determine the effects of a given legal event. Were that the thesis, empirical inspection of actual results could certainly provide a rigorous, pragmatic test. (For example, the voting phenomenon apparently would defeat the thesis). Conversely, firm predictions of legal impact would be available for as long as the thesis held up.

However, as just about everyone is by now aware, the "rational"-behavior axioms do not pretend by themselves to determine predicted results. Conversely, they are strictly nonfalsifiable. They are formal propositions only, which can cut no empirical ice without additional concrete input about the actual, particular motivations of those subject to the investigation. (In the voting case, everything depends on our imputations to people of "tastes" for voting.) And that means trouble.

3. A strong regularity of human social behavior is behavior which serves the interest of the actor. This premise . . . can be used to analyze responses to laws because it leads to the prediction that individuals will alter their behavior to avoid the costs of laws and to obtain their benefits. This prediction is a prolific generator of hypotheses for investigation.

5. Observed stable behavior is an indicia of an equilibrium that serves the objectives of those who sustain it. . . . [This idea] . . . guards against the theorist's tendency to disregard either as aberrational or antisocial behavior that does not fit his predictions. The richness of the best law-and-economics scholarship reflects the tension between the predictions of rigorous price theory models and careful investigation and analysis of actual behavior. . . .⁴

Precept 3 does not help much to avert the trouble. It would, if "interest" were used in the sense of the identifiable *objective* good of an actor which may or may not accord with the latter's current desires or conduct.⁵ A thesis that persons regularly act, willy-nilly, in accordance with objectively identifiable "interest" would certainly be falsifiable. But that does not seem to be the one Kitch has in mind. He means, rather, that people regularly act

3. "Rational" for present purposes means optimizing on one's alternatives, thus maximizing one's satisfactions, by continuous trading off at the margin. See discussion, below, of Kitch's Precepts 4, 6, and 7. Since this is, in my view, a peculiar and constricted notion of rationality, I shall continue to enclose the word in scare-quotes when I use it thus.

4. Kitch, *supra* note 2, at 188-89.

in pursuit of their interests as currently experienced by themselves. And *that* theorem is nonfalsifiable, i.e., tautological, except insofar as investigators have some way, independent of the behavior that the thesis means to predict, of ascertaining the concurrent motivational experience of their subjects.

That this is indeed possible, to some worthwhile extent, is the implication of Kitch's formulation of the thesis in terms of "the costs" and "the benefits" of alternative responses to laws. What that language seems to intimate is that various consequences may be identifiable by investigators as serving or diserving the subjective interests of the members of a population simply on the basis of common sense, shared experience, and accumulating positive knowledge derived from prior, common-sense-based hypotheses. The thesis, then, is that a population will respond to a legal event by "rationally" moving to minimize costs or maximize benefits *as those would be typically evaluated in the common culture shared by the population and the investigators*. What really, ultimately "generates . . . hypotheses for investigation" is nothing more or less than the investigator's common-sense suppositions about what people generally want and do not want.

Modest as that position may be, it does move us back from the brink of tautology. Things *can* turn out detectably different from what was predicted in a specific case, and if they do, we will know the analyst was wrong about something: either the particular attribution of concrete subjective interests to the population, or the general theorem that people behave "rationally" so as to serve their interests.

However, it is just this inexpungible possibility of equivocation on *which* guess was wrong—that concerning the content of the interests or that concerning the "rationality" of the behavior—which leaves the economic perspective on human events finally lacking substantive content, as a hard look at Precept 5 will certainly show. The analyst may sometimes be proved wrong about something, but it will not ever be the "rational"-behavior axiom any more than it will be the attributions of contingent motive. The "rational"-behavior premise, and its sophisticated transformations into the analytic apparatus of microeconomics, are just a way—often, to be sure, a powerfully clarifying way—of organizing thought and experience about where the sundry ends and motivations of interacting, culturally conditioned humans will carry them if subjected to this or that set of institutional constraints.

The point is not that one does not sometimes, even often, obtain a useful purchase on the world by thus shuttling between "rigorous price theory models" and "careful investigation and analysis of actual behavior." Rather, it is that the "tensions" in the picture exist, not between "rigorous . . . models" on the one hand and refractory behavioral material on the other, but between potentially conflicting bodies of particular behavioral/motivational material: those inserted into the model at moments of prediction, and those read out of it at moments of observation. The imaginative entities behind the predictions and the tensions are all—depending on point of view—either (objective) behaviors or (subjective) interests. The model is an

predict and those we observe. As such, the model is optional, especially inasmuch as there is plenty of plainly significant experience that it quite fails to capture or explain.⁶

The essence of the model can be found embedded in Kitch's fourth, sixth, and seventh analytical precepts.

4. Marginal rather than gross or average effects are the important effects to analyze in understanding human response to law. . . . [For example,] past costs are sunk costs and have no bearing on decisions in the present.

6. Goods and services are multidimensional and regulation of one dimension will affect the other dimensions of the good or service. . . . For instance, safety regulation will not increase safety because the existing amount of "safety" reflects a preexisting equilibrium, and if one input to safety is increased by law, the participants will increase other inputs to risk in order to return toward the previous equilibrium.

7. In evaluating the effects of law, the multiparty private transactional response is important. . . . If zero transaction costs are assumed, the Coase theorem comes into play and generates the corollary that the law will not matter. . . . [O]ne should be wary of concluding that laws have large effects where the parties affected are in continuing and regular bargaining relationships with each other.⁷

These precepts strike me as much alike in both content and merit. All are descriptive of the same mode of "rationally" calculative behavior—in which the key ideas are the closely interrelated ones of optimization by marginal choice ("trade-off" governed by a "rate of substitution") and competitive equilibrium—which law-and-economics practitioners suppose will govern individual and societal responses to legal events, and which, as they have well taught, will often lead to counterintuitive results.

Taking these as standing, strong reminders of things "one should be wary" of overlooking in instrumental appraisals of law actual or prospective, I consider these precepts to be true and valuable contributions of law-and-economics work to the fund of critical understanding that should guide the efforts of reform-minded lawyers and law professors. The kinds of responses they describe are assuredly common, and the effects of those responses on legal impacts are liable to be overlooked without prompting from the analytical habits and methods that these precepts represent.

Still, issues of no slight importance are suppressed by the categorical tone in which the precepts are offered. Among mistakes one ought to be wary of, after all, are such suppositions as that "past costs [categorically] . . . have no bearing on decisions in the present"; that "if one input to safety is increased by law, the participants [categorically] will increase other inputs to risk"; and that, by virtue of the Coase theorem, "if . . . transaction costs are assumed [to be negligible], . . . the law will not matter." Understood as

depictions of or derivations from a special *normative* standard of rational conduct, such categorical statements are incontestable. Understood as characterizations of what we *actually* are like and how we *actually* behave, they are half-truths sure to mislead. Which gets us to Precept 2.

2. The purpose of scientific analysis is to identify the systematic component of phenomena and separate that component from the random phenomena. A generalization is useful and worthwhile even if it can explain only a portion of the behavior examined.⁸

If an elegant theory appears to explain, in the correlational sense, a respectable amount of the variance in a set of observations, there will be some tendency to picture the variance remaining unexplained by that theory as unsystematic, random, impenetrable muck lacking significance—what statisticians call "the residuals." Thus may one be led to think that the distinctive behavioral theorems of economic analysis (see the preceding discussion of Kitch's Precepts 4, 6, and 7) are the only ones capable of making comprehensible the legal phenomena that interest us.

Critics of law and economics (myself included) believe the opposite is true: that is, that the marginally trading-off (some critics would call it the "commodity") form of consciousness and behavior posited by law and economics is only one side of the story of what people—us—are and can be like; that the story has other sides, no less coherent or authentic to whoever is in a frame of mind to receive them; and that we, especially as we act through our conversations with each other, are very much the agents of our own conditioning and the authors of our own story.

In other words, which is the "systematic" component and which the "random" is very much in the eye of the beholder. There are perspectives—not so unfamiliar, after all—in which mercantile behavior on the part of a parent apparently ready to sell his child for a good profit over what he would have paid for it, or even something as prosaic as the sale of votes or offices, would definitely fall into the random fraction.

No one, so far as I know, questions that "a generalization is useful and worthwhile even if it can explain only a portion of the behavior examined." To trumpet this point is, as Mark Kelman has had occasion to observe,⁹ to miss what critics are driving at when they point to empirical deviations from the asserted behavioral regularities of price theory. Explanations—schemata that serve to organize some significant fraction of experience—are useful, to put it mildly, and that includes law and economics. The critical point is to avoid mistaking an organizing construct for a structural reality that, by defining the possible, limits vision and deadens will.

That, indeed, would seem to be the message of Kitch's own Precept 10:

10. The study of legal history and comparative law is important because significant differences in the structure of legal institutions will probably only appear where there are significant differences in the cost conditions facing society. . . . To understand the really important aspects of our own legal system, we may need the comparative mirror of law generated by a very different culture.¹⁰

8. *Id.* at 190.

9. See Mark G. Kelman, Spitzer and Hoffman on Coase: A Brief Rejoinder, 53 S. Cal. L. Rev. 1915, 1919, 21 (1980).

6. Warren J. Samuels, an economist, puts the matter this way:

Any behavior or area of life that can be specified in terms of a maximization problem will evidence "economic" characteristics. But the maximizing conclusions will be due to the paradigm with which the phenomenon is interpreted and not to the "nature" of the phenomenon itself. Alternatively, the phenomenon may be intelligible in terms of several different paradigms, and there are no criteria dictating choice among paradigms.

Warren J. Samuels, *Maximization of Wealth in Justice*, 60 Texas L. Rev. 147, 164 (1974).

This precept I regard as exhibiting both a truth of surpassing importance and a paradox. Its truth is that one comes to define and perceive, and thus to understand, one's own culture—one's own intellectual situation—only by imagining alternative possibilities. It is by simultaneously providing us with the means of imaginative escape, and suggesting to us what our own consciousness is not, that the sympathetic study of quite other cultures may allow us to form some self-observant sense of what our own consciousness is.

One does not escape one's fetters, though, by dragging them along; and one will not ever get much of a look at one's own intellectual predicament if one always starts by projecting that predicament onto the foreign ground from which one hopes to catch a true glimpse of home. If all you think to search for in other cultures is correlation between variations in "cost conditions" and "the structure of legal institutions," you foreclose the possibility of recognizing a culture in which one of the controlling "conditions" is that crucial promptings and motivations do not take the "commodity" form of marginally interchangeable "costs" at all. And so you may fail to see that one of the distinguishing and contingent features of our own thought process is its relentless urge to reduce every motivation to a cost.

* * *

NOTES

1. Consider the first of Kitch's "analytic methods" of law and economics, that "the subject to be studied is to be conceived as a system of constraints and rewards interacting with individuals." All social science agrees with that proposition. A model ought to instruct us about what sorts of constraints and rewards constitute the main variables affecting behavior. What variables does Kitch point to?

2. Recall Ellickson's story of how ranchers and farmers dealt with stray cattle. In accordance with Kitch's third "analytic method," how might Kitch account for that behavior? Compare Michelman's example of why people bother to vote.

3. Michelman argues that some of Kitch's propositions defy falsification. Warren Samuels said of Posner's work: (Book review of Posner, The Economics of Justice (1981), 60 Tex. L. Rev. 147, 150 pp.)

Part of the confusion stems from the tautological nature of Posner's "maximization" analysis. Maximization itself is an empty process: any goal-directed activity can be said to constitute maximizing behavior. For rational maximization to produce determinate results, the object or goal to be maximized must be specified. Posner, of course, rejects the generalized happiness of Benthamite utilitarianism in favor of *wealth* maximization.³² But wealth can be specified in different ways, depending in part upon the *distribution* of income and wealth.³³ Changes in distribution will affect the substance of wealth, the object of maximizing behavior. Whether behavior is rational remains dependent on the specification of its goal, and this is no less true if the goal is wealth, for wealth is necessarily subject to further specification.

* * *

Posner's problem is an analytic circularity that destroys the probative value of the wealth maximization principle as a means of explanation or justification. Because any putative wealth maximizing result is a function of the legal specification and assignment of the property rights that give rise to it, there is no unique wealth maximizing result, only results specific to the rights structure that supports the existing distribution of wealth. Thus, wealth maximization "cannot be used as

a benchmark to determine the initial set of property rights."⁵⁸ The circularity problem arises from the fact that

rights must be assigned before trading can take place and the way they are assigned will determine the set of outcomes that are Pareto efficient [wealth maximizing]. Rights must be assigned before the wealth maximization principle can be used, and hence rights cannot be determined by it. If rights are to be assigned to mimic a perfect market outcome then we must know the rights structure on which that outcome was based.⁵⁹

To say, then, that the common law produces efficient or wealth maximizing outcomes is circular: whatever rights structure is produced by law will produce an efficient outcome.

* * *

Nor is Posner's maximization principle dispositive of the normative issue it is supposed to settle. It cannot uniquely determine which interests the law should promote as rights and which it should inhibit. The law's decisionmaking processes can work only with selective normative premises as to whose interests are to count as rights, and these premises necessarily have distributive consequences. To argue that wealth maximization can determine rights serves only to mask a choice of which interests to protect as rights. Legal decisions or changes can be said to be efficient only from the point of view of the party whose interests are given effect through the identification and assignment of rights. Law is fundamentally involved in making such determinations. The principal positive problem is to study the processes through which courts and other sources of law decide whose interests are to count and whose interests are not to receive protection. The fundamental normative issue, which Posner's wealth maximization principle only obscures, is to determine as an exercise of choice whose interests should count.

Contrary to what Posner would have us believe can be done objectively, uniquely, and conclusively by virtue of the wealth maximization principle alone, we cannot base rights on what will maximize wealth.

* * *

In both theory and practice the issue is which interest, and therefore which efficient result, is to count. Identifying which interests are to be given legal protection as a matter of right is the point at issue, and it is one on which the wealth maximization principle does not and cannot help. There is no independent test by which the law's solution can be said to be *the* efficient solution. Indeed, not only is there no independent test, but there cannot be: each legal solution points to a different efficient outcome.⁶³ Posner is simply wrong in asserting that "a system of rights could be deduced from the goal of wealth maximization itself";⁶⁴ different rights systems will produce many different wealth maximizations. No system of rights can be deduced uniquely from the goal of wealth maximization, and none from that goal alone.

* * *

Overall, then, Posner's wealth maximizing principle has the same problem with regard to distribution as Bentham's greatest happiness principle: it cannot determine whether wealth is to be maximized extensively through the number or percentage of persons enjoying wealth or intensively through the greater happiness of the wealthy. Wealth maximization is always within the rights and law governing the balance of intensive and extensive margins. Posner recognizes that those who are destitute do not contribute to value understood as willingness to pay (in contrast to happiness derived): "[T]he wealth of society is the aggregate satisfaction of those preferences (the only ones that have ethical weight in a system of wealth maximization) that are backed up by money, that is, that are registered in a market."⁹¹ In other words, "society seeks to maximize the satisfaction only of those whose preferences are backed up by a willingness to pay."⁹² Posner goes so far as to say that one "implication of the wealth-maximization approach . . . is that people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no say in the allocation of resources unless they are part of the utility function of someone who has wealth."⁹³ In Posner's system, only wealth counts in social decision-making. This, of course, only reinforces the existing distribution of income, wealth, and rights on which income and wealth are in part predicated.

4. Samuels concludes his review of Posner's book:

It is my interpretation, offered here as a hypothesis, that Posner's economic approach to law can be described as any or all of the follow-

ing: a manifestation and expression of a culturally determined perspective; a subtle expression and legitimation of social power on behalf of the judiciary; an attempt to escape from the freedom and pain of moral judgment; and a technician's effort to reach determinate solutions rather than be satisfied with understanding what is going on. Posner's vehicle for all this is, of course, the principle of wealth maximization.

To explain this interpretation, we must first clarify the existential nature of economic phenomena. It has been said of economists that we know the price of everything but the value of nothing. On the contrary, economists, particularly insofar as we are neoclassicist in character, deny that there is, with regard to the exchange value of commodities, anything approaching "value" as an absolute or metaphysical category that transcends price. There is only a network of prices derived from the interaction of demand and supply functions that operate within and give effect to a changing system of rights, law, preferences, technology, population, and so on. For all its emphasis on positivistic, deterministic solutions, such an economics is relativist and existentialist. Prices are only temporary resting places, only coefficients of choice in continual flux.

Consider, for example, equilibrium, or optimal, prices. A change in physical resource availability, in tastes, in relative entitlements, will lead to a change in relative prices and, more importantly, to a change in resource allocation. Such prices are made through the market or through planning rather than found. There is no unique configuration of prices and therefore no unique set of costs or resource allocation, and no unique optimal solution. More generally, all variables, even their episodic equilibrium magnitudes, are interdependent; none is absolute. Even scarcity is a relativist condition.

But the economy is a normative process and is so in at least two respects: normative choice is exercised as to the allocation of resources, in part through tastes, and normative choice is exercised with regard to the structure of decisionmaking itself—the structure of rights or of power. All this is true of lawmaking as well.

One of the characteristics of human choice is the quest for absolute, if not neutral, principles of choice. The purpose of this quest is somehow to escape the terrible frustration of choice as well as to mask or to legitimize the choices actually made. This is a quest pursued by individuals as they seek to satisfy personal choices and by individuals and groups contributing to social choices. It is one from which Posner is not free.

Posner has his own activism, his own agenda for law, for philosophy, and for judges. His principle of wealth maximization is derivative of the culture of a society that maximizes wealth in Calvinist terms.¹⁴⁹ That the principle is not uniquely dispositive by itself of the questions to which it is addressed does not negate its force: it does not hamper its ideological function in further legitimizing and reinforcing wealth maximization as a principle of systemic interpretation and value. Posner's is an attempt to identify and establish a propaganda for one version of economic freedom, a ground for certain economic liberties¹⁵⁰ understood in historical terms comprehensible to a business and wealth-oriented civilization.

Posner seems to believe that he has found in economics an apparent base for legal decisionmaking. That his base in economics is itself derivative from the parent culture and that the principle is no more in economics than in law capable of providing uniquely dispositive results are here, too, beside the point.

5. Critique the Tenant Screening Reporting bill from a law and economics perspective.

6. Critique the stop sign article from a law and economics perspective.

The Normative Perspective

The Chicago study makes clear that normative issues are central to any effort to understand authority and compliance. In three areas normative issues were found to be important: the legitimacy of leaders is directly related to compliance; justice affects reactions to personal experience; and people think about justice in noninstrumental terms.

The instrumental perspective is clearly insufficient to explain people's views about the legitimacy of authority and their behavioral compliance with the law. Citizens act as naive moral philosophers, evaluating authorities and their actions against abstract criteria of fairness. The instrumental conceptions of the person that have recently dominated discussions of legal issues are incomplete. Explanations based on the image of people as entirely rational beings who maximize utility are insufficient to account for their behavior in social groups. Further, procedural justice plays a crucial role in the political impact of experience. The legitimacy of authorities is closely intertwined with the procedures they use when dealing with the public. These findings of the Chicago study reinforce the importance of "civic duty" in political science (Easton 1965), of normative issues in sociology (Gamson 1968; Schwartz 1978), and of distributive and procedural justice in psychology (Crosby 1976; Lind and Tyler 1988). Although issues of justice and legitimacy have long been given attention in each of these fields, more recently models of public choice emphasizing instrumental concerns have dominated. The Chicago study shows that a fuller description of citizens' behavior can be obtained by paying greater attention to normative questions.

A normative perspective can also give a differing approach to policy issues, such as the issue of how to implement public policies. In past discussions of policy implementation, it has been assumed that citizens' behavior is motivated by self-interest, and as a result the focus has been on the manipulation of behavior through the control of punishments and incentives. In light of the Chicago study, however, policymakers might also pay attention to the normative climate that surrounds legal authority and to citizens' conceptions of fair decision-making procedures in legal settings. The study does more than make the

general suggestion that norms matter: it strongly supports a procedural orientation toward normative issues. Research on distributive justice has focused on fair outcomes, but people focus on fair procedure.

Implications for Theories of Public Choice

The Chicago study raises questions about the completeness of the theories of public choice that have guided earlier research on how people react to the law and legal authorities. Although it is possible to develop explanations for the findings of the study that are consistent with models that focus on outcome, it is much more straightforward simply to recognize that people are concerned about normative issues. This is of course not to suggest that people never care about outcomes. The Chicago study examined the political implications of experience, and it may be that people differentiate between political aspects of their experience and market aspects. According to traditional economic theory, market decisions are heavily influenced by concerns about self-interest (but see Kahneman, Knetsch, and Thaler 1986).

When considering the implications of the study it is important to distinguish between the model of subjective expected utility and the image of the person contained in theories of public choice. The model is used for combining various utility factors into a single behavioral propensity. The image of the person contained in theories of public choice is one of a person motivated primarily by short-term self-interest.

It is possible to deal with issues of fairness by incorporating them into an expanded model of expected utility, following the conceptual approach of Fishbein and Ajzen (1975; Ajzen and Fishbein 1980) or Leventhal (1976, 1980). To do so follows the pattern of recent research on deterrence, which has incorporated both informal sanctions by the social group and personal moral concerns into models that traditionally had included only judgments about the certainty and severity of punishment. Once the concept of an expanded model of expected utility is accepted, the issue becomes one of specifying when each of the terms in the equation will be important. The Chicago study sheds light on one factor: whether the judgment is one of personal satisfaction or an evaluation of authorities affects the values of the terms. Situational factors may also matter: for example, procedural justice matters more in dispute situations. Ultimately a model should incorporate all these elements into an overall theory of fairness.

In contrast to its minimal implications for models of expected utility, the Chicago study's implications for the image of the person contained in theories of

public choice are troubling. The people studied in Chicago do not react to their experiences or behave in ways that can be easily explained by reference to their short-term self-interest. Instead, people seem concerned with normative issues. After the Second World War came a series of important developments in economics. Theories were formulated based on rational models of choice and decision making that were oriented toward outcome. The principal conceptual innovation was the articulation of expected utility and of a theory of how to assess it (Von Neumann and Morgenstern 1947). Models of expected utility allow the idea of people as personal maximizers of utility to account for social and political behavior. As a result of these developments, models of the person based on self-interest have come to dominate law, policy studies, and political science. It has been increasingly assumed that people are concerned primarily with the personal favorability of the outcomes they receive from legal and political authorities, and that they shape their behavior based on expectations about the rewards and punishments those authorities provide. This assumption is the key characteristic of models of public choice.

Models of public choice have had two influences on the study of law and public policy. First, they have influenced the political and social issues that are regarded as important enough to study. Second, they have influenced the image of the person that is used in examining the issues. One implication of the Chicago study is that there is a need to shift the questions that are studied by political psychologists. Theories of public choice have directed attention to issues that when viewed from a perspective of public choice appear paradoxical or problematic. That people vote, for example, is difficult to explain given the low expected gains of voting and its clear costs (Laver 1981; Mueller 1979). Another problem central to theories of public choice is that of noncompliance with government burdens, for example taxes. If people are viewed as motivated by personal gain, they will be expected to try to avoid obligations, as long as avoidance does not appear to have immediate personal costs. Therefore, all citizens will try to avoid paying taxes. If all succeed, society cannot function.

A normative perspective directs attention to a different set of concerns. In particular, it focuses the attention of researchers and policymakers on normative issues, and on the need to understand how people acquire the normative values that have such an important influence on how people evaluate the law and behave toward it. The Chicago study is unclear about the origins and evolution of beliefs about the legitimacy of authority. Earlier theories have emphasized that legitimacy develops during socialization in childhood. This initial belief in the legitimacy of authority then functions as a residue of support that cushions people against negative experiences during their adult life. The re-

spondents in the Chicago study clearly had such beliefs, because an overwhelming proportion of respondents said they felt the law should be obeyed. But when their belief developed is unclear.

It is also important to study the origin of people's schemata for judging the fairness of outcomes and procedures. Researchers have found that people are almost always able to judge whether a procedure is fair or unfair, just as they can almost always judge this of an outcome. Thus people have well-established frameworks for making judgments about justice. Where do these frameworks come from? As has been noted, research has found that there is a consensus among Americans about what constitutes a fair procedure, and explanations of this have focused on socialization. In this regard, the results are similar to those that prevail with legitimacy. There too a consensus exists that people ought to follow the law. Still unanswered in both cases is the nature of the process of socialization underlying the effects. In addition to research aimed at understanding the origin of normative views, more research is needed about what those views are. Although the Chicago study makes clear that normative concerns matter, it is vague about their content. The perceived obligation to obey authorities was found to have a stronger relationship to compliance than support for the authorities has. Unfortunately, it is not clear why people feel obligated to obey the law and legal authorities, to whom they feel this obligation, or the range of behavior to which the obligation applies.

In addition, people's views about fairness are quite complex and sophisticated, in two ways. First, judgments about justice consider in general a variety of issues, some of which are quite subtle. For example, people rely heavily on inferences about the motives of the authorities. Second, people do not always consider the same issues. They recognize that different issues are relevant to the fairness of a procedure in different circumstances.

One approach to understanding the nature of values pertaining to justice is to begin with their connection to basic political and social values. An incipient effort to do so is the demonstration by Rasinski (1987) that values of justice are linked to basic political and social values. Models of justice also point up the need for a different view of the person in efforts to understand and deal with legal and political problems (Tyler, Rasinski, and Griffin 1986). In trying to understand why people follow the law, for example, we should not assume that behavior responds primarily to reward and punishment (as do traditional theories of deterrence; see Andenaes 1974 and Tittle 1980). Instead, we should recognize that behavior is affected by the legitimacy of legal authorities and the morality of the law. Similarly, the literature on implementing policy should not focus simply on manipulating penalties and incentives; it should also be con-

cerned with creating a normative climate that promotes the acceptance of law and public policies.

The implications of accepting public concerns about justice are broad. To recognize them will help us to understand the nature of public discontent with the legal and political system, to design ways of implementing policies that will make the policies more widely accepted, to understand why people react to their dealings with police officers, judges, and other legal and political officials, and to understand the basis of public behavior—whether the public is obeying the law, rioting, or voting.

**A CASE STUDY IN LAW AND ECONOMICS:
CREATING A MARKET IN BABIES FOR ADOPTION**
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[In 1978, Professor Posner and Dr Elizabeth Landes proposed a radical change in the regime of law surrounding the adoption of babies. Since then, Professor Posner has written about the proposal several times. We include here the version in his book, *THE ECONOMIC ANALYSIS OF LAW*¹, with brief excerpts from a later article in the *Boston University Law Review*].

Another solution to the problem of the neglected or unwanted child is, of course, to allow the parents (or mother, if the father is unknown or uninterested) to put up the child for adoption, preferably before they begin to neglect the child. Provided that the adoptive parents are screened to make sure they do not want the child for purposes of abusing it sexually or otherwise, adoption enables the child to be transferred from the custody of people unlikely to invest optimally in its upbringing to people much more likely to do so. But the universal availability of contraception, the decline in the stigma of being an unwed mother (can you think of an economic reason for this decline?), and the creation of a constitutional right to abortion have reduced to a trickle the supply of children for adoption, since most such children are produced as the unintended by-product of sexual intercourse. Recent advances in the treatment of fertility (perhaps spurred in part by the decline in the supply of babies for adoption) have reduced or at least controlled the demand for babies for adoption, but the demand remains high, and is much greater than the supply. The waiting period to obtain a baby from an adoption agency has lengthened to several years and sometimes the agencies have no babies for adoption. The baby shortage would be considered an intolerable example of market failure if the commodity were telephones rather than babies.

In fact the shortage appears to be an artifact of government regulation, in particular the state laws forbidding the sale of babies. The fact that there are many people who are capable of bearing children but who do not want to raise them and many other people who cannot produce their own children but want to raise children, and that the costs of production to natural parents are much lower than the value that many childless people attach to children, suggests the possibility of a market in babies. And as a matter of fact there is a black market in babies, with prices as high as \$25,000 said to be common.³ Its necessarily clan-

3. See Adoption and Foster Care, 1975 Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess. (1975); Sale of Children in Interstate and Foreign Commerce, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977); Nancy C. Baker, *Babyselling: The Scandal of Black-Market Adoption* (1978).

¹ 3rd. ed., 1986, pp. 139-43.

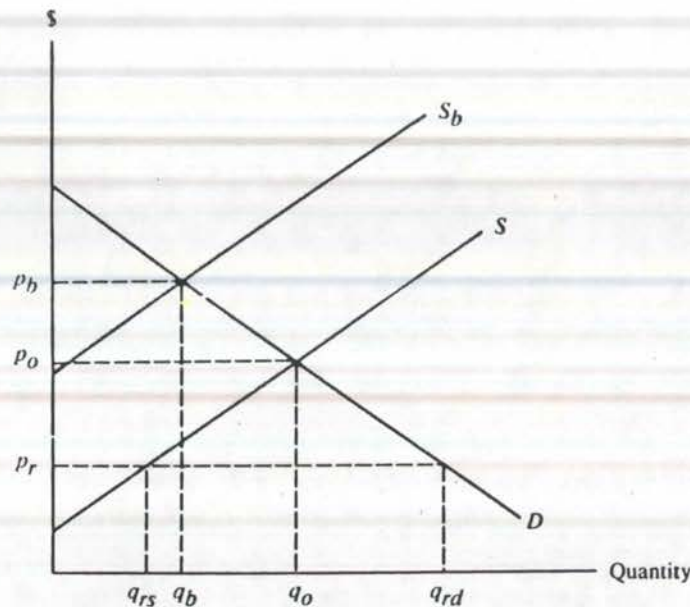


Figure 5.1

destine mode of operation imposes heavy information costs on the market participants as well as expected punishment costs on the middlemen (typically lawyers and obstetricians). The result is higher prices and smaller quantities sold than would be likely in a legal market.

This is shown in Figure 5.1, where p_0 is the free market price of babies and q_0 the free market quantity, and government regulation places a ceiling on price at p_r , well below p_0 (p_r is not shown as zero both because adoption agencies and other legal suppliers do charge fees to adoptive parents and because children are expensive to raise). The result of the price ceiling is a reduction in the quantity supplied to q_{rs} , creating excess demand of $q_{rd} - q_{rs}$. A black market springs up, but such a market is much more costly to operate than a free market would be (because of punishment costs, poor information, and lack of enforceable warranties), and clears at price p_b (where D intersects S_b , the higher, black market supply curve), which is higher than the free market price. So only q_b babies are supplied, compared to q_0 at the free market price.

This analysis is oversimplified in assuming that all babies are adopted through the black market. That of course is not true. Adoption agencies — private, nonprofit organizations licensed by the state — use queuing and various nonmarket criteria (some highly intrusive and constitutionally questionable, such as requiring that the adoptive parents

have the same religion as the natural parents) to ration the inadequate supply of babies that they control. The principal objection to the agencies is not, however, the criteria they use to ration the existing supply of babies but their monopoly of adoptions, which ensures (given their profit function) that the supply will remain inadequate.

Most states also permit (subject to various restrictions) independent adoption of babies, wherein the natural parents (normally the mother) arrange for the adoption without using the facilities of an adoption agency. This avoids the sometimes irrelevant and demeaning criteria of the agencies, but since the mother is not permitted to sell the child, independent adoption does not create a real baby market. The lawyer who arranges the adoption, however, is permitted to exact a fee for his services plus payment for the mother's hospital and related childbearing expenses, and since these charges are difficult to police, in practice they will often conceal a payment for the baby itself. And if the mother breaks a contract to give up her child for adoption, the adoptive parents may be able to recover damages measured by the lying-in expenses they had advanced to her.⁴ Also close to outright sale is the "family compact," wherein the mother agrees to give up the child to a close relative in exchange for financial consideration running to the child; such contracts have been enforced where the court was satisfied that the arrangement benefited the child.⁵

Should the sale of babies be made legal? The idea strikes most people as bizarre and offensive; the usual proposal for getting rid of the black market in babies is not to decriminalize the sale of babies but to make the criminal penalties more severe. However, economists like to think about the unthinkable, so let us examine in a scientific spirit the objections to permitting the sale of babies for adoption.

There is, it is argued, no assurance that the adoptive parents who are willing to pay the most money for a child will provide it with the best home. But the parents who value a child the most are likely to give it the most care,⁶ and at the very least the sacrifice of a substantial sum of money to obtain a child attests to the seriousness of the purchaser's desire to have the child. The reply to this is that the high paying adoptive parents may value the child for the wrong reasons: to subject it to sexual abuse or otherwise to exploit it. But the laws forbidding child neglect and abuse would apply fully to the adoptive parents (as they do under present law, of course). Naturally one would want to screen adoptive parents carefully for possible criminal proclivities — just as is done today.

4. See *Gordon v. Cutler*, 471 A.2d 449 (Pa. Super. 1983).

5. See *Enders v. Enders*, 161 Pa. 266, 30 A. 129 (1894); *Clark v. Clark*, 122 Md. 114, 89 A. 405 (1915); *In re Estate of Shirk*, 186 Kan. 341, 350 P.2d 1 (1960).

6. The existence of a market in babies would also increase the natural parent's incentive to produce a healthy baby and would reduce the demand for abortion.

A better objection to a market in babies is that the payment of a large sum to buy the child could exhaust the adoptive parents' financial ability to support the child. If so, the equilibrium price of babies would be low, since in deciding how much they are willing to pay for a child the adoptive parents will consider price. But this is not a complete answer to the objection. Few people would pay to adopt a child they could not afford to raise, but the more costly the child is to acquire the less will be the cost-justified investment in the child's upbringing, that investment being as we said a function of the parents' utility as well as the child's.

All this assumes that a free market would raise the price of babies. In fact it is unlikely that the price of babies in such a market would substantially exceed the opportunity costs (mainly the mother's time and medical expenses) that the adoptive parents would have incurred had they produced rather than purchased the child — and that they save by purchasing. For that would be the competitive price. The net cost to the adoptive parents would thus be close to zero, except that the adoptive parents would incur some costs in locating and trying to ascertain the qualities of the child that they would not have incurred had they been its natural parents. The black market price is high because it must cover the sellers' expected punishment costs for breaking the law and because the existence of legal sanctions prevents the use of the most efficient methods of matching up sellers and buyers.⁷

Opponents of the market approach also argue that the rich would end up with all the babies, or at least all the good babies. (Recall the parallel argument against permitting the sale of radio and television frequencies.) Such a result might of course be in the children's best interest, but it is unlikely to materialize. Because people with high incomes tend to have high opportunity costs of time, the wealthy usually have smaller families than the poor. Permitting babies to be sold would not change this situation. Moreover, the total demand for children on the part of wealthy childless couples must be very small in relation to the supply of children, even high-quality children, that would be generated in a system where there were economic incentives to produce children for purchase by childless couples.

The poor may actually do worse under present adoption law than they would in a free baby market. Most adoptions are channeled through adoption agencies, which in screening prospective adoptive parents at-

7. In one respect, however, the black market price is lower than a legal free market price would be. The buyer in the black market does not receive any legally enforceable warranties (of health, genealogy, or whatever), comparable to those that buyers receive in legal markets. The buyer in a legal baby market would receive a more valuable package of rights and it would cost more; the seller would demand compensation for bearing risks formerly borne by the buyer. But the resulting price increase would be nominal rather than real (can you see why?). How might Figure 5.1 be redrawn to reflect this

tach great importance to the applicants' income and employment status. People who might flunk the agencies' criteria on economic grounds might, in a free market with low prices, be able to adopt children, just as poor people are able to buy color television sets.⁸

Although the condition of the market for adopting infants is one of chronic excess demand, the condition of the market for adopting children who are no longer infants is one of chronic oversupply (why?). An impediment to their adoption is the fact that foster parents are paid for foster care, but not for adopting a foster child, so that if they do adopt their foster child they incur even higher costs than other adoptive parents, since, as we know, forgone income is a cost. Can you think of any practical measure for overcoming this problem? Cf. §16.5 *infra*.

8. A recent development in reproductive technology should be noted in connection with the discussion in the text: artificial conception. Suppose a woman produces ova but cannot carry a fetus to term. Her fertilized ovum is transplanted to another woman, the surrogate mother, who carries it to term. Should the natural parents or the surrogate mother have the property right in the child? Should a contract between the surrogate mother and the natural parents whereby the latter pay the former to carry the fertilized ovum to term, and the former agrees to give the baby up to the natural parents when it is born, be legally enforceable? In what ways is the economic analysis different from that of baby selling? For background see Walter Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 Va. L. Rev. 465 (1983).

THE REGULATION OF THE MARKET IN ADOPTIONS†

Richard A. Posner*

I. THE SHORTAGE OF BABIES FOR ADOPTION

Whenever critics of the law-and-economics movement want an example of its excesses they point to what is popularly known as the "baby selling article," which Dr. Elisabeth Landes and I wrote almost a decade ago.¹

Some critics of our article apparently believe we wrote it as an exercise in mechanical extrapolation from the economic analysis of conventional markets. According to one of the least controversial concepts in normative economics—Pareto superiority—a transaction that makes at least one person better off and no one worse off increases social welfare, and is therefore efficient. A voluntary exchange is such a transaction, since the parties would not make it if they did not think it would make both of them better off. Therefore (it might seem) the exchange of money for a baby is efficient. But this last step does not follow from the first two.² A baby is a member of society too. If the transaction diminishes its welfare, the transaction is not Pareto-superior. If it diminishes the baby's welfare by more than it increases the transactors' welfare, the transaction is not efficient even under a less demanding definition of efficiency. These points are fundamental to an economic analysis of family law,³ but they do not establish the irrelevance of

On the demand side, many married couples are unable to have children and want to adopt them. Recent advances in the treatment of fertility problems appear to have been offset by the growing tendency of women to marry later and postpone childbearing to their thirties, when they are likelier to have fertility problems and will have less time to do something about them (whether the something is medical treatment or joining the queue for adoption). Childless couples who try to adopt through an adoption agency find that they must join a long queue and that even then they may be ineligible to adopt—not because they would be unfit parents but because the agencies, having a very limited supply of babies, set demanding (and sometimes arbitrary) criteria of age, income, race, and religion to limit demand to supply. Few healthy white infants are placed through adoption agencies today; I postpone discussion of the special problems involved in placing other children for adoption.

A couple may try to go the independent adoption route, but this route is haphazard and disorganized, and information about babies available for adoption through it is hard to come by. Some states, moreover, have outlawed independent adoptions.⁴ It goes without saying that both adoption

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through an agency and independent adoption favor the wealthy and well connected. The final alternative is the black market, a form of independent adoption. The black market is by definition illegal,⁵ and illegality forces price up and quality down and makes prospective buyers uneasy. Long queues, shortages, uncertain quality, a black market—these are the classic symptoms of excess demand, whether in the baby market or the Soviet food market.

The difficulty of satisfying the potential demand for babies for adoption would be easier to accept if the supply of babies were inherently quite limited in relation to the demand, as it would be if premarital sex were rare—for the usual source of babies for adoption is illegitimate births. But sex outside marriage is rampant in our society. Although the widespread use of contraceptives reduces the fraction of sexual encounters that result in unwanted conception, the reduction is not so great as one might imagine. Because the probability of conception is reduced, the "costs" of sex (one cost being unwanted conception) are also reduced. The reduction in cost can be expected to increase, and undoubtedly has increased, the amount of premarital sexual activity. For although there are effective methods of contraception, people are often careless about using them; and some people have greater moral inhibitions about contraception than about premarital sex. So even though the fraction of pregnancies is reduced, when it is multiplied by the larger number of sexual encounters the number of undesired pregnancies may not be reduced greatly or even at all.⁶ Furthermore,

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economics to adoption. Economics is not just about the exchange of objects. Labor economics, and more recently family or household economics, are important fields of economic inquiry even though they deal with the exchange of, and not merely between, human beings. The purpose of our article was not to make an extrapolation at once mechanical and unsound from the market in goods to the market in babies but to use the analytical tools of economics to explore a pressing social problem—the imbalance between the demand for and supply of babies for adoption.

because the stigma of illegitimacy, for both parents and children, has also lessened, a smaller fraction of babies born out of wedlock is put up for adoption. The decline in that stigma is also partly responsible for the increase in premarital sex and the casual attitude of many engaged in it about contraception. And more than a change in moral attitudes is involved. The welfare system enables indigent single women and girls, who might otherwise be forced to give up their children for adoption, to keep them.

The supply of babies for adoption has been dramatically affected by the increase in abortions since the Supreme Court's decision in *Roe v. Wade*.⁹ The number of reported legal abortions rose from nearly 600,000 in 1972 (before *Roe*) to almost 1,300,000 in 1983, the last year for which reliable figures are available.¹⁰ Of course, even if abortion were illegal, there would still be many abortions, and of the additional babies born many would be retained by the mother. Nevertheless the supply of babies for adoption would be greater. Because of *Roe v. Wade*, the state cannot compel a woman determined to have an abortion to have the baby and give it up for adoption, but it does not follow that the woman should not be given incentives to do so. For many women, abortion is a last resort; indeed, most supporters of a right to abortion insist that this is generally the case. Thus, for little more than the maintenance and medical expenses of pregnancy plus any lost earnings, and often for less, many women might be induced to forgo an abortion and give up the baby for adoption. Dr. Landes and I proposed authorizing some adoption agencies, on an experimental basis, to use a part of their adoption fees to pay women contemplating abortion to forgo the abortion, have the baby, and put it up for adoption through the agency.¹¹ I

in the United States had risen from 183,000 in 1957 to 407,000 in 1973. Landes & Posner, *supra* note 1, at 325 n.6. By 1984 this figure had risen to 770,355. See NAT'L CENTER FOR HEALTH STATISTICS, MONTHLY VITAL STATISTICS REPORT, vol. 35 no. 4 Supp., ADVANCE REPORT OF FINAL NATALITY STATISTICS, 1984, 31 tab. 18 (July 18, 1986).

⁹ 410 U.S. 113 (1973).

¹¹ See Landes & Posner, *supra* note 1, at 347-48. An alternative to the scheme Dr. Landes and I suggest would be to subsidize adoption: this is proposed in Comment, *Funded Adoption: A "Viable" Alternative to Adoption*, 1979 B.Y.U. L. REV. 363 (1979). It is an odd proposal, however. The imbalance in the baby market comes not from insufficient, but from excess, demand; subsidizing adoption would make the demand even greater. What is needed is a mechanism for getting more money into the hands of women facing a choice between having an abortion, on the one hand, and carrying the baby to term and then putting it up for adoption, on the other. The Comment does recommend that the program of funded adoption include payment for maternal health care, but it would be a lot simpler (and require no public funding) to let the adoptive parents make a transfer payment to the natural mother via the adoption agency. Although the general case for subsidized adoption is weak, there is

continue to believe that this would be a good experiment. Dr. Landes and I did not in 1978 and I do not today advocate the wholesale and immediate abolition of laws forbidding the sale of babies for adoption.

One problem we did not consider was the age of consent for giving up a child for adoption in exchange for money. If a young girl, say a fourteen-year-old, becomes pregnant, should she be considered competent to decide among abortion, sale, and perhaps other alternatives? I would elide this difficult issue by confining the experiment to pregnant women eighteen or older.¹²

Because no one to my knowledge proposes the "deregulation" of the adoption market beyond the limited experimental step just mentioned, debate about a free market in babies is academic. But that should not be an objection to an article published in an academic journal. In the remainder of this article I shall describe briefly how such a market might operate, under what regulatory constraints, and with what likely consequences, and in doing so will try to respond to the most frequently expressed objections to allowing the market to function in this area.

II. CHARACTERISTICS OF AND DESIRABLE CONSTRAINTS ON THE BABY MARKET

A. The Question of Price

For heuristic purposes (only!) it is useful to analogize the sale of babies to the sale of an ordinary good, such as an automobile or a television set. We observe, for example, that although the supply of automobiles and of television sets is rationed by price, not all the automobiles and television sets are owned by wealthy people. On the contrary, the free market in these goods has lowered prices, through competition and innovation, to the point where the goods are available to a lot more people than in highly controlled economies such as that of the Soviet Union. There is even less reason for thinking that if babies could be sold to adoptive parents the wealthy would come to monopolize babies. Wealthy people (other than those few who owe their wealth to savings or inheritance rather than to a high income) have high costs of time. It therefore costs them more to raise a child—child rearing still being a time-intensive activity—than it costs the nonwealthy. As a result, wealthy couples tend to have few rather than many children.¹³ This pattern would not change if babies could be bought. Moreover, since most people

a stronger case for subsidizing the adoption of children for whom the market demand is weak—children who are nonwhite, or handicapped, or no longer infants. I come back to this issue in Part IIA.

¹² This is probably three-fourths of all women who have abortions, for only 27.1% of women who have abortions are under 18. See Landes & Posner, *supra* note 10, tab. 1.

have a strong preference for natural, as distinct from adopted, children, wealthy couples able to have natural children are unlikely (to say the least) to substitute adopted ones.

It is also unlikely that allowing people to bid for babies with dollars would drive up the price of babies, thereby allocating the supply to wealthy demanders. Today we observe a high black-market price conjoined with an artificially low price for babies obtained from adoption agencies and through lawful independent adoptions. The "blended" or average price is hard to calculate; but probably it is very high. The low price in the lawful market is deceptive. It ignores the considerable queuing costs—most people would pay a considerable premium to get their adopted baby now, not five or ten years from now. And for people unable to maneuver successfully in the complex market created by the laws against baby selling, the price is infinite. Quality-adjusted prices in free markets normally are lower than black market prices, and there is no reason to doubt that this would be true in a free market for adoptions. Thus, while it is possible that "[i]nherent in the baby black market is the unfairness that results from the fact that only the affluent can afford to pay the enormous fees necessary to procure a baby,"¹⁴ the words "black market" ought to be italicized. It is not the free market, but unwarranted restrictions on the operation of that market, that has raised the black market price of babies beyond the reach of ordinary people.

Thus far I have implicitly been speaking only of the market for healthy white infants. There is no shortage of nonwhite and of handicapped infants, and of any children who are no longer infants, available for adoption. Such children are substitutes for healthy white infants, and the higher the price of the latter, the greater will be the demand for the former. The network of regulations that has driven up the full price (including such nonmonetary components of price as delay) of adopting a healthy, white infant may have increased the willingness of childless couples to consider adopting a child of a type not in short supply, though how much (if at all) no one knows. The present system is, in any event, a grossly inefficient, as well as covert, method of encouraging the adoption of the hard-to-place child. If society wants to subsidize these unfortunate children, the burden of the subsidies should be borne, if not by the natural parents of these children, then by the taxpaying population at large—rather than by just the nation's childless white couples, who under the present unsystematic system bear the lion's share of the burden by being denied the benefits of an efficient method of allocating healthy white infants for adoption in the hope that this will induce them to adopt nonwhite, handicapped, or older children.

NOTES AND QUESTIONS

1. Reconsider the different uses of theory early discussed (Chapter III, pp. 4-11). How does Posner use theory in his justification for a free market in adoptive babies? (Note that Posner says that he analogizes the sale of babies to an ordinary good, such as an automobile or a television set (p. IV-xx). What does he mean by "heuristic" in this context? Does he give that word the same content that the article at p. III-4 gave to it?)

2. In the extract from Posner's book, Posner says that the demand for children for adoption now greatly exceeds the supply (p. IV-xx). In the BU Law Review article, it turns out that the demand exists for healthy white babies (p. IV-xx). He acknowledges that "there is no shortage of non-white and of handicapped infants, and of children who are no longer infants, available for adoption" (p. IV-xx). That is to say, Posner's entire article has as its underlying premise that the state ought to structure the market for adoptions to cater to the desire of parents to have white babies. In plain fact, does not Posner urge that the state rearrange the system of adoption in order to satisfy racist motivations by prospective adopting parents? Do you believe that that is appropriate?

3. Posner states that "the shortage [of adoptable white babies] appears to be an artifact of government regulation" (by which he apparently means that government regulation causes the white adoptive baby shortage). Does he have any evidence for that proposition? Compare J.M.Cohen, "Posnerism, Pluralism, Pessimism"²:

C. *Posnerism Revisited: A First Round of Comments and Concerns*

As nature abhors a vacuum, so, too, does Richard Posner, himself a force of nature.⁶⁸ When he characterizes the black, white, and gray adoption markets, we apprehend a total absence of public policy initiatives other than his own. Observed in the context of his other remarks, how can we read the

² 67 Boston University L. Rev. 105, 120 et seq.

sentence, "Long queues, shortages, uncertain quality, black markets—these are the classic symptoms of excess demand, whether in the baby market or in Soviet food markets,"⁶⁹ as anything other than a statement about the utter failure of regulatory policy? The *j'accuse* points by way of explicit comparison to the Soviet Union, that ever-popular epitome of dysfunction in the production and allocation of private-use commodities, although the relevant comparison—Soviet allocative mechanisms for permanent child transfer—is not made. Moreover, by treating these "shortages" as the partial product of judicial (*Roe v. Wade*)⁷⁰ and legislative ("the welfare system")⁷¹ interventions, Judge Posner leaves no doubt that his indictment is not limited to a bill of particulars against the adoption system. He ropes in reproductive and family assistance policy as well.

The politics that underlie this indictment are not masked in other portions of the text either. Thus, there is a world of meaning in phrases such as those I lifted into the discussion earlier, phrases in which Judge Posner "describes" the genesis of child-related public policy problems his proposal sets out to cure: non-marital sex is "*rampant*";⁷² people are "*careless*"⁷³ about contraception; the welfare system *rightly or wrongly*⁷⁴ "enables indigent single women and girls, who might otherwise be *forced* to give up their children for adoption, to keep them";⁷⁵ "for little more than the maintenance and medical expenses of pregnancy plus any lost earnings, and often for less, many women might be *induced* [(not coerced)] to forgo an abortion and give up the baby for adoption."⁷⁶ If there is not a world of meaning here, there is at least a world of ideology.

Judge Posner's descriptive remarks about the women on the other side of the equation, however, the married women he depicts as presently constrained from buying first-preference babies, are devoid of any detectable coloration. They are simply abstracted as part of a "growing tendency"⁷⁷ to "marry later and postpone childbearing to their thirties, when they are

likelier to have fertility problems and will have less time to do something about them (whether the something is medical treatment or joining the queue for adoption)."⁷⁸ "Recent advances in the treatment of fertility problems"⁷⁹ are also mentioned as a flat-out fact, unconnected in origin to the public or private initiatives of anyone, let alone older, child-deficient women and their spouses.

Merely to illustrate the shift that other predispositions might produce, one might be tempted to write:

Late marriage among the individualistic and career-minded is *rampant*. These people are *careless* about the consequences to their ability to procreate of their choices in marriage (and divorce!) and career.⁸⁰ *Rightly or wrongly*, public policy and public spending have begun to bend to the collective will of these "well-connected" and, in any event, well-represented people. That is why the 'gray' market in adoption and other changes in adoption policy have become increasingly accepted during the past decade, and that is why public and private funding for fertility research has increased during this same period.⁸¹

A series of developments that members of this group may not have found objectionable, even if they did not actively *induce* them, has come along during the same brief span of time. One is the Supreme Court sanctioned denial of public funding for abortion,⁸² which has *forced* many very young, very poor women into childbirth, including some who were naive, rather than *careless*, about the use of contraception.⁸³ A second is the payment by means of public funds for

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Familism (childbearing practices) within the population at large as well as within various racial, age, and ethnic groups is the subject of a rich literature produced by demographers, statisticians, medical researchers, and economists. Much recent information is gathered and disseminated by the National Center for Health Statistics, sponsor of the National Survey of Family Growth. The Center for Population Research, National Institutes for Child Health and Human Development, has sponsored considerable research. See, e.g., *SEX ROLES, LIFE STYLES, AND CHILDBEARING* (J. Scanzoni ed. 1975). Economists Gary Becker and Theodore Schultz have also written prominently and provocatively on this subject. See, e.g., *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL* (T. Schultz ed. 1975) (collecting research in population studies and family economics).

⁸¹ Federal funding for infertility research increased twelvefold between 1977 and 1983. See NATIONAL INSTITUTE OF HEALTH, *INVENTORY AND ANALYSIS OF FEDERAL POPULATION RESEARCH, FISCAL YEAR 1983*, 13 (1984).

The above figures do not include federal funding of research in contraception, which may overlap with infertility research. Non-federal funding is not included, but is widely considered to have risen even more dramatically during the years in question.

⁸² *Harris v. McRae*, 448 U.S. 297 (1980).

⁸³ The article likely to become the *locus classicus* of the pro-funding position and its constitutional justification is Tribe, *The Abortion Funding Conundrum*, *Harvard Law Review*, 90:11 (1977).

⁶⁹ Posner, *supra* note 1, at 62.

⁷⁰ 410 U.S. 113 (1973). See Posner, *supra* note 1, at 63.

⁷¹ Posner, *supra* note 1, at 63.

⁷² *Id.* at 62 (emphasis added).

⁷³ *Id.* (emphasis added).

⁷⁴ *Id.* at 63 (emphasis added). The phrase "rightly or wrongly," which Judge Posner used in an earlier draft, was deleted from the final version. There is little doubt, though, that Judge Posner is at least ambivalent about such forms of subsidy as the Aid to Families with Dependent Children program. See generally R. POSNER 30, *supra* note 1.

⁷⁵ Posner, *supra* note 1, at 63 (emphasis added).

⁷⁶ *Id.* (emphasis added) (the parenthetical "not coerced," which appeared in an earlier draft, was deleted from the final version); see also *id.* at 65: "If society wants to provide subsidies for these unfortunate [hard-to-place] children, the burden . . . should be borne, if not by the natural parents . . ." (emphasis added)

childbirth—that is, for confinement at the end of pregnancy and delivery—but not for prenatal care for ill-nourished, inexperienced women who are thereby *forced*, being unable to afford private abortion, to produce a rising number of low birth-weight, handicapped infants,⁸⁴ which those in the adoption market should not be *forced* privately to subsidize.

A third development is the increasing unwillingness of legislative bodies to invest public funds in Aid for Dependent Children, housing programs for the indigent, job and job-training programs for the unemployed, child-care assistance programs, Head Start Programs, hot breakfasts or lunches in the public schools, family counseling,⁸⁵ or most other income substitutes that would *induce* (not *coerce*) the growing population of women and children living in poverty to invest in themselves and in society by developing decent, productive lives.

Rightly or wrongly, we treat indigent persons and the children they refuse to surrender into adoption as wasting assets. *Rightly or wrongly*, we want to require the preservation of life without public investment in it.⁸⁶

330 (1985). See also Relkin & Solomon, *Using State Constitutions to Expand Public Funding for Abortions: Throwing Away the Carrot with the Stick*, 9 Women's Rts. L. Rep. (Rutgers Univ.) No. 1, at 27 (1986).

⁸⁴ The absolute number of low-birthweight, handicapped, and other high-risk neonates has been increasing during the 1980's due to the youth and poverty of increasing numbers of first-time mothers, poor nutrition during pregnancy, and unequal access to pre-natal care. Because many such infants cannot be saved, infant mortality rates have risen in 22 major American cities. The latest statistics place the U.S. among the four countries with the worst infant mortality rates of industrialized nations. On the other hand, extraordinary medical technologies have saved the lives of thousands of the high-risk neonates who otherwise would have died. Thus, increasing mortality rates for the general infant population and decreasing mortality rates for high-risk and handicapped infants (many of whom remain permanently handicapped) have both been consistently reported during this decade. See generally C. MILLER, *THE HEALTH OF AMERICA'S CHILDREN: MATERNAL AND CHILD HEALTH DATA BOOK* (1987); Miller, *Infant Mortality in the U.S.*, SCI. AM. July 1985, at 31; see also Levkoff, *Biologic, Emotional and Intellectual Risks in Teenage Mothers and Their Babies*, in ADOLESCENT OBSTETRICS AND GYNECOLOGY 277-81 (A. Krentner & D. Hollingsworth eds. 1978); Stickle, *Overview of Incidence, Risks, and Consequences of Adolescent Pregnancy and Childbearing*, 17 BIRTH DEFECTS ORIGINAL ARTICLE SERIES No. 3, at 5, 9-10 (1981).

⁸⁵ That publicly financed spending in each of the named areas has been reduced or eliminated during the past several years, and that the current administration opposes government funding of such programs hardly requires documentation. The effects of these policies are widely discussed. See, e.g., *FAMILIES, POLITICS, AND PUBLIC POLICY* (I. Diamond ed. 1983) (collecting essays on this theme and related issues); *RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING* 21-25 (C. Hayes ed. 1987) [hereinafter *RISKING THE FUTURE*] (providing factual details concerning the federal government's retreat from funding abortion, contraception counseling, and pregnancy prevention).

⁸⁶ The majority opinion and the dissents by Justices Stevens and Brennan in

4. Posner supposes that changing the incentive for producing babies-for-adoption will change the supply (that is, he assumes complete factor mobility in the supply of babies). Does that assumption hold?

5. Posner states that "there is, it is argued no assurance that the adoptive parents who are willing to pay the most money for a child will provide it with the best home. But the parents who value a child most are most likely to give it the most care, and at the very least the sacrifice of a substantial amount of money attests to the seriousness of the purchaser's desire to have the child" (p. III-xx). Do you agree? What evidence can you think of to support Posner's assertion?

6. Cohen, *supra*, suggests some "vignettes" and then some problems (pp. 140 et seq., 171 et seq.). In effect, is Professor Cohen telling us that to create a market may help affluent "buyers" of white adoptive babies, but hurt their poorer mothers? Do you agree? If so, does that count as an argument against Posner's proposal (as Cohen obviously thinks that it does)? Can one generalize from this example, that every market whose structure helps one group will necessarily disadvantage other groups?

1. Potential Suppliers: Some Vignettes

(a) Mary Sue is 18. She has a steady, if very recent boyfriend named Rodney, a steady part-time job as a waitress, and an unsteady view of the importance of the high-school diploma she has had a hard time achieving, despite childhood test scores that put her superior intelligence beyond doubt. Matters she feels insecure about include a sense of self-worth, personal goals, and the possibilities that may exist for her further education and development. Her father died, drunk, in a motorcycle accident three years ago. Her mother keeps Mary Sue on a very tight leash financially, mostly because her own drinking problem consumes their meager resources.

(b) Vanessa led a charmed existence through her sophomore year in college, the year her parents embarked on their incredibly rancorous divorce. She has been torn up emotionally during the past year, alternately trying to separate from both of them and then feeling responsible for their well-being. Dean's list her first two years, she is now experiencing difficult times academically due to an inability to concentrate. She is determined to become a lawyer but isn't sure, at the moment, whether to take a semester or two off to release herself from the pressures created by her highly developed needs to achieve and to cosset her seemingly implacable parents.

(c) Tom is a steelworker. That is, he was and he wants to be, but he was laid off fifteen months ago. He collects an unemployment check, attends union meetings, and pumps gas whenever the local filling station needs an extra hand. Jean takes care of the boys, twins who will start school in the fall, and the little guy, who is two. In addition to her skill at stretching their food dollars, she has talented fingers that allow her to knit scarves and sweaters for sale to neighbors while supervising the unlicensed daycare program she runs four mornings a week in the basement of the small ranchhouse they were able to buy at a foreclosure sale seven years ago.

2. Potential Demanders: Some Vignettes

(a) Mary Anne has lost touch with a lot of friends since her husband's sudden, untimely death. To make matters worse, the younger of her two daughters has just gone off to college at Mary Anne's alma mater, a large university half-way across the country. The older girl is spending her junior year in Peking, an opportunity all of them concluded she simply could not refuse. At forty-two, Mary Anne is experiencing a severe case of the empty nest syndrome. Her community volunteer work could lead to a full or part-time paid position but she is finding the prospect of leaving home during the day rather daunting. Life insurance and investment income render remunerative employment optional.

(b) Virginia completed her college degree with honors, graduated from law school with even higher honors, and is a shoo-in for partnership at the

father's steel mill. She has been married for seven years to Cliff, the top litigator in a firm just an Eastern shuttle away. He is several years older than she. Although they have to spend most weekdays apart, Virginia and Cliff are together every weekend as well as every other Monday, when they go for counseling and treatment of their primary infertility problems.

(c) Tom and Gene have been together for seven years. They consider their relationship to be more stable and congenial than that of most of the straight couples they know. They believe themselves to be extremely fortunate in other ways as well. They are in excellent health, are enrolled in a serious exercise program, have plenty of job security, and have been building a portfolio of jointly held assets since the day they first moved in together. They have been considering whether to file an application with the state's foster care program, as they would love to add a child or two to their family, but have been strongly discouraged by persistent reports that the agency in charge of placement treats homosexuality as a virtually complete disqualification for parenthood.

3. Potential Brokers: Some Vignettes

(a) Rodney, who is several years older than Mary Sue, is in a state of transition. In the midst of a strict, religious upbringing, he experienced a troubled adolescence involving a lot of boundary-testing. During high school, his apparently innate entrepreneurial talents added fuel to his emotional problems, with the result that he received a year's probation for dealing drugs in the ninth grade and a suspended sentence for stealing cars in the eleventh.

A hitch in the Marines and a truce between his hormones and his superego seem to have left Rodney firmly on the side of law enforcement. But he is still looking for a place to put a lot of energy, proven merchandising ability, and the desire to make it in the private sector. He has lots of friends with similar drives, including a few with some ready capital.

(b) The physician who is treating the infertility problems of Virginia and Cliff has a younger brother, Arthur, who recently passed his boards in obstetrics and gynecology. Unlike his older sibling, who has already made a name for himself in the fast-moving field of infertility research, Arthur's only distinction is that he is the fourth member of his family to have embarked on a career in medicine. He has been working at a regional family practice clinic in a working-class community a couple of Piedmont airhops away from the city in which the rest of the family has built its reputation.

(c) Mary Anne's brother Stanley has done tolerably well, in a financial sense, during the twenty years since he left law school. Like many suburban lawyers these days, his paralegal, his word processor, and he have seen the insides and outsides of a profusion of middle-sized estate plans and real estate transactions. But little comes along to capture his attention fully and the yearly gross consists of a myriad of modest receivables. Like many

off by the inherent limitations that exist when billable time must be balanced against familial commitments and when hours that can be billed at a premium are uncommon in his area of practice.

4. Making the Baby Market: Some Vignettes

(a) Mary Sue has discovered, shortly after she and Rodney have gotten together, that she is pregnant. She is utterly confused, unsure whether to abort, to have and then surrender the baby, or to have the baby and try to raise it while attempting to complete high school. She may or may not qualify for public assistance if she seeks to raise a child while continuing to live with her mother, who manages to hold down a job despite her drinking problem, or if she moves in with Rodney, who thinks the baby is his, though the facts render this conclusion uncertain.

If she divulges to Rodney the truth about the baby's paternity, she may place her physical safety as well as the future of their relationship in jeopardy. On the other hand, if she decides she does not want to keep the baby, or that she wants to make the abortion/adoption/retention decision by herself, one way to clear a path around Rodney would be to tell him he is not the father.

Arthur, a doctor at the clinic where Mary Sue has gone for pregnancy testing, has spent an hour discussing the test results with her. He has recommended that she continue the pregnancy and also that she continue to live with her mother, if her mother agrees to offer no resistance to placing the baby for adoption. He suggests that Rodney be told the baby cannot possibly be his, even though a reliable determination of paternity cannot be made until the baby is born.

Arthur is sure he can find someone who will not only adopt the baby, but will pay for Mary Sue's medical care during pregnancy, pay for an in-hospital delivery, and will add in an extra \$500 for Mary Sue to keep after she gives up the baby and consents to an adoption. He shows her photographs of several couples, including Virginia and Cliff, and a photograph of a lonely looking Mary Anne. Mary Sue is drawn to the image of Mary Anne because she knows what it is to be lonely. She doesn't question Arthur about his motives, his pecuniary interest in such a transaction, or his reasons for not discussing other options with her or recommending separate counseling.

Mary Sue has no idea what physiological or psychological developments to expect during pregnancy but she could certainly use \$500 and likes the idea of making another woman less lonely. She will try to figure out a way to keep both her mother and Rodney at bay so she can follow the course that Arthur has recommended.

(b) Vanessa has read an ad in the personals section of the campus newspaper: "Professional couple wishes to add wonderful baby to wonderful life. Will pay equivalent of two years of college to willing woman with winning credentials. Phone or write our attorney . . . for details."

At least, by the least, intrigued. Since her parents and their law

are embroiled in negotiations about alimony, property settlement, and an allocation of her further educational expenses, here is an opportunity to take herself out of the financial aspects of the fray while paying back her parents for their solipsistic fixation on the divorce, meanwhile gaining some needed time off from her studies.

As soon as Stanley has ushered Vanessa into his office, he is certain he has found the winning ticket for Virginia and Cliff. However the two, three, or four of them resolve the question of how to choose a male bloodline and accomplish impregnation, it is clear that the bright, young, well-bred, and malleable Vanessa is as ideal a maternity candidate, from their perspective, as is likely to happen along.

Since Stanley is not representing either of Vanessa's parents, whose divorce is occurring a far remove from this college town, he sees no reason not to act as the lawyer-intermediary in this transaction. This will involve drawing a contract specifying the terms and conditions of impregnation; payment, on the couple's part, for Vanessa's accommodation at an attractive maternity home not far from Virginia's office (but nowhere near the college); provisos, on Vanessa's part, concerning her conduct during the pregnancy; the quality and extent of medical care to be provided throughout the pregnancy; the extent of testing and monitoring that Virginia and Cliff will seek to require of Vanessa; and the timing of her receipt of the large final payment that is conditional on her binding consent to their adoption of the child.

Stanley's compensation package will include a handsome finder's fee for locating Vanessa, an amount payable by the couple for services rendered to them and to Vanessa in connection with the maternity contract, and payment for his services in attending to the adoption. Stanley is correct in assuming that this package might equal or exceed the total that the couple pays to Vanessa (especially if the excellent health insurance she is carrying, courtesy of her parents, should pick up most of her medical costs).

He is also correct in assuming that Virginia and Cliff are willing to pay such lavish amounts, rather than buy in at the vastly lower prices at which babies have become available, in order to acquire a child as much like themselves as possible. For them, the average price in the baby market is as relevant to the issue of family formation as the average price of a domestically produced car. Given the choice, they won't place in their bassinette the analog of something they would not park in their driveway.

(c) Jean has become pregnant again, the outcome of a hasty sexual reunion after a stormy Saturday night marital dispute involving Tom's future employment prospects. Their traditional upbringings have left this couple leery of abortion, though they did not rule it out until Arthur, a physician at the local clinic, told Jean a number of frightening facts about possible complications that can result from such a procedure and about the ghosts that might stalk her thoughts, especially if any misfortune should befall one of her existing children.

Tom and Jean have decided that Arthur is really bad medicine and that they will seek medical help and counseling elsewhere. The abortion issue hangs over their heads, even if they have, for the time being, dispelled the fear of ghosts. It is at this point that Tom encounters Rodney, with whom he lost touch after Marine basic training. At his favorite neighborhood bar, Tom describes the problem to Rodney, who turns out to be the man-of-the-moment. Rodney owns and manages a string of maternity homes. These comfortable, if modest, places are set up to meet the needs of a small army of Mary Sue's high school friends and their counterparts from other high schools, young women who, when they peer into the future, stare into a void; women whose own birth families have provided them with object lessons in the limits of both temporal and psychological interconnection.

Tom and Jean do not need to use one of Rodney's homes, but they have become persuaded that Rodney's willingness to help out an old buddy by lining up adopters for a baby they cannot afford to have or to keep may be their best available option. This is especially so since Rodney has assured them that he can arrange for a payment that will not only cover expenses but help the family out a little bit, too.

It is not obvious to Rodney that Tom and Jean care to know the identity of the adopting couple, so long as he can assure them that he has found a decent, stable home for their baby in a setting that will offer a lot of economic and emotional advantages. On the other hand, it isn't obvious to Rodney that, if they *do* want to know the identity of the couple he has chosen, they would reject the arrangement just because the pair is homosexual.

Judge Posner's key assumptions regarding the Mary Sues of our society seem fundamentally ill-founded. These assumptions are that the existence of monetary inducements, unrestricted by law, which are intended to cause such young women to maintain their pregnancies and then relinquish their babies constitutes a benefit to them; that the option is itself a benefit because it increases their ambit of choice; and that if they engage in the "voluntary exchange"¹⁹¹ of a baby for money, social welfare has probably increased and certainly has not diminished.

Perhaps because I am old enough to be her mother, I began worrying about the implications of Judge Posner's proposed rule change for Mary Sue. Thus, responding—somewhat doggedly, in light of the real-world events Judge Posner manages to ignore—to his call for an "experiment" to be conducted on some unspecified number of post-eighteen-year-old women for some unspecified period in accordance with some unspecified criteria,¹⁹² I became concerned to understand what Judge Posner would have us seek to discover and whether, as with most of the outcome studies involving adoption, the subjects of the research he proposes are intended to be the adoptees only and not also the parties to the adoption. If so, his experiment misses the point of my concern: Any woman who is, by hypothesis, pregnant, unmarried, age eighteen "or older,"¹⁹³ and willing to sell her baby for money when, also by hypothesis, she might not otherwise have chosen to remain pregnant or to relinquish the baby is likely to be very nearly a child herself. In fact, if she is below the age of twenty-one, it is only very recently that we have fastened on the presumption that she is anything *other* than a child.¹⁹⁴ Before concluding any normative inquiry into a proposal designed to encourage an almost-child to have and then to sell a child, we ought to commit ourselves to some process by which to understand and evaluate the nature and effects of such an experience.

¹⁹¹ Posner, *supra* note 1, at 60.

¹⁹² *Id.* at 67. See also Landes & Posner, *supra* note 1, at 347-48 (suggesting the same type of experiment). As must be clear by now, I have not felt constrained (nor have other commentators) to treat Judge Posner's proposal as a modest or limited experiment; the structure and scope of his remarks invite broader response.

¹⁹³ Posner, *supra* note 1, at 64.

¹⁹⁴ See generally F. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982). This wonderfully provocative and highly readable set of essays, the written version of the 30th Thomas Cooley Memorial Lectures delivered at the University of Michigan School of Law in 1980, explores in depth a concern I can only adumbrate here: that maturity is a process, not a sharp awakening, and that suddenly assigning the legal responsibilities of adulthood to persons who were, just a day before, children is a vexatious course even if no ready alternative presents itself.

Since Judge Posner was not here to tell me what, if anything, we should hope to find out about Mary Sue on the basis of his suggested experiment, I set out to learn what I could about her from already published research. While certain I would not unearth conclusive responses to such questions as, "How would a young, unmarried woman be affected by the sale (or potential for sale) of her baby or by her decision to remain pregnant in order to accomplish this?," I wanted at least to know what we now know about the process of relinquishment and about responses to the process. Given my announced concerns about "Mary Sue," experimental bias might well intrude were I to conduct a field study myself. I do not believe that bias has colored the present report, however. This caveat to the reader, together with citations to the research that forms the basis of the views expressed here, is intended to provide notice of the possibility, in any event.

Looking first at the literature cited by Judge Posner in his present essay and in the seminal version he wrote with Dr. Elisabeth Landes, I found several references to outcome studies that compare the effects of agency and independent adoption placements.¹⁹⁵ Only one of their cited references, a survey of independent adoption practices in five major cities during the mid-1970's, set out to consider the adoption process as it affects the birth mother.¹⁹⁶ Even this study did not delve into the after-effects of adoption on women who surrender babies, focusing instead on factors, especially the quality of counseling, that influenced their choice. In describing their findings, the researchers noted that, "[a]lthough most of the women thought about other ways of handling the situation, only 40% reported that the facilitator discussed alternatives [to adoption] with them. Such discussions were more likely to take place if the intermediary was not a lawyer."¹⁹⁷

This finding caused me to pursue further the matter of intermediation by lawyers and its effects on birth mothers involved in the adoption process. In the legal literature I consulted, including Judge Posner's cited materials, I read several pieces by lawyer-intermediaries who have participated on a repeated basis in independent adoptions.¹⁹⁸ Most of these lawyers wrote approvingly (none, disapprovingly) of the possibility that a lawyer can represent both the birth parent and the adoptive parents in such an adoption, provided there is mutual consent to the dual representation. No lawyer expressed concern,¹⁹⁹ or any recognition,²⁰⁰ that dual representation may be

¹⁹⁵ See, e.g., WITMER, *supra* note 135.

¹⁹⁶ See MEEZAN, *supra* note 98, cited in Posner, *supra* note 1, at 24 n.25.

¹⁹⁷ MEEZAN, *supra* note 98, at 97.

¹⁹⁸ See, e.g., Carsola & Lewis, *supra* note 67; Charney, *supra* note 111; Leavitt, *supra* note 111; Lestikow, *supra* note 126.

¹⁹⁹ See Krones, *Stimulation of Independent Adoptions—A Sensible Approach to Eradicating the Baby Black Market*, 6 ORANGE COUNTY B.J. 192, 201-04 (1979). Attorney Krones confronts the ethical problem by construing the California Code of Professional Conduct, which he characterizes as "less restrictive" than the ABA Model Code of Professional Responsibility, as favoring such transactions.

But see Note, *supra* note 126, at 944-51 (discussing the ethical problems of d

prophylactically barred, even with the parties' consent, because it fails the threshold test of Disciplinary Rule 5-105(c) of the ABA Model Code of Professional Responsibility: "[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representations on the exercise of his independent professional judgment on behalf of each."²⁰¹

Moreover, none of these lawyers advised his or her readers—presumably, other lawyers—about a birth mother's need for independent counseling,²⁰² how and when her consent to adoption should (and under what circumstances it should not) be obtained,²⁰³ her need to understand the legal nature

²⁰¹ Emphasis added.

²⁰² See MEEZAN, *supra* note 98, at 139 (reporting that professional, disinterested counseling was seldom made available (or even suggested) to relinquishers even though 32% of the intermediaries surveyed reported their direct knowledge of cases in which the birth mother needed but did not receive counseling).

The researchers cite the following responses as typical of those received from the intermediaries surveyed:

Actually a lot of biological mothers could use counseling. Many seem confused and sad. They show their insecurity and their hesitancy. Some don't ask questions they should be asking about the adoptive couples. . . . Usually nobody, especially the adoptive parents or the biological grandparents, want her to get counseling because they don't want her to change her mind about the adoption.

Id.

²⁰³ According to a survey by the National Committee for Adoption, many states still permit women to sign relinquishment papers within seventy-two hours of giving birth and almost as many states permit relinquishments immediately after birth. FACTBOOK, *supra* note 100, at 76-85. Occasionally one finds an exotic blend of paternalism and non-paternalism in state adoption policy. According to the Committee's report, for example, birth mothers in Oklahoma may relinquish "immediately unless Indian and under Indian Welfare Act." *Id.* at 83.

The British Adoption Act of 1958, by contrast, rendered void any consent to adoption executed less than six weeks after childbirth. A supportive comment in The Report of the Departmental Committee on the Adoption of Children is instructive:

Most witnesses agreed that a mother needs about six weeks to recover physically and psychologically from the effects of confinement, and that it would be wrong to alter the provisions relating to the date of consent. Many organizations, including those specially concerned with unmarried mothers, deplored the making of adoption arrangements before birth, since their experience has shown that a large number of mothers who before the birth decide on adoption change their minds completely when the child is born.

C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 240 (1976) (citing Cmd. No. 9248, Par. 56 (1954)). See also Ryneanson, *Relinquishment and its Maternal Complications: A Preliminary Study*, 139 AM. J. PSYCHIATRY No. 3, at 338-39 (1982) (all the mothers in the study who made relinquishment arrangements at or prior to the birth of their babies still suffer over their decisions twenty

of expense money or other payments she might receive during or after pregnancy to induce her to relinquish her baby,²⁰⁴ the relevant law governing possible revocation by her²⁰⁵ or abrogation by the adopters,²⁰⁶ or any other issue of material importance to her²⁰⁷ before, during or after the process of relinquishment. Aside from those who advocated dual representation, none of the lawyers even advised that the birth mother should be legally represented in any type of arrangement involving the binding surrender of her child.

Turning to the non-legal literature I consulted, none of which was cited by Judge Posner, I found some recent statistical and other empirical data about unmarried women who become pregnant and about those who have caused their children to be adopted. In 1982, the most recent year for which statistics are available, approximately 1.1 million American teenagers became pregnant.²⁰⁸ Researchers have studied the physiological effects of such

²⁰⁴ Some jurisdictions make it illegal to profit from relinquishing a child; others prohibit accepting any money for relinquishment; still others simply outlaw independent adoptions altogether. In such jurisdictions, birth mothers must be thoroughly informed of the legal consequences of their participation in such transactions. Furthermore, birth mothers are entitled to know that most jurisdictions still consider any payments to a pregnant woman gratuitous, rendering unenforceable any promise she has made to exchange her baby for such payments. There is no evidence in the literature to suggest that lawyer-intermediaries are quick to provide this information. Indeed, lawyers who have written on the subject do not even suggest that counsel ought to provide such information. See *supra* notes 198-99 and accompanying text.

²⁰⁵ In fact, the relevant law may be little more than a jagged run of appellate cases narrowly limited to their facts. Even so, the birth mother must be informed of three things: that some jurisdictions are more inclined than others to allow revocation after relinquishment but before an adoption decree is entered; that no jurisdiction treats economic exigency, the pressures of the decisional process, or the birth mother's postpartum mental state as tantamount to duress; and that courts are becoming increasingly less solicitous of relinquishers who seek to revoke their consent to adoption.

²⁰⁶ "Revocation" refers to attempts by birth parents to undo adoptions, while "abrogation" refers to attempts by adoptive parents to annul adoptions. Abrogation is a complicated subject about which potential relinquishers should be fully informed before deciding to continue an unwanted pregnancy in order to place the child for adoption. Relatively little has been written on abrogation, but an illuminating discussion is provided in Carroll, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L.Q. 155 (1985).

²⁰⁷ See *infra* notes 208-38 and accompanying text (discussing the physical and psychological problems resulting from pregnancy and relinquishment).

²⁰⁸ Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis*, in ADOLESCENT ABORTION, PSYCHOLOGICAL AND LEGAL ISSUES I (G. Melton ed. 1986). To provide a frame of reference for this statistic, consider that the United States is believed to have the highest adolescent pregnancy rate of any developed nation.

early pregnancies, with at least one study finding that pregnant adolescents are five times more likely to die from continuing the pregnancy than from aborting it.²⁰⁹ This finding is considered consistent with research showing that women who find themselves with unwanted pregnancies—often the case among adolescents, whose pregnancies tend not to be the result of conscious intention²¹⁰—run a heightened risk of medical complications.²¹¹

About 40% of all adolescent pregnancies end in abortion.²¹² Several studies have considered the physical and psychological effects of abortion on adolescents, but their methodologies, including sample sizes and techniques, are not in accord. There is, nevertheless, general agreement that from a physiological standpoint, medically induced abortion is a "relatively benign alternative" to continued pregnancy. Psychologically, "severe responses" are rare, and the "modal response to abortion itself is relief."²¹³

There are also studies of women in this same age group who carry their fetuses to term. Several have compared the socioeconomic status of women who have retained their children with that of women from similar backgrounds who have had abortions.²¹⁴ Other studies compare the socioeconomic status of women who have retained the children of their premarital

ABORTION, PSYCHOLOGICAL AND LEGAL ISSUES 96 (G. Melton ed. 1986). It seems reasonable to concentrate, as I have in this section, on the experiences of adolescent women, and more particularly late-adolescent women, since their relatively low opportunity costs, greater likelihood of non-marriage, and rate of unplanned pregnancy makes them the likeliest target of the inducements Judge Posner suggests.

²⁰⁹ Cates, *Abortions for Teenagers*, in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 139 (J. Hodgson ed. 1981), cited in Melton & Pliner, *supra* note 208 at 16; see also *RISKING THE FUTURE*, *supra* note 85, at 125.

²¹⁰ See *infra* note 239. For many adolescents, that they lack a conscious intent to get pregnant (or to impregnate) does not necessarily imply that a pregnancy is "unwanted." Indeed, adolescents who wish to become pregnant may avoid any conscious acknowledgment of that desire in order to avoid having to consider whether to postpone or overcome it. Adolescents may similarly deny the need for or efficacy of contraceptives. Moreover, those who unconsciously want to have a baby tend to delay confirming the pregnancy until it is too late for a first or even a second trimester abortion. See *RISKING THE FUTURE*, *supra* note 85, at 109-14.

²¹¹ Medical complications for which higher rates among teenagers have been documented include maternal morbidity and mortality, premature and underweight babies, toxemia, anemia, and prolonged labor. The rates of these complications vary with the age of the mother even after race and income factors have been controlled. See *RISKING THE FUTURE*, *supra* note 85, at 123-25.

²¹² Melton & Pliner, *supra* note 208, at 1.

²¹³ *Id.* at 16; Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortions*, 42 Am. J. Orthopsychiatry 48 (1980); Osofsky, Osofsky & Rajan, *Psychological Effects of Abortion: With Emphasis Upon Immediate Reactions and Followup*, in THE ABORTION EXPERIENCE: PSYCHOLOGICAL AND MEDICAL IMPACT 188 (H. Osofsky & J. Osofsky eds. 1973).

²¹⁴ Several of these studies are discussed in Marecek, *supra* note 208 at 98-102.

pregnancies with that of peers who have delayed childbearing until marriage.²¹⁵ I have found no single study that includes a controlled sample of women who have aborted, women who have surrendered their children for temporary periods, women who have permanently surrendered them, and women who have delayed childbearing until marriage. The research is, however, consistent in finding that young women who abort their early pregnancies are vastly better off in terms of a variety of standard socioeconomic variables than young women who retain the children of their premarital pregnancies. One demographic survey found an abnormally low rate of subsequent marriage among women who have given birth outside of a marital relationship.²¹⁶ Many have noted the extremely high divorce rates that prevail for marriages entered into during adolescence, of which a considerable proportion are marriages intended to legitimate a birth.²¹⁷ None of these studies included psychological variables and none focused on the outcomes for women who have given up babies for adoption. In several places, researchers and evaluators of research noted the dearth of outcome studies that have followed up on child relinquishers, especially among the late-adolescent women of the current generation.²¹⁸

Two recent research efforts have focused exclusively on the psychological effects of relinquishment. One reports the impressions of a small (twenty subjects) clinical sample of women who surrendered a child into adoption and who later sought psychiatric outpatient care for help in dealing with the effects of relinquishment. The researcher's introductory comments conclude:

I assessed a group of psychiatric patients who had relinquished a child. This report deals with their retrospective reports. I am aware that such data must be suspected of subjective distortion because (1) they are based on recollection, and (2) they are recalled by psychiatric patients who might distort more than normal control subjects. However, these observations were expressed with such unanimity that they are reportable and may prove to be elemental accompaniments to the event of relinquishment.²¹⁹

This study tracks the responses of its subjects during a chronological period divided into three sequences: pregnancy, delivery and relinquishment, and post-relinquishment adjustment. Although all twenty of the women had agreed during pregnancy to relinquish at birth, nineteen of them

²¹⁵ *Id.*; *RISKING THE FUTURE*, *supra* note 85, at 125-34.

²¹⁶ Bachrach, *supra* note 96, at 249 (citing O'Connell, Martin & Rogers, *Out-of-Wedlock Births, Premarital Pregnancies, and Their Effect on Family Formation and Dissolution*, 16 *FAM. PLANNING PERSPECTIVES* 157 (1984)).

²¹⁷ For statistics and citations see *RISKING THE FUTURE*, *supra* note 85, at 128.

²¹⁸ See, e.g., *RISKING THE FUTURE*, *supra* note 85, at 61, 69-71.

²¹⁹ Ryncarson, *Relinquishment and Its Maternal Complications: A Prelimi-*

developed a covert maternal identification with the fetus; this identification became more manifest in the second trimester with quickening. During this time the subjects established an intense private monologue with the fetus, including a rescue fantasy in which they and the newborn infant would somehow be "saved" from the relinquishment

All of the subjects perceived relinquishment as an externally enforced decision that overwhelmed their internal wish for continued attachment to the baby. The external factors included parental demands for relinquishment, social demands for parenthood only within marriage, and altruistic demands for the infant.²²⁰

Concerning relinquishment, all the women signed the necessary surrender forms while still in the hospital. All reported "numbness and dissociation," while eight "were so overwhelmed by this event that they were amnesic for it."²²¹

The study divides the post-relinquishment adjustment period into two segments: the first two years after relinquishment and later years in the aggregate. During the earlier period, all the women "were obsessed with fears of future infertility."²²² All of them "delayed subsequent dating because of the anger and disillusionment they felt toward men. When they began dating, they experienced varying degrees of sexual dysfunction."²²³ Eventually, nineteen of the twenty married and had children. The study does not report long-term findings concerning the viability of these marriages or whether the sexual dysfunction characteristic of the earlier period was ever resolved. The researcher concludes:

Relinquishment appears to have been a fundamentally disjunctive event in the lives of these psychiatric patients. It appears to have been presaged and followed by specific maternal precepts and behavior. These mental and behavioral epiphenomena may be viewed as adaptive adjustments to the real and anticipated threat of the interruption of 1) the biologic drive of maternal attachment, 2) the psychosocial expectation of maternal identification, and 3) the involuntary response of mourning to a loss complicated by the fact that it was intentional and by the child's continued existence.²²⁴

A second recent study of the effects of relinquishment includes psychological variables and also a particular set of physiological ones—those related to the subjects' post-relinquishment fertility.²²⁵ The research population this time was much larger—334 individuals—and included some of the fathers of

²²⁰ *Id.* at 339.

²²¹ *Id.*

²²² *Id.* at 340.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See Deykin, Campbell & Patti, *The Postadoption Experience of Surrendering*

the surrendered children. Again, the sample was not random: the subjects had all chosen to participate in a non-clinical outreach group. The researchers note that "the applicability of [the] findings may be limited, since the study sample consisted of a volunteer subset of an already self-selected population"²²⁶ whose "educational attainment" was "surprisingly high."²²⁷ Nevertheless, their findings are consistent not only with the smaller study cited above, but also with three others, one of which followed 300 women during the three years immediately after relinquishment.²²⁸

In the study of three hundred thirty-four individuals, the mean age of the birth mothers at the time of the child's birth was 19.8 years. All relinquishments took place immediately after birth or during early infancy. In this subject population, 280 eventually married, 27 of them marrying the child's other biological parent. Seventy-one percent of the subjects reported that their earlier birth experience had "colored their marital interaction," citing marital problems centered on issues of allegiance, commitment, and jealousy.²²⁹

Three hundred eight of these subjects contributed information about their fertility subsequent to relinquishment. Of these, 64% had had at least one liveborn child, while 14% reported failure in their subsequent attempts to reproduce and 17% said they had chosen to remain childless. Omitting the intentionally childless, the secondary infertility rate among those who reported on their fertility was 16.2%—an increase of 170% over the rate of infertility in the general population among those who have had one child and desire more. The researchers found no social or personal attributes or variables associated with particular adoption processes that correlated with this elevated infertility rate.²³⁰

Nor did the researchers find any corresponding variables among those who had chosen to remain childless. They did, however, elicit some rather striking testimony, of which the following three examples are representative:

Desired not to have children; I did not want to be unfaithful to her (the child).²³¹

Always felt unfit to become a mother again (even though I loved children) after signing adoption papers. I have not been able to even hold a baby since the surrender.²³²

²²⁶ *Id.* at 278.

²²⁷ *Id.* at 273.

²²⁸ Burnell & Norfleet, *Women Who Place Their Infant for Adoption: A Pilot Study*, 1 PATIENT COUNS. HEALTH ED. 169 (1979), cited in Deykin, *supra* note 223, at 272 n.3.

²²⁹ Deykin, *supra* note 223, at 278.

²³⁰ *Id.* at 276-77.

²³¹ *Id.* at 277.

I do not want children. My husband agrees and is very understanding. I want my daughter's birth fresh in my mind.²³³

Even among subjects who had gone on to have more children, the researchers found evidence of obsessive longing for the surrendered child. The researchers offer the following comments as representative:

I regret the joy my children give me when they do something special because I cannot share the event with the son I gave up.²³⁴

I can't seem to get close to anyone. I fear their (the children) leaving me. I cannot believe that anyone could really accept me when I haven't yet. So I dump on them. Sometimes I think they would be better off with someone else.²³⁵

I have had absolutely no patience with my children, and when frustrated with two toddlers, I've manifested an awful rage much greater than the situation called for. I feel this rage is over my birthparenthood [*sic*] past—a rage that has been suppressed for years!²³⁶

Toward the beginning of the report, the researchers wrote, "The traditional view of adoption is that it simultaneously meets the needs of the mother, the child, and the prospective adoptive couple."²³⁷ They concluded,

The results of this study indicate the need to consider the biological parent more fully both at the time of adoption and subsequent to the signing of adoption papers. . . . Innovative techniques, based on a clearer understanding of the magnitude of this loss, its difficult resolution, and its possible long-range consequences, will have to be developed. Since grief over a surrendered child appears to remain undimmed with time, present knowledge of the dynamics of mourning may only partially apply to this situation

[C]urrent trends [in] social policy . . . hinder . . . access to abortion for young women, promoting adoption as the option of choice, and severely limiting social services and financial aid. Implementation of such policies is likely to increase both the numbers of children born to younger single mothers and the proportion of such children surrendered for adoption.²³⁸

B. About Pessimism

In light of available data, concern for Mary Sue's welfare hardly seems misplaced. Judge Posner would reassure us with his by-now familiar syllogism: dollars in trade are a benefit, so long as coercion doesn't rule their

²³³ *Id.*

²³⁴ *Id.* at 278.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 272.

exchange; this proposal allows the transfer of more dollars to baby sellers in uncoerced exchanges than does present law; therefore, baby sellers benefit from it. I am pessimistic.

Market theory pitches any normative argument like Judge Posner's at a hard tilt: there is coercion or there is free choice; everything else is swept off the table. But in determining public policy, we should be blamed, rather than exonerated on the basis of strict adherence to market theory, for failing to take the relevant "else" into account.

To argue with Judge Posner over the basis for treating monetary inducement as coercive is to argue over a quiddity. If a woman's pregnancy is not the product of choice (that is, it is not consciously intended in the exercise of free will),²³⁹ if she is so poor or uninformed that abortion is not an option, if

²³⁹ Studies increasingly show that many adolescents believe that one cannot get pregnant from one's first experience of sexual intercourse. Indeed, one study found that "seven out of 10 [teenagers surveyed] said that they did not use contraception because they did not think they could become pregnant." Shah, Zelnik & Kanter *Unprotected Intercourse Among Unwed Teenagers*, 7 *FAM. PLANNING PERSPECTIVE* 36, 39 (1975). As mentioned earlier, *supra* note 210, adolescents are also given to denying the desire to have a baby. In the process, they deny the need for contraception. The combined effects of early fecundity, ignorance about reproductivity, and denial of the desire to have babies are notable: in 1978, 554,000 infants were born to teenage mothers; in that same year, 1.3 million children lived with teenage mothers; 20% of adolescent pregnancies occur in the first month after first-time intercourse, 50% occur in the first six months; 86% of the 749,000 pregnancies that involved unmarried adolescents in 1978 were unplanned. See Leffert, *The Effect of Pregnancy on Adolescent Growth and Development*, 9 *WOMEN & HEALTH* No.2-3, 65, 66 (1984).

In doing research for her documentary film *Taking Charge*, Gail Nathanson discovered that even when teenagers are informed about birth control, they often do not use it because it does not fit in with their desire to have "fantasy sex, like in the movies." Stocker, *Teen-agers and Birth Control*, *Boston Globe*, Dec. 27, 1986, at 9, col. 2. In her film, one of the male teenagers explains that when friends exchange stories about sex, "No one says, 'Gee! Did you use a rubber?'" or "Wow! What kind of birth control did you use?" That's not pretty." *Id.* at 9, col. 3. One of the female teenagers in the film talks about the image of sex on the television shows *Dallas* and *Dynasty*: "They're all just sleeping all over the place with everyone and having a great time, and they never, like roll over in bed and open a drawer and pull out the diaphragm. It just doesn't happen." *Id.*

While sex on television is "rampant," to adopt Judge Posner's term, information about birth control is just the opposite. When the American College of Obstetricians and Gynecologists tried to get television stations to air a public service announcement about birth control that the group had spent \$100,000 to produce, they were refused by every network. Simon, *Casual Sex on TV Part of the Problem*, *L.A. Times*, Jan. 4, 1987, § 5, at 5, col. 1. Last December, Planned Parenthood placed an ad in *USA Today* that began, "It's no secret that a lot of TV characters have sex. The only mystery is how they keep from getting pregnant." *Id.* A lot

government disinvests in her choice to try to retain her offspring, does the fact that she retains the choice to starve them and herself render her decision to relinquish uncoerced? Or would some women facing that "choice" legitimately "choose" relinquishment, at any price, as their only option?

Let us assume that the situation is not (yet) so dire: public assistance for a poor woman and her children is still intended to keep them above the starvation level, even if it maintains them below the governmentally established poverty level.²⁴⁰ Thus, even if abortion is not within her domain of choice, it is fairer than in my prior rendition to say she may still choose, in a meaningful sense, between retention and relinquishment. But, how, in the midst of what is probably her first pregnancy,²⁴¹ with her hormonal and endocrine systems busily generating choices of their own, is she to know how or what to choose?

Judge Posner, like any strict market theorist, is content to leave her to manage the moral-social-economic calculus any way she can. By treating her freedom to attempt such a calculus as a social good, he sees no need to advocate for changes in public policy other than those necessary to permit private parties to induce her to relinquish. But he knows, just as we and would-be adopters know, that some combination of youth, inexperience, poverty, under-representation, ambivalence, fear, anxiety, embarrassment, and the need for expediency will render her unable to manage even the

teenagers watch *Dallas* and *Dynasty* than read *USA Today*. The problem of AIDS, rather than the problem of adolescent sexuality, is likely to alter network decision-making.

²⁴⁰ In a suit by the Coalition for the Homeless and the Coalition for Basic Human Needs on behalf of recipients of Aid to Families with Dependent Children (AFDC), a Massachusetts Superior Court judge found that the \$491 per month the state provided for a family of three did not meet the state's statutory obligations. *Massachusetts Coalition for the Homeless v. Dukakis*, No. 80109 (Suff. County Sup. Ct. Mass. Jan. 5, 1987). State officials had calculated the actual cost of basic living requirements for such a family at \$926 per month. The trial judge found that as a consequence of the funding gap, increasing numbers of young, dependent children are living for indefinite periods in emergency shelters, hotels, and motels. The suit seeks increased AFDC benefits for approximately 85,000 families. See *Welfare Ruling Clarified*, *Boston Globe*, Jan. 8, 1987, at 1, col. 1.

²⁴¹ Despite my conjurings concerning women who might become recidivistic suppliers, it is far more likely that most market suppliers would experience the need to do so only once (or at least seldomly), and that relatively few would choose this activity as an occupation. In the Landes & Posner article we find this observation: "Any market involving a complex and durable good (i.e., one that yields services over a substantial period of time) would probably operate sub-optimally in the absence of . . . at a minimum, regular, repetitive business relations between (the same) sellers and (the same) buyers." Landes & Posner, *supra* note 1, at 341. Their concern was with consumer dissatisfaction in the black market. The force of the observation should be directed toward the proposed baby market.

economic portion of this calculus very adequately. I say that Judge Posner knows this because, in writing the following very telling sentence, his bottom line is consonant only with this view: "Thus, *for little more than* the maintenance and medical expenses of pregnancy plus any lost earnings, *and often for less*, many women might be induced [(not coerced)] to forego an abortion and give up the baby for adoption."²⁴²

But it is surely unfair to say that his bottom line is all about making the normative jump to the allowance of profit by baby sellers in the full knowledge that sellers will not know how to calculate, let alone bargain for, that profit. I do not for a moment believe that Judge Posner has consciously, and in that sense knowingly, sought to exploit some theoretically large number of women. His stated sense of how little they will need to obtain in order to surrender their children is simply bred into his assumptions, as must be a myriad of other intuitions about the world.

It is possible that persons of an anti-paternalistic bent might wish to rescue the principle of autonomy from the drubbing I have been administering it. They believe women are better served by the freedom to make choices—even potentially harmful ones, within the ambit of choice involving contraception, reproduction, and relinquishment (including baby sales)—than they would be by having their options restricted by even so well-meaning a neo-maternalist as I.

But anti-paternalism seems seriously misplaced if it should lead to an optimistic evaluation of the benefits to poor women of price deregulation in the baby market. To the extent that these women embody the characteristics I have described, they are likely to radically misperceive, and hence to undervalue, their potentially enduring costs and even their shorter-term opportunity costs. A market that aggregates such undervaluations will tend to clear at an artificially (and unjustly) low price. Thus, even if at all times relevant to her decision to sell, a new entrant into the baby market were to have perfect information about the market-clearing price, the pricing errors of other women would depress the price that she would be likely to obtain. Alternatively, even if the market-clearing price managed to incorporate what I would term the true costs to baby sellers of these transactions, it is highly unlikely that a poor, young woman would be able to acquire perfect information about the market-clearing price in her region, let alone beyond it, at all times relevant to her decisional process.

Mary Sue is not Everywoman. Nor is she every woman who has need to consider putting her baby up for adoption. In Part II, I mentioned that there are women whose personal belief-systems have caused them to reject abortion and choose adoption as the best available alternative for themselves and their babies. From what we know, these women have not sought money in exchange for babies. In fact, there is some reason to believe they would have rejected money if it had been offered them, perhaps because it would offend the altruistic concerns that may have animated their preference for adoption, perhaps because their economic circumstances have rendered financial gain

²⁴² Posner, *supra* note 1, at 65 (emphasis added).

irrelevant, perhaps because they have recognized that the sale of a baby might damage their self-esteem. To the extent such women will continue to exist, they do not need to have me reject on their behalf a commodification of babies along the lines Judge Posner suggests. They can be counted upon to reject it for themselves, as something they do not want or need.

Mary Sue, however, is not such a woman. Her belief-system is largely unformed. She cannot reject abortion for altruistic reasons because, for economic ones, it is not hers to choose. She is caught in a web of poverty and pregnancy, aloneness and inexperience. As a person, she is needy; as a prototype, she is numerous. To succeed according to his plan, Judge Posner would need to induce her to sell her babies, for only if a lot of Mary Sues participate—a premise I have not undertaken to reexamine—will the supply of white, healthy, adoptable babies increase considerably and the price of the "average" baby decrease considerably.

But the success of Judge Posner's market depends on market failure for Mary Sue. If I am correct in assuming that most Mary Sues will sell themselves short in a Posnerian baby market because they do not understand their true costs, they cannot present value their future losses, their bargaining ability will be undercut by their still-less-sophisticated sisters, and because Judge Posner places no regulatory constraints on the consequent depression of baby prices, then I must reject this proposal on their behalf. I do not reject it because I am convinced that *all* Mary Sues will suffer on account of relinquishment, or that they will be seriously disadvantaged by price deregulation relative to their present, already disadvantaged positions. I reject it because I insist that if we are genuinely concerned about Mary Sue, and not just her ability to produce at low cost what others feel they need from her, we must fashion public policy so as to improve her lot beyond the point at which selling babies for depressed prices is likely to seem better than any of her available alternatives.

To increase the chance that public policy will confront the problems of Mary Sue, and in so doing decrease the likelihood that she may be recruited into the service of a baby market, I must also reject this proposal on behalf of the would-be baby buyers who are its certain beneficiaries (though they would hardly give me their proxy were they here to speak for themselves!). Judge Posner's market would enlist baby buyers in a range of exploitative enterprises, from denying potential sellers access to reproductive counseling and abortion to sustaining self-dealing intermediary-profiteers and reaping benefits from the vulnerabilities of Mary Sue. Such a market's dependence on the exploitation of one class of persons by others is a social bad that outweighs whatever social good would flow from the production of first-preference children for the infertile, white couples who are the objects of Judge Posner's solicitude.

Of course, I may be too pessimistic. Perhaps Judge Posner's market would somehow compensate in full and fair measure those women who sell their babies. Perhaps the ethical appeal of abortion funding would somehow transcend the fiscal appeal of its denial. And perhaps baby market inter-

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mediaries would somehow be regulated or otherwise induced to modify their behaviors and billing practices so as to seem less like reproductive pimps and more like family doctors and ministers. But even according to this Panglossian rendering, Judge Posner's proposal would reduce birthing, parenting, and being parented—matters as morally sensitive as any in our cultural experience—to issues of efficient distribution. This non-contingent aspect of the privatization of a market for babies constitutes an independent ground for its rejection. . . .

7. As we have seen, law underpins every market; call that law's "underbearer" role. That implies that, since the law that underpins a market may vary, the way that markets work may vary. (Consider, for example, the law of contract: At every point, with respect to every rule, alternative possibilities exist.) Laws, however, do not hit people differently situated equally. The very choice of legal framework for a market necessarily empowers and enriches some people, and disempowers and impoverishes others. The outcomes of a market do not result merely from the law of marginal utility; they result in part from political choices made when establishing law's particular underbearer role. Does Cohen point to a general difficulty with the law and economics position: That while claiming to provide a device that permits markets to work free of governmental intervention, in fact no market, however free it may claim to be, in fact avoids governmental interference in economic decision-making?

8. Consider the model of people upon which Posner, like other law and economics theorists, rests his proposal. It depends upon people who always calculate their economic advantage, and who frequently do so in very far-sighted ways. A great deal of law depends upon that and analogous models: consumer protection law that says we can protect consumers by printing on a label the ingredients of packaged food products (even when that consists of chemicals of which most of us have never heard), constitutional law that says that a person can waive a constitutional right so long as she does so understandingly, contract law that says that so long as a person is literate, by and large she has legal liability on a written contract she has signed, right-to-die law that says you have a right to die without heroic measures only if you have had enough foresight to sign a "living will". Law students and people like them have little difficulty thinking that as applied to themselves these do not demand too high a standards; they make sense. Do they for most of the population? Does law and economics's vision of an "economic person", who ruthlessly and accurately calculates every economic advantage down to four bargaining moves in advance really hold for most people? If it did, would you want to live in a society where people applied to family relationships and to friendship ties the motivations of the marketplace?

II INSTITUTIONALIST THEORY

SEIDMAN, "THE MEMORANDUM OF LAW AND LEGISLATIVE THEORY..."

Institutionalism¹. As we have seen, people behave by making choices within a range of constraints and resources thrown up by their milieu. Both the sociological school and Law and Economics look mainly for some single, overriding motive that leads to action ("values and attitudes", wealth-maximization). Institutionalism, by contrast, tries to understand the process of choosing and the multitude of factors people take into account in that process.

People will choose to obey the law depending upon the nature of the rule itself, the range of choices in fact available to the individual, the incentives and disincentives thrown out by the milieu, the way the individual perceives her environment, and the process by which she comes to decision. That environment in particular includes the behavior of implementing agencies and the conformity-inducing measures ("sanctions") they impose. This section discusses these in turn.

a. **The Rules.** By definition, the existing rules of law constitute part, but only part of the milieu within which the role occupant chooses. (The discovery that behavior responded not merely to the rule, but to all the forces of the social and physical milieu constituted, of course, the great discovery of sociological jurisprudence, whose legacy the Realists inherited²).

Adequate solutions address causes, not conditions. Since the drafter's solution--legislation--always constitutes a change in the law, then part of the cause of the difficulty must always lie in the existing legal order. People act -- that is, make choices -- within a whole framework of existing laws and implementing agencies. For example, water polluters act not only in light of the sort of laws conventionally labelled "water pollution law", or "environmental law". They also act within a framework of property law, contract law, water law, tax law, constitutional law, and many others. Every legal system includes the proposition, that that which the law does not forbid, it permits. Unless the property law or some other law forbids a

¹ See generally Seidman, "Why Do People Obey the Law? The Case of Corruption in Developing Countries" 5 Brit. J. of L. and Soc. 45 (1978); cf. Allott, supra n. 4, at 236 et seq. (three reasons for the ineffectiveness of laws: Failure of communication of the rule; conflict between "the aims of the legislator and the nature of the society in which he intends his law to operate"; and failure of implementation).

² Horwitz on Realism

landowner from polluting a stream that runs through her property, she has a legal right to pollute it. Moreover, the legal order includes not only the texts of the rules, but implementing agencies. If the agencies that supposedly enforce anti-pollution laws do not adequately do so, in choosing how to act the polluter will take that into account.

In short, role occupants act -- choose -- within, among others, the constraints and resources thrown up by the legal order itself. The legal order consists (roughly) of normative rules, implementing agencies and the conformity-inducing measures the legal order uses to channel role occupants into desired behavior. As its first cut at explanation, therefore, every justification for legislation must contain a statement of the rules of law that purport to affect the behavior at issue -- and that usually includes much more than the specific laws explicitly aimed at it.

b. **The Requirement of Choice.** Unless the role-occupant has the requirement of choice thrust upon her, the question of obedience to law becomes trivial. To say that a babe in arms "obeys" the law against speeding misuses the word "obeys". Before one can obey, one must choose to obey or disobey. That occurs only if three factors coincide.

- (1) The role occupant must have the opportunity to choose to obey or disobey, that is, her environment must put her in a position where she has a choice to obey or disobey (for example, the existence of an open stream through a landlord's property gives her the opportunity to pollute it, or to obey a law prohibiting pollution; or a court's opportunity to enforce a statute depends upon the willingness of aggrieved parties to bring lawsuits)
- (2). The role-occupant must have the capacity to do the act involved, that is, she must have the skills and resources to do the task³ (for example, some years ago the Coast Guard promulgated regulations requiring yachts to have inboard tanks to receive wastes, and prohibiting pumping wastes into the sea. The yacht

³ In a case in which plaintiff argued that the City of Edinburgh had an absolute duty to keep the gas lamps turned on during the hours of darkness, no matter what the wind, Lord Sands remarked that "Great as are the powers of the legislature, it can control and give directions to persons only, and not to things. It can say to the Corporation 'Light', but it cannot say to the material universe, 'Let there be light'". Keogh v. Magistrates of Edinburgh, [1926] S.L.T. 527, 531, quoted in Anton, *supra* n. 59, at 236. In cases involving the salvage function of law, see *supra*, n. 82, the only capacity required of the role-occupant concerns the depth of her pocket.

could empty its waste tanks only at shore facilities having the necessary pumps and tanks.⁴ No regulations, however, provided for the installation of pumps and tanks, and (with rare exceptions) no shoreside facilities appeared. The role occupants lacked opportunity to obey the law, because of insufficient shoreside facilities, and no capacity to pump out their own tanks. The Coast Guard lacked the capacity to implement the law, for it did not have anything like the resources necessary to trail every small boat to see if it pumped wastes at sea).

- (3). The rule must be communicated to the role-occupant (for example, if a law exists prohibiting pollution, but the landlord does not know of the law, she will obey it only accidentally)⁵;

c. Incentives. Whatever the limitations of the Law and Economics vocabulary, plainly material incentives constitute a powerful motive in human affairs. The researcher must therefore investigate whether the behavior at issue lies in the material interest of the role-occupant, including the probability of punishments or rewards, broadly considered. Obviously, a role-occupant considers not the paper penalty for criminal activity, but rather the probabilities of sanctioning behavior by the implementing authorities -- for example, for an action possibly violating a criminal law, detection, arrest, and the imposition of a criminal sanction. The sanctioning behavior by authorities may or may not find warrant in law. If in practice jobs in

⁴ [cite?]; see Anton, note 59, at 244 (many activities carried on well out of reach of implementing agencies; that explains why United Kingdom customs and excise authorities no longer prohibit brewing home beer)

⁵ Under this heading the drafter ought to consider two sets of issues: (1) the appropriate form of legislation to communicate its intention -- the form of word, relative generality, goal-oriented legislation, and so forth -- that is, the subject-matter of most of the extant manuals on legislative drafting. See drafting texts cited supra, n. 31; Allott, supra n. 4, at 236-37; Rubin, supra n. 3, at 408 et seq. (in lieu of tight prescriptions of role-occupant behavior, modern legislation might well couch itself in terms of either the goals the legislature desires that the implementing agency pursue, or generalized statements to the agency of how to go about allocating its resources in the course of implementation); and (2) the actual communication of the law to its addressees in an way that promotes understanding of it, see R.B.Seidman, "The Communication of Law and the Process of Development in Anglophonic Africa", [1972] Wis. L. Rev. 680; D.J. Gifford, "Communication of Legal Standards Policy Development and Effective Conduct Regulation", 56 Cornell L. Q. 409 (1970); J. H. Robertson and P. Teitlebaum, [1973] Wisc. L. Rev. 665, 695 et seq..

industry do not go to former officials who implemented agency rules to the detriment of large industrial organizations, the interest of many officials will lead them to enforce rules in ways that match industry but perhaps not the legislatively-stated agency mission.⁶

d. Subjective factors. In two different ways, how people view their world plainly affects their behavior. First, a particular sentiment may present the role occupant with a set of valuations that dominate the choices she makes. For example, in China, women have so deep a socialization in traditional values of a large family that they frequently try to evade the laws aimed at limiting the number of children she may bear. Second, and more pervasively, actions have meaning only in terms of the actor's subjective understanding⁷ -- her "domain assumptions"⁸ If

⁶ See Thurman Arnold, testifying before a subcommittee of the Senate Labor and Public Welfare Committee, 1951 (quoted in C.A.AUERBACH, L.K.GARRISON, W. HURST AND S. MERMIN, *THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE AGENCIES* (1961)853 ("One of the things that happens to all administrative tribunals is that it is first opposed by the industry and then it becomes controlled by the principal industry. . . . That is due to the fact that young men in Government careers want to get the best jobs they can in the specialties and there is this social pressure to be a sound man. . . . because if you are not a sound man, you will never get a job in the industry.")M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); but cf. L. L. Jaffe, Book Review, 65 Yale L. J. 1068 (1956). Where the subject-matter of the proposed bill relates directly to economic affairs, frequently sophisticated economic analyses based on the economic interest of the role-occupant becomes relevant at this point in the memorandum of law -- for example, with respect to legislation relating to restrictions on competition, developing new transportation routes or systems, the supply of energy, and the like.

⁷ Weber, *supra* n. 130, at 87 et seq.; T. Parsons, "Introduction", in *id.* at 3, 10 et seq.; Schutz, "The Social World and the Theory of Social Action", in Braybrooke, *supra* n. 97, at 53, 62 (Unlike hard science, in the social world it does not suffice

"to refer the fact under consideration to other facts or things. I cannot understand a social thing without reducing it to the human activity which has created it and, beyond it, without referring this human activity to the motives out of which it springs. I do not understand a tool without knowing the purpose for which it was designed, a sign or symbol without knowing what it stands for, an institution if I am unfamiliar with its goals, a work of art if I neglect the intentions of the artist which it realizes. . . ." *Id.* at 60).

a person turns over to another some thin metal discs, a researcher cannot explain the action unless she knows how the actor perceives the discs -- perhaps as medals, and the recipient as a craftsman who will polish them; perhaps as religious objects, and the recipient as a priest or shaman; or perhaps as money, and the recipient as a tradesman who receives them in payment for goods.⁹ Because a drafter concerns herself not with particular role occupants but the whole set of role occupants, she will necessarily focus on their commonly-held beliefs about action, that is, the socially acquired and transmitted norms defining the activity at issue.¹⁰ To explain behavior, the researcher must investigate the actor's subjective ideology and whether it tends to move her to conform to the desired norm.

e. **Process.** How role-occupants decide depends in part upon the process by which they come to decision. That has importance both with respect to individual role-occupants, and collectivities.¹¹ (For example, an agency in charge of managing national parks that makes resource-allocating decisions after secret negotiations with commercial users of the parks will likely make different decisions than an agency that before decision holds a public hearing at which private environment-protection groups testify).

(The acronym ROCCUPI serves as a mnemonic for these factors: Rule, Oppportunity, Capacity, Communication, Interest, Process and Ideology).

In thinking about explanations for the behavior at issue, the ROCCUPI categories require the drafter to turn her mind systematically to each of these seven variables, and generate hypotheses based on them.¹² Since hypotheses require empirical

⁸ Supra, n. 117.

⁹ Winch, supra n. 65, at 117; see A. Kronman, supra n. 27, at 1051; 1 M. WEBER, ECONOMY AND SOCIETY (G. Roth and C. Wittich, eds., 1968) 7.

¹⁰ Moore and Anderson, "Puzzles, Games and Social Interaction" in Braybrooke, supra n. 97, 68, 72 ("...self-consciously acting in accordance with a rule (or formulating such a rule) is one of the fundamental aspects of social interaction, and any experimental studies which neglect this point simply have nothing to do with that topic"); Winch, supra n. 65, at 24 et seq. (language itself arises out of rule-driven social behaviors).

¹¹ See below, p. 76 [of MS].

¹² Frequently, one or more of the categories will seem obviously satisfied. For example, if analyzing an official as a role-occupant, frequently the situation makes it obvious that the

warrant, the existence of the hypotheses serves to guide the research into the social problem at hand. Thus do these categories serve their heuristic function. So do hypotheses concerning implementing agencies.

f. Implementing Agencies. Unless implementing agencies perform their assigned tasks, the whole project of legislation fails -- indeed, the whole project of the Rule of Law fails. [Discussed below, Chapter VIII et seq.].

NOTES AND QUESTIONS

1. The mnemonic, "ROCCIPI" may help to remember the categories advanced in the principal article: Rule, Oppportunity, Capacity, Communication, Interest, Process. Ideology.

2. What difficulty does the principal reading address? What explanation does it propose? Does the proposed explanation meet the criteria for an adequate explanation -- logical form, falsifiability, consistency with known data?

3. Explanations flow from perspectives. What perspective lies behind the theory put forward in the principal reading?

4. Sociological jurisprudence and law and economics tend to argue that individual motivation (self-interest, values and attitudes, tastes) alone explain behavior. Does the principal reading agree? Compare S.M.A.Lloyd-Bostock, "Explaining Compliance with Imposed Law", in S.B.BURMAN AND B-E. HARRELL-BOND (eds.), THE IMPOSITION OF LAW (1979), 9, 19:

"...[M]oral and other norms very often leave alternatives open to the individual, and hence opportunities to maximize his own material social and psychological self-interest. Awareness of social norms, however it may be acquired, allows the individual to estimate the social rewards and costs attached to different courses of behavior. Similarly, awareness of legal rules and the ways they are likely to apply in practice will influence behavior in contexts where they are seen to be relevant. Motives then become closely tied to competence. The individual needs to know what the law is, what the chances of sanctions are and what the sanctions may be, what excuses and justifications will work, and what other costs and benefits may be involved in, say, using the courts. The outcomes that can be achieved depend also on skill in handling the relevant moral and legal concepts and working the system generally."

5. H.W. JONES, THE EFFICACY OF LAW (1968):

official knows of the rule and its content.

"I suggest. . .that at least five patterns or categories of inefficacy emerge plainly from a survey of various and sundry legal precepts, in all fields of legal regulation, which have remained 'law in the books' and never quite or really made it as 'law in action'. Let us. . . characterize these five categories of inefficacy as follows: (1) failures of communication; (2) failures to enlist supportive action [e.g., by community groups]; (3) failures to forestall avoidance; (4) failures of enforcement; and (5) failures of obligation [i.e., failure to persuade addressees and others to internalize the duties imposed by the law]. Doubtless there are other patterns of inefficacy that will appear to the discerning eye. . . "

Critique Jones's categories.

6. Every theory has a residual category. What constitutes the residual category in Seidman's theory?

7. Critique the stop sign article using the institutionalist categories.

8. Critique the Tenant Screening Bill using the institutionalist categories.

9. Consider the Massachusetts statute mentioned in Note 5, p. I-5, Mass. Stats. Ann. Ch. 111, Sec. 127B:

A copy of the report of any investigation or inspection of residential premises for violations of the code or other applicable laws, ordinances, by-laws, rules or regulations, and of any written order or notice issued by the board, shall be delivered personally or sent by first class mail to the occupants of all affected premises within seven days after the investigation or inspection of the premises or the issuance of the order or notice. A notice of the date, time and place of any administrative or court hearings scheduled by or known to the board relating to violations, including all referrals of violations to other government agencies, shall also be delivered or sent to the occupants. All investigation or inspection reports shall include the name of the inspector, and the date and time of the inspection or investigation; the date and time of any scheduled follow-up inspection; a description of the conditions constituting the violations, if any; a listing of the specific provisions of the code or other applicable laws, ordinances, by-laws, rules or regulations that appear to be violated; a determination by the official inspecting the premises whether each violation, or the cumulative effect of all violations, may endanger or materially impair the health, safety or well-being of any occupant or the public; a determination by said official whether any violations appeared to be substantially caused by the occupant or any person acting under his control; and a brief summary of the statutory remedies available to occupants of the affected premises. All reports, orders or notices relating to such inspections, investigations, or violations shall be public records, and shall be kept on file by the originating agency according to law.

Would the ROCCUPI categories have helped the drafter of the statute to discover its weakness?

A PROBLEM CASE: A MASSACHUSETTS STATUTE ON DRUG REHABILITATION

Mass. Acts, 1969, Ch. 889 (since repealed) created a system for the rehabilitation of drug addicts. Sec. 134 provided as follows:

Section 134. Any defendant who is charged with a drug offense shall, upon being brought before the court on such charge, be informed that he is entitled to request an examination to determine whether or not he is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, and that if he chooses to exercise such right he must do so in writing within five days of being so informed.

For the entire period during which the request is under consideration by the court, the criminal proceedings shall be stayed.

If the defendant requests an examination, the court shall appoint a psychiatrist, or if it is, in the discretion of the court, impracticable to do so a physician, to conduct the examination at an appropriate location designated by it. In no event shall the request for such examination, any statement made by the defendant during the course of the examination or any finding of the psychiatrist or physician be admissible against the defendant in any criminal proceedings.

The psychiatrist or physician shall report his findings in writing to the court within five days after the completion of the examination, stating the facts upon which the findings are based and the reasons therefor.

If the defendant is also charged with a violation of any law other than a drug offense, the stay of the criminal proceedings shall be vacated upon the report of the psychiatrist or physician, the report shall be considered upon disposition of the charge in accordance with sections one hundred and thirty-five and one hundred and thirty-six, and the remaining provisions of this section shall not apply.

If the defendant is not also charged with a violation of any law other than a drug offense, and if the psychiatrist or physician reports that the defendant is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, the court shall

inform the defendant that he may request commitment to the division, and advise him of the consequences of the commitment and that if he is so committed the criminal proceedings will be stayed for the term of such commitment.

If the defendant requests commitment and if the court determines that he is a drug dependent person who is a drug addict who would benefit by treatment, the court may stay the criminal proceeding and commit him to the division as an inpatient. An order committing a person who is determined to be a drug dependent person who is a drug addict under this section shall specify the period of commitment, which shall not exceed two years.

If the defendant requests commitment and if the court determines that he is a drug dependent person who is not a drug addict but who would benefit by treatment, the court may stay the criminal proceeding and commit him to the division as an outpatient; provided, however, that the commitment may be as an inpatient if the court determines that the defendant is a proper subject for an inpatient program. An order committing a person who is determined to be a drug dependent person who is not a drug addict under this section shall specify the period of commitment, which shall not exceed one year.

In determining whether or not to grant a request for commitment under this section, the court shall consider the report, the past criminal record of the defendant, the availability of adequate and appropriate treatment at a facility, the nature of the offense with which the defendant is charged including, but not limited to, whether the offense charged is that of a sale or sale to a minor, and any other relevant evidence.

In the event that the defendant requests commitment, and if the court determines that the defendant is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, and the defendant is charged with a first drug offense not involving the sale or manufacture of narcotic or harmful drugs, and there are no continuances outstanding with respect to the defendant pursuant to this section, the court shall order that the defendant be committed to the division without consideration of any other factors.

If the defendant requests commitment, and if the court determines that the defendant is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, and the defendant is charged with a first drug offense not involving the sale or manufacture of narcotic or harmful drugs, and there are no continuances outstanding with respect to the defendant pursuant to this section, and adequate and appropriate treatment at a facility is not available, the stay of criminal proceedings shall remain in effect until such time as adequate and appropriate treatment at a facility is available.

In all other cases, a commitment order shall not be made unless adequate and appropriate treatment is available at a facility; provided, however, that the court may in its discretion order that the stay of criminal proceedings remain outstanding until such time as adequate and appropriate treatment is available.

In the event that the stay of the criminal proceedings remains in effect for the reason that adequate and appropriate treatment at a facility is not available, the issue of the availability of adequate and appropriate treatment at a facility may be reopened at any time by way of motion by the court, the prosecutor, or the attorney for the defendant.

In no event shall any defendant be committed pursuant to this section unless the defendant consents in writing to the terms of the commitment order.

If the psychiatrist or physician reports that the defendant is not a drug dependent person who is a drug addict who would benefit by treatment or drug dependent person who is not a drug addict but who would benefit by treatment, the defendant shall be entitled to request a hearing to determine whether or not he is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment. The court may of its own motion, or shall, upon request of the defendant or his counsel, appoint an independent psychiatrist, or if it is impracticable to do so, an independent physician, to examine the defendant and testify at the hearing. If the court determines that the defendant is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, the procedures and standards applicable to a defendant who is determined by the court, following the report of the first examining psychiatrist or physician to be a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment, shall apply to the defendant.

If the court does not commit the defendant to a facility, the stay of the criminal proceedings shall be vacated.

At any time during the term of commitment, the administrator may transfer any inpatient to an outpatient program if he finds that the patient is a proper subject for an outpatient program; provided, however, that the administrator may retransfer the patient to an inpatient program if he finds that the person is not suitable for outpatient treatment.

Any patient committed under this section may apply in writing to the director for discharge or transfer either from inpatient to outpatient treatment or from one facility to another; provided, however, that no more than one such application may be made in any three-month period. Upon receipt of an application for discharge or transfer, the director shall give written notice to the patient of his right to a hearing and to be represented by counsel at the hearing.

Within ten days of the receipt by the director of an application for discharge, the administrator and an independent psychiatrist, or, if none is available, an independent physician, designated by the director to make an examination of the patient shall report to the director as to whether or not the patient would benefit from further treatment at a facility. If the director determines that the patient would no longer so benefit, the patient's application for discharge shall be granted. If the director does not so determine said application shall be denied.

Within ten days of the receipt by the director of an application for transfer, the administrator shall report to the director as to whether the patient is a proper subject for the transfer for which he has made application. If the director determines that the patient is a proper subject for the transfer, the patient's application for transfer shall be granted. If the director does not so determine, said application shall be denied.

Determination by the director as to discharge and transfer pursuant to this section shall be made after holding a hearing in accordance with sections ten and eleven of chapter thirty A, unless the hearing is waived in writing. The determination of the director shall be subject to judicial review upon petition of any aggrieved patient pursuant to section fourteen of chapter thirty A; provided, however, that the director shall file the record of the proceeding within fourteen days of the service of the petition upon him.

At the end of the commitment period, when the patient is discharged, or when the patient terminates treatment at the facility, whichever first occurs, the director shall report to the court on whether or not the defendant successfully completed the treatment program, together with a statement of the reasons for his conclusion. In reaching his determination of whether or not the defendant successfully completed the treatment program, the director shall consider, but shall not be limited to, whether the defendant cooperated with the administrator and complied with the terms and conditions imposed on him during his commitment. If the report states that the defendant successfully completed the treatment program, or if the defendant completes the term of treatment ordered by the court, the court shall dismiss the charges pending against the defendant. If the report does not so state, or if the defendant does not complete the term of treatment ordered by the court, then, based on the report and any other relevant evidence, the court may take such action as it deems appropriate, including the dismissal of the charges or the revocation of the stay of the criminal proceedings.

As to any defendant determined by the court pursuant to this section to be a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict who would benefit by treatment, concerning whom the court does not order commitment in lieu of prosecution, the court may, in the event that such person is convicted of the criminal charges, order that he be afforded treatment pursuant either to section one hundred and thirty-five or section one hundred and thirty-six.

NOTES

1. Consider the language of the Act. Why did the drafter draft so opaquely? Consider the following (from Chambliss and Seidman, Law, Order and Power, 2d ed., supra, pp. 130-135:

5.3 EXPLANATIONS AND CONSEQUENCES

Why did legalese continue in documents of private legislation and statutes? Lawyers explain it by the demands for precision. As we have seen, that states a myth. Except for its specialized vocabulary and "open, sesame!" incantations (and that leaves most of it) legalese does not perform an instrumental function. *Ss.* today has neither meaning nor function, and nobody remembers what it once meant or did, yet, like the buttons on the sleeves of men's jackets that no longer button anything, it hangs on. That lawyers use form-books helps to explain legalese's survival, but it hardly goes far enough. Why does it continue in the form-books? We discuss three alternative explanations: social lag; theories that ascribe to law various kinds of legitimating, mystifying, symbolic, or hegemonic functions; and what we denote an institutionalist explanation.

Social Lag

In 1922, F. Ogburn said that "when one part of culture changes first through some discovery or invention, and occasions changes in some part of the culture dependent upon it, there frequently is a delay. . . . The extent of this lag will vary . . . but may exist for . . . years, during which time there may be said to be a maladjustment."⁴¹ He later specified his hypothesis more precisely:

The theory of cultural lag . . . calls for the following steps: (1) the identification of at least two variables; (2) the demonstration that these two variables were in adjustment; (3) the determination by dates that one variable has changed while the other has not changed in greater degree than the other; and (4) that when one variable has changed earlier or in greater degree than the other, there is a less satisfactory adjustment than existed before.⁴²

Yehezkel Dror made the concept central to his theory of law and social change.⁴³

The theory of social lag as thus set out does not suggest any causal explanation. It does no more than to state the problem that calls for explanation. Why does the institution "lag"? Obviously, that does not happen in a fit of social absentmindedness. "When, in the face of changed technology and new problems, a social arrangement

stubbornly persists, there are social reasons why this is so; there are explanations why no change or slow change occurs."⁴⁴ What explanations can we suggest to explain the "lag"?

The Noninstrumental Functions of Law

Max Weber and Marxist theorists argued that law serves a noninstrumental function. Weber suggested that governments cannot rule easily through force or threat of force; instead, they seek to win the consent of the governed.⁴⁵ The developed, capitalist, western countries accomplish this in part through "legal-rational legitimacy"—that is, a legal order that operates through universalistic rules, based upon legalistic law-finding by judges, where the legal order appears discontinuous with the social system, and where the law contains discretion. Weber examined how the rulers maintain their control with the cooperation of the dominated in societies in which the rulers used their control for their own benefit. He asked, "What claims to authority do the rulers make? How do these serve the interests of the rulers?"⁴⁶ Marxists capsized that question, asking instead, "What illusions do the dominated have that blind them to their own potential for changing affairs?"⁴⁷ Both sought to explain how the powerful retained their rule in an unjust society. Weber's concept of legitimacy pointed to solutions for the problems the rulers have in maintaining power; Marx's concept of false consciousness, to the difficulties the masses have in liberating themselves.

The Italian Marxist Gramsci held that the masses' false consciousness mirrors ruling class hegemony.⁴⁸ Ideas affect the way that people perceive the possibilities and the means of changing their circumstances. A class achieves hegemony to the degree that ideas that serve its own interests permeate society. "People who are objectively members of the working class acquire a bourgeois subjectivity. As a result each member of the ruled class becomes an instrument of his own oppression. Herein lies the essence of hegemony."⁴⁹ A legal system has normative rules enforced by coercion (its coercive aspect) and a set of values (its hegemonic aspect). "In a bourgeois legal system these latter will include such ideas as equality before the law, separation of powers, due process, the rule of law, fairness, and so on. The direct interests of a dominant class will not always determine the outcomes of particular cases. Instances will arise when the hegemonic aspect is determinative."⁵⁰

In this view, legalese serves a mystifying and hegemonic function. When a court bailiff requires a witness to tell "the truth, the whole truth and nothing but the truth," or a lawyer tells a layperson to put her signature to a contract that ends "in witness thereof, we have hereunto put our hands and seals the day and year first above written," the non-lawyer must feel the awe and majesty of the law. He succumbs to its hegemony.

The hegemonic and legitimization explanations make some sense but they do not go far enough. Nobody today questions that people act pursuant to their domain assumptions, their concepts about and explanations for the world. Certainly, legalese mystifies the law and makes laypersons incapable of dealing with it. The hegemonic and legitimization explanations, however, sometimes imply that legalese exists in

order to create hegemony, that, inevitably, "the law" created legalese. The law, however, does not *do* anything. People do things. Legalese gets used because particular groups find it necessary or convenient to use it. It may serve a hegemonic or legitimizing function, but the consequence (function) of a social fact does not explain its existence, except teleologically. Furthermore it is not inevitable that legalese will serve hegemonic or legitimizing functions. Theories of hegemony too easily make it seem as though the rules of law adopted its hegemonic characteristics (such as legalese) by processes both ineluctable and mystical. In this logic "law" like "society" are reified and lead to errors of factual reason.

An Institutional Explanation

The choice model earlier advanced holds that people act as they do by making choices within the constraints and resources of their environment as they perceive it. Linguistic behavior arises in the same way. Legalese arose for all the reasons that professional vocabularies flourish in other professions. Its continued use in statutes and private legislation, however, betrays a particular ideological bent.

Every professional field develops its own vocabularies out of necessity. Professionals communicate with other professionals about matters of shared concern. They develop a special vocabulary to express the concepts they need in their professional work. Physicists need words like *molecule* and *mass* and *velocity* to communicate to other physicists about matters of mutual interest and concern. So lawyers need words like *beneficiary* and *testator* and *certiorari*. Doctors and musicians and accountants and engineers each have their specialized vocabularies. All these get socialized into their professions through specialized education and training, a large part of which consists of learning to communicate in the appropriate specialized vocabulary.

That does not explain the noninstrumental words and dysfunctional style of legalese. Why the mystic *ss.*? Why *L.S.* and *to have and to hold* and *all that certain lot, tract or parcel of land* (with *lot*, *tract*, and *parcel* meaning the same thing)? All ingroups have their own style, reinforced by education. (Have you ever tried reading a scientific article on, say, microbiology?) In the same way, legal education and training perpetuate legalese. No doubt some lawyers imagine that, because they learned it in school, it must have value. Other lawyers talk to them in legalese, and they respond in it. We all believe that social institutions exist for a reason although often enough the reason arose *after* the institution, in order to explain it. Legalese becomes the "right" and "only" language in which to write statutes and private legislation. One of the authors conducts a legislative drafting service, in which students draft for Massachusetts legislators. The students learn to draft in relatively simple, common English. Not infrequently a lawyer-legislator insists that the student redraft the bill, adding more "legal" terms to make it sound "more legal."⁵¹

People write for an expected audience. That lawyers use legalese in writing documents of private legislation and statutes argues that they expect that lawyers and judges constitute their principal readership. Behind that proposition, however, lurks the ideology of law that we earlier characterized as legal liberalism. That ideology

constituted the legal expression of laissez-faire. Law does not directly affect the behavior of private parties; the market does that. Before the dictate of marginal utility, all else must fail. Courts exist to decide disputes between parties. Case law, private legislation, and statutes in this view become the rules of the litigation game, not norms to guide behavior outside the judicial forum. Case law, private legislation, and statutes use legalese because their authors believed that only judges and lawyers need read them.

That does not explain why legalese continues in use. In a society of unequals, every norm (except perhaps very trivial ones) affects different people differently. To understand the consequences of a rule, we must examine how the rule advantages and disadvantages people in the society. Only with that information can we begin to understand the continued existence of particular rules. The consequences of a social fact, institution, social relationship, or common practice cannot explain the fact's existence but it will often give us a clue why those with the power to change it do not do so.

It is evident that the use of legalese has the direct consequence that only legally trained people learn how to read statutes. That does not say that only legally trained people know their content. People who use a law or a contract daily of course learn its content. Bureaucrats in government and in business know the laws that ought to control their behavior. They become experts not only in the subject matter involved, but in its legal environment. That becomes a principal source for the power of lawyers, and of all the people who use a law repeatedly, over laypersons without the expertise that arises either from knowledge of legalese or from experience with a particular area of law. Insurance companies defend their use of legalese in insurance policies; banks and appliance sellers in consumer credit sales; real estate brokers and agents in real estate contracts and leases.

Knowledge is power, and no place more than with respect to the law. The legal order constitutes the system of social control supported by the immense organization, resources, and ultimately the armed might of the state. Whoever can manipulate the legal order to his or her benefit has an enormous advantage against those who cannot. Lawyers play a central role in the legal order. Because they come in relatively small numbers compared to the total populace, they do not come inexpensively.

That becomes a principal consequence of the obscurity and inaccessibility of law brought about by the case system and legalese: lawyers become indispensable, and that inevitably enhances the power and control of those who have the money to pay for lawyers. The obscurity of the law ensures that result.

That result came about as a consequence of the ideology of liberal legalism. That ideology perceives the legal order as distinct from the social order, with the law coming into play only to resolve emergent disputes. It sees courts as the principal institutions of the legal order. Courts serve par excellence as the arena for lawyers and judges. Only they need to know and understand the law. The result is that liberal legalism leads to elitism in the legal order and to creating opportunities that can more readily be seized by those who already have power and privilege than by the ordinary person. The very form of the law, expressed in practically innumerable cases and statutes, written in a

language that laypersons cannot comprehend, endowed lawyers with disproportionate power, and enhanced the power and privilege of the already powerful and privileged.

That an institution enhances the power and privilege of a social group does not demonstrate that that constituted the motive for creating the institution. The early lawyers who first used the mystic ss. on affidavits did not do so to enhance the power and privilege of lawyers in the twentieth century. That an institution has as a consequence the enhancing of the power and privilege of a particular group or stratum, however, does help to explain why that group does not try to change it. Why should lawyers or those who control legislation seek to change a language system that helps them to maintain power and privilege? Why should those who can afford lawyers try to change a system that gives them an advantage?

This explanation can conveniently be restated as a theory to explain the continued existence of the noninstrumental aspects of legalese:

- 1 The process of a problem-solving institution and its ruling ideas permits it to address some difficulties and not others, and permits only some outcomes and not others.
 - a) Legislative and other legal drafting by lawyers, and the ideas that supported them, tended to produce statutes and documents of private legislation that spoke mainly to lawyers and judges in the language used by lawyers and judges.
- 2 An institution and its associated ideas tend to create interest groups that support them, always including their own functionaries.
 - a) Lawyers formed an interest group that supported the use of legalese.
 - b) Those with sufficient power and privilege to retain lawyers in the ordinary course of affairs formed an interest group that supported the use of legalese.
- 3 Those interest groups come in time to prize the institution and its associated ideas for their own sake, without regard to their instrumental uses or, sometimes, even their own self-interest, and devise explanations to justify that prizing.
 - a) Lawyers came to prize legalese and devised the myth that precision in drafting required legalese as a justification for its use.

It seems possible to test part of this explanation empirically. In recent years, various legislatures have enacted statutes requiring simple language in insurance contracts (Massachusetts), contracts generally (New York), and consumer credit contracts (federal). Drafters can write these instruments in simple language without losing precision. Jeffrey Davis rewrote a typical consumer credit contract that contained 1100 words and tested at a 16th to 17th grade reading level (that is, beyond the ordinary college graduate level) into a 480-word contract that tested at the 11th to 12th grade level. Overall, that led to a 26 percent increase in the understanding of the contract of a sample of consumers.⁵² The objection to the simplification of statutes cannot rest upon claimed impossibility of drafting them in simple language.

If our explanation serves, however, one would expect that opposition to the simple

language statutes came from lawyers and from the large corporations that use documents of the sorts at issue. That, of course, constitutes precisely the hard core of the opposition to the bills. Opposition in fact came from exactly those sources.

New York's Sullivan Law provides that all consumer contracts and leases "must be written in non-technical language and in a clear and coherent manner using words with common and every day meanings."⁵³ The bill kicked up formidable opposition. The opponents included the New York State Bankers Association; the Association of the Bar of the City of New York's Committee on State Legislation; the New York State Council of Retail Merchants, Inc.; the New York State Bar Association's Business Law Committee; and the New York County Lawyers' Association's Special Committee on Consumer Agreements.⁵⁴ Massachusetts enacted a lay language insurance law.⁵⁵ The opposition there came from the same general groups: lawyers and the large firms that in fact have drafted most of the contracts at issue (in the Massachusetts case, the great insurance companies).

5.4 CONCLUSION

The language of the law arose because the structure of the legal order and the ideology that dominated most of its professional actors created lawyers as a specialized profession that created a specialized dialect, and then used that dialect to draft both private legislation and statutes. It had the direct consequence of bolstering the power of lawyers and other professional actors in the legal order, and of those with the sophistication and money to pay for lawyers. Thus did the language of the law reflect both the social milieu and the existing forces in it, and in turn change and re-create the social milieu in its own image.

2. By what channels of communication does law ordinarily pass from legislature to addressee? Consider the following (Seidman, *State, Law and Development*; London: Croom-helm, 1978, pp. 105-113):

A. Communication Rules in England

England and the United States employed state power massively to induce economic development. Government investment and subsidies induced and channelled private investment; special and local laws

favoured corporations and productive use of resources.³ This use of the legal order to bring about directed change, however, hid behind an ideology that denied either its desirability or possibility. The myths of free enterprise stated that development will arise without state activity as private individuals seize advantages for profit. Governments officially exuded indifference. In those myths, law and state power should not favour one class against another, but merely provide facilitative forms through which individuals can accomplish the purposes that seem economically desirable to them. The laws of corporations, of contract, of property, of partnership and of commerce generally reflected this ideology. So did the processes of the common law, whose judges seemingly only gave the force of law to existing custom or private agreement.

In modern times, the ideology of free enterprise had to accommodate itself to the welfare state. Regulatory laws — tax laws, planning laws, food and drug laws, insurance and health programmes, for example — increasingly occupied the statute-books. Those laws involved explicit government interventions in the economic system, but like the Victorian virgin tubbing under her nightie,⁴ the law-makers accomplished that while all the while denying it.

This situation produced two official rules for the communication of law in England: *Ignorantia juris* and publication. In a few exceptional situations, when government affirmatively required citizens to change their activity, the state devised specific communication channels for the law in question.

1. *Ignorantia Juris*. If laws merely restate social norms, every properly raised person will know the law.⁵ The criminal law particularly supposedly only codifies established community mores.⁶ An early judge wrote, '[e]very one is bound to know what is done in Parliament even though it has not been proclaimed in the country; as soon as Parliament has concluded any matter, the law presumes that every person has cognizance of it, for Parliament represents the body of the realm'.⁷ If every properly socialized person knows the law, its communication becomes unnecessary.⁸ Ignorance or mistake of law cannot be a defence to a criminal charge, for such a plea implies that the accused had not accepted community mores. Such a plea confesses deviance. It cannot exonerate, for the criminal law aims precisely at the deviant.⁹

In many cases, the *ignorantia juris* rule can create injustice. Scholars have justified it, however, as a spur to communication.¹⁰ It compels

'people to learn the standard of conduct expected of them . . . The rule is a useful weapon where the legislature intends to change the social mores, for the most effective way of bringing the new rule to the public is by convictions reported in the public press'.¹¹

2. *Publication.* In the nineteenth century, cognoscibility¹² warred with *ignora itia juris*. Citizens demanded that the law be knowable before they acted. Entrepreneurs particularly must know the legal consequences before hazarding capital. In a compromise between the requirement of knowledge of the law, and the myth that government remains aloof, most modern capitalist states chose to make the law available to interested citizens, without requiring actual knowledge of it. Conforming to notions of *laissez-faire*, citizens have the burden of learning the law, while the state only accepts responsibility to make it available. With respect to case law, until recently private law reporters substituted for the British state. Government has printed statutes officially since approximately 1705. In 1893, statutes became effective only after publication.¹³ In the United States, administrative rules follow the same requirement.

In Africa, as in England, criminal defendants invoked the publication rules as a defence. In *Mwangi s/o Githigi v. Rex*¹⁴ for example, the price controller published an order in the *Gazette* establishing the price of haircuts by African barbers. When he amended his order, reducing the price, he did not publish in the *Gazette*, since no requirement of publication of subsidiary legislation existed. The Supreme Court of Kenya reversed a conviction for overcharging, construing the applicable statutes to mean that any revocation or variation in an order or rule required publication in the same manner as the original order.

3. *Exceptions.* Regulatory law attempts to change behaviour, but the rules did not ordinarily require the state to communicate the law to those it affected. The government did not, for example, promulgate anti-trust laws among businessmen. An entrepreneur had to discover the law himself. Public welfare and social security laws, too, operated as facilitative, requiring the affected individual to unearth them on his own.

Nevertheless, sometimes government cared whether citizens changed their behaviour to match new rules. Then the statute usually required its publication in newspapers or elsewhere. Internal revenue officials mailed tax forms and instructions to every tax-payer. Immigration authorities published widely the requirement that aliens register.

II Communication Laws in Action

A. England and the United States

In England and the United States, government announced a rule but made little effort to ensure its communication. Government met its formal duty when it published the new rule in a gazette or the Federal Register. The official publication, however, triggered a widespread, unofficial communications network. The mass media noted the publication and re-broadcast it. If they did not, government took pains to alert them to it, sometimes by the ceremonial and highly publicized signing of new statutes by the President.

In addition, official publication set off specialized legal information systems that communicated new laws to lawyers, the legal information brokers to government agencies and private clients, especially businessmen. Large businesses had their own house counsel. Smaller ones frequently had lawyers on retainer to advise them of changes in the law.

Vast and rapidly accumulating law reports and periodicals kept the profession up to date on the current state of law. Specialized reporting services proliferated. United States lawyers could subscribe to periodicals on federal taxation, state taxation, money and banking law, negligence law and trade regulation. In addition, a gaggle of law reviews listed recent legislation and reviewed recent cases. Services collected, indexed and annotated statutes, regulations and court decisions, so that lawyers could readily find the law. It matched the pattern of the two-step communications system with lawyers functioning as opinion leaders.

The structure of legal communications adhered to the official definition of the situation. The state only made the law available. Private entrepreneurs then republished it, mainly for the use of lawyer-information brokers, who serviced those who could afford them. This structure could communicate any law, but whether it did communicate any particular law depended, not upon official activity but upon the informal infrastructure.

The formal communications system appeared as a one-way flow: government published; lawyers and ultimately clients, learned. In fact, the system flowed both ways, since interest groups and parties had lobbyists and other informal channels to transmit their demands to the political leadership. Whether information moved down or up, the official communications system depended upon private informal institutions.³⁷ The necessary legal information came only to those who met preconditions. Lawyers cost money. Even where potential beneficiaries had free legal services available, many did not know of them or think to ask about new laws. Many persons eligible for welfare did not know it. Similarly, a system of feedbacks that depended upon private interest groups ensured the influence of the wealthy in policy-making. As a result, in recent years new roles developed to reach people otherwise outside the legal communications system. Legal aid and store-front lawyers became a significant source of information about the law. Moral entrepreneurs, such as welfare rights organizations, the NAACP, or the American Civil Liberties Union took the initiative to inform the ignorant of their legal entitlements and to communicate the demands of otherwise disenfranchised people to law-makers.

The liberal state confined its social engineering to formal rules requiring merely publication of its laws. In England and the United States, these limited formal rules for the publication of law nevertheless provided real communication to certain publics, because of a private, informal communications channel with lawyers as information brokers.

It reinforced the power of those with the money and sophistication to make use of it, and made u-likely successful social engineering through law aimed at the mass.

If the propositions put forward in the excerpt hold, would one expect that a failure of communication explained the low impact of the Massachusetts statute?

3. J. H. Robertson and P. Teitlebaum, "Optimizing Legal Impact: A Case Study in Search of a Theory." [1973] Wisc. L. Rev. 665, considered the impact of the Massachusetts drug rehabilitation statute quoted at p. 75:

D. Rival Hypotheses to Explain the Law's Lack of Impact

Our conclusion from the data, showing virtually no change in treatment or dispositional outcomes for drug defendants, is that the law had practically no impact. The finding of no change may be challenged on the grounds that a change in treatment outcomes *did* occur, but for various methodological reasons was not reflected in our statistics.¹⁶⁹

The most important of these rival plausible hypotheses is that a real increase in treatment occurred, but that our post-test was conducted too early to capture it. Our data cover only the first nine months of the law's use. Is it likely that the law's impact increased significantly thereafter? There is no reason to expect that a significant increase in treatment occurred after September 1971.¹⁷⁰ Moreover, the only official data available¹⁷¹ show just the opposite—that the number of pre-trial diversions¹⁷² remained relatively steady over a period of 16 months (January 1, 1971 to May 1, 1972), with 324 diversions total, averaging 4.4 diversions per district court over this period (Table 8).

TABLE 8
NUMBER OF PRE-TRIAL DIVERSIONS REPORTED BY DISTRICT
COURTS, JANUARY 1, 1971—MAY 1, 1972

	NUMBER OF COURTS	PERCENT OF COURTS
0-4 diversions	47	64%
5-10 diversions	18	25%
11+ diversions	8	11%
	<u>73</u>	<u>100%</u>

Although the official data are not entirely comparable to our own,¹⁷³ they do confirm the basic conclusion that pre-trial diversion is an extremely rare occurrence under the Massachusetts law. Moreover, the fact that there was no trend toward increasing numbers of diversions over time suggests that even if the study had been conducted later, no impact would have been observed.¹⁷⁴

169. Several such methodological objections—weaknesses of the basic research design, controlling for seasonal variation, changes in "history" changes in "instrumentation," build-up effects, and the continued use of a prior treatment law are dealt with in the Methodology section. See notes 104-107 *supra* and accompanying text; text accompanying notes 129-30 *supra*.

170. By June 1971, the four courts studied had developed routinized procedures for handling defendants under the new law and had received complete information on all licensed treatment facilities in Massachusetts. No significant event occurred after September 1971 which would plausibly have changed their practices. It is possible that attorneys gradually came to understand the law and employ it more frequently, but nothing in the statistics or interviews supports a theory of gradual increase in use.

171. This data is on file at the Division of Drug Rehabilitation, Department of Mental Health, Boston, Massachusetts.

172. The only treatment outcome which district courts are required to report to the Division is pre-trial diversion treatment pursuant to MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972).

173. Our study included all recorded diversions in four courts for 3 months of completed cases. The official data cover all reported diversions in all 73 district courts for 16 months of cases not necessarily completed. If we estimate that the official data cover 14 months of completed cases, then their time period is 4 2/3 times as long as ours. The average number of diversions was 4.4 per court, or about 3 times our average of 1.5 diversions per court. Their data thus show slightly fewer diversions than we would have expected (had we extrapolated from our data), rather than more.

174. This holds at least with respect to pre-trial diversions. Since no official data exist on probation treatment or prison treatment, it is im-

Other plausible rival hypotheses for the lack of impact of the law were examined,¹⁷⁵ but no evidence was found to support any of them. We conclude that, except for a slight change in type of treatment, the law had no impact on the outcomes of drug cases in 1971 as compared to 1970.

IV. DETERMINATIONS OF IMPACT

A. Failure of Communication

Ignorance of the law's options among judges, lawyers, and defendants explains the lack of impact to a small but important extent. Numerous instances of legal ineffectiveness¹⁷⁶ can be explained wholly or in part by inadequate communication of legal change to relevant decision-makers. One cannot assume that appellate decisions and statutory changes are automatically communicated, even to judges, lawyers or others who are familiar with law.¹⁷⁷ Where communication does occur, its source,¹⁷⁸ or noise in the transmitting channel,¹⁷⁹ may distort the contents of the change and influence whether the law affects behavior.

The communication problem was particularly acute in this case. The law was complex, overly technical, awkwardly worded,¹⁸⁰ and

possible to prove or disprove the hypothesis that an increase in non-diversionary treatment occurred after our study was completed.

175. These included statistical instability or regression effects (both unlikely, in our particular study); a large impact in some of the district courts but not in others (no evidence for this); changes in the availability of treatment facilities (if anything, their availability increased in 1971); and a real change which occurred before Feb. 1970 in terms of more treatment given drug addicts (in this case, the law itself had no impact, since the same increase would have occurred with or without the law).

176. See generally Medalie, Zeitz, and Alexander, *Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1363 (1968). A study of police practices in New Haven, Connecticut, found that even with law student observers present, only 25 of 118 suspects received full advice, while 26 were not advised of their rights at all. *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1550 (1967). Similar results have been observed with regard to the implementation of *In re Gault*, 387 U.S. 1 (1967). Lefstein, Stapleton and Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491 (1969).

177. For an interesting discussion of the communications process, see Seidman, *The Communication of Law and the Process of Development*, 1972 WIS. L. REV. 686, 698-700. Prof. Seidman, however, in emphasizing the role played by lawyers in communicating law to private parties, overlooks the many lapses that occur in lawyer knowledge of new law.

178. FBI lectures on *Miranda* were found, at least in one Wisconsin city, to distort the meaning of the change. See Milner *Comparative Analysis of Patterns of Compliance with Supreme Court Decisions: Miranda and the Police in Four Communities*, 5 LAW & SOC'Y REV. 119, 124-25 (1970); Seidman, *supra* note 177, at 713.

179. *Id.*

180. The Massachusetts statute is full of long sentences, repetitious wording and confusing paragraphs. In section 47, the operative diversion section,

in order to work, had to be understood by hundreds of judges, lawyers, prosecutors, probation officers, and defendants. Given its liberal premises and detailed procedures, selective perceptions or misunderstanding could easily occur.

1. JUDGES

Judges learned of the law at the time of passage from newspaper reports and legislative advance sheets, and, just before it took effect, by a memorandum from the Chief Justice.¹⁸¹ Subsequent memoranda during January and February informed the judges of developments and specific problem areas. However, during the first nine months of operation¹⁸² no judicial conferences or seminars on the law were held.¹⁸³ Lawyers and probation officers also apprised judges of the law.

All judges interviewed were aware that a new drug law had taken effect, but they displayed a wide variation in their knowledge of precise provisions. A few judges had clearly mastered the details of the new procedures. Most judges had an adequate working knowledge of the law, but misperceived its scope. One, for example, did not think that persons charged with sale offenses were eligible for pretrial diversion.¹⁸⁴ In a few cases, judicial ignorance was appalling.¹⁸⁵

over 3,000 words are strung together in unnumbered paragraphs, most of which repeat at least once the phrase "drug dependent person who is a drug addict who would benefit by treatment," or "drug dependent person who is not a drug addict." See MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972).

181. See note 86 *supra*.

182. The Boston Bar Association and the attorney general sponsored a 1-day conference on the law in Boston on January 1, 1971. One judge participated on a panel and a few others attended.

183. An example of what could have been done to assure accurate knowledge of the new procedures occurred later in 1971 when the Chief Justice convened two judicial sessions at which mental health experts and lawyers explained in detail to judges a statutory revision of the state mental health code.

184. See Robertson, *supra* note 15, at 369.

185. Illustrative of this point was a case defended by one of the authors in a busy district court not included in the study. The case arose 11 months after the law went into effect. The defendant was alleged to have sold heroin on a day five months prior to his arrest. He had no prior drug convictions. A week after the alleged transaction the defendant had entered a reputable drug treatment program and was making great progress. Having been examined and been found a drug dependent person who would benefit from treatment, he requested a stay of prosecution and commitment to the treatment program in which he had participated for the last five months, pursuant to section 47 (MASS. GEN. LAWS ANN. ch. 123, § 47 [Supp. 1972]). The first judge, in a proceeding lasting five minutes, was in doubt as to the applicability of section 47 to sale, and continued the case for three months. A new judge at the next appearance also did not know and continued the case for three weeks to seek an answer. At that point a third judge entered the case, who also did not have the answer.

Ignorance of the law was reflected in the failure of some judges to notify defendants (particularly those charged with non-opiate offenses) of their right to be examined for drug dependency, and to a lesser extent, in denials of defendant requests for treatment. However, neither defect appears to have greatly influenced outcomes. Nearly every defendant had counsel at or shortly after his first court appearance.¹⁸⁶ Unless the attorney was also ignorant of the law, the judge's failure to notify the defendant could be rectified by the lawyer, who presumably, would discuss the option with the defendant. Similarly, the lawyer of an eligible defendant requesting treatment was available to inform the judge and the defendant of the law's options at the treatment stage.¹⁸⁷ Knowledge deficiencies, however, may have reinforced the negative attitudes toward the law,¹⁸⁸ and thus indirectly influenced judicial decision-making. On the whole, however, we conclude that judicial ignorance had only a slight effect on defendant outcomes.

2. ATTORNEYS

Attorneys learned of the law from legislative advance sheets, newspaper publicity in December 1970, and from informal discussion with or observation of other attorneys. Some attorneys attended a 1-day conference on the law in December 1970¹⁸⁹ and two bar journals published synopses of the law.¹⁹⁰ The public defender agency distributed a memo to its attorney¹⁹¹ but held no workshops or seminars aimed at developing understanding and strategy.¹⁹²

Attorney understanding of the law varied widely, reflecting the absence of formal supplementary channels of communication and the differential motivation among practitioners to familiarize themselves with new procedures. A few lawyers had a detailed working knowledge of the law, and even developed contacts with psy-

chiatrists and treatment facilities. The majority, however, including public defenders who were in court daily, misunderstood key provisions. The scope of eligibility, for example, was unclear to many lawyers.¹⁹³ Common misconceptions were that the law could not be used for sale offenses, that only first drug offenders were eligible, and that only heroin addicts were covered.¹⁹⁴

Attorney ignorance, although not susceptible to statistical measurement, does appear to have lowered the frequency of examination and treatment. We attribute the low examination request rate by defendants in part to attorney unfamiliarity with the potential benefits of pre- or post-trial treatment, and thus their failure properly to advise defendants of their options.¹⁹⁵

Attorney ignorance also explains why only one of eight defendants who qualified for mandatory diversion¹⁹⁶ had prosecution stayed, and why four of the eight defendants in this group were tried and convicted. Since the pre-trial treatment available for those defendants is so clearly desirable, it is inconceivable that a knowledgeable attorney would advise a client to risk conviction, and as occurred in one case, imprisonment.¹⁹⁷ The lapse here suggests that attorney ignorance prevented other eligible defendants from requesting treatment.¹⁹⁸ Better understanding of the law among the criminal bar would have increased, to a small but significant extent, treatment outcomes under the law.

3. DEFENDANTS

Defendants learned of the law from the court, probation officers, and their attorneys. While the court notified the defendant in most cases of a right to an examination, the form, tone, speed, and content of the notice sometimes confused the defendant or inaccurately

The case was continued for another week. By then, the third judge had determined that diversion was possible, and granted the defendant's request.

186. Only 9 of 310 defendants in the sample on whom we have information concerning attorney, had no attorney.

187. Lawyers play an important function in educating judges about new law and about law relevant to the case at hand.

188. See notes 208-222 *infra* and accompanying text.

189. See text accompanying note 256 *infra*.

190. See Cohen, *The Drug Law of 1969*, 14 BOSTON B.J., Dec. 1970, at 9; Kleeman & Posner, *The Comprehensive Drug Rehabilitation and Treatment Act: Treatment in Lieu of Prosecution*, 56 MASS. L.Q. 171 (1971).

191. This memo was drafted by Mark Cohen, Esq., who, as an assistant attorney general, had helped draft the statute.

192. An instructive contrast was the effort of the Public Defender Service of Washington, D.C. to develop defense strategy in cases arising under a preventive detention statute. BASES & McDONALD, PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS 112-121 (

193. Newspaper reporters contributed to the knowledge problem by inaccurate reporting of the law's provisions. In a lengthy article on the law shortly after passage, which we assume informed many persons of the change, the impression was clear that only first offenders were eligible. See Knox, *State's New Drug Law is Not Considered a Cure-all*, Boston Globe, September, 14, 1969, at 38, col. 1.

194. In interviews many judges stated that lawyers had a poor knowledge of law.

195. A more significant factor was the few real incentives that examination offered to defendants. See notes 223-235 *infra* and accompanying text.

196. See MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972).

197. The willingness of these defendants to undergo treatment is suggested by their consent to examination.

198. No inconsistency necessarily exists between defendants being eligible for treatment, and attorneys unaware of treatment options. A different attorney might have handled that part of the case, an examination may have been requested for delaying purposes, or the attorney may have lacked sufficient knowledge to make an informed decision even though he advised the defendant to request an examination. One attorney interviewed, who displayed an ideological preference for treatment, thought all treatment programs were ineffective.

conveyed to him the choices before him.¹⁹⁹ Even with more thorough explanations, the use of words like "commitment" and "in-patient facility" were likely to frighten defendants. As the *Miranda* experience shows, a full explanation of rights by one perceived as an adversary does not enable a defendant to exercise his rights, even if he is intelligent, alert, and understands what is being said.²⁰⁰ Where the explanation is incomplete or distorted, and the defendant is uneducated or dazed, the defendant may not even understand what rights are to be exercised.

Unlike the *Miranda* situation, however, notification deficiencies could be cured by advice of counsel,²⁰¹ even if the defendant had already waived examination or the time period for election lapsed.²⁰² Defendant knowledge thus depended heavily on his lawyer's familiarity with the law and its benefits, and his willingness to discuss them with the defendant. As discussed above, attorneys did not always fully convey the alternatives to defendants. Thus, some defendants who would otherwise have opted for examination and treatment were never fully informed of the law's options.²⁰³

B. Insufficient Treatment Facilities

Lack of examination and treatment facilities does not explain the infrequency of treatment in the four courts studied.²⁰⁴ Courts 1 and 2 had full-time court clinics that easily screened defendants,

199. The judge, clerk, or probation officer might notify the defendant of the right to an examination. Some read from a typed card, others paraphrased the words of the statute.

200. The Washington, D.C. study of *Miranda* found that 40% of defendants who were informed of and understood their right to remain silent gave statements to the police, and over one-third of the defendants notified of the right to free station-house counsel rejected it. See Medalie, Zeitz, and Alexander, *supra* note 176, at 1372-74. Even more revealing is the behavior of Yale University professors and students, presumably an educated group, when asked by the FBI, and warned of their rights, to answer questions about draft resisters. See Griffiths and Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 311-13 (1967).

201. Probation officers may also help the defendant understand the right. In Court 3 one probation officer was particularly solicitous of explaining carefully to the defendant the options of the law. The relatively high frequency of exams in that court is partially explained by this fact.

202. All judges interviewed acknowledged a willingness to permit a defendant who had waived or failed to elect examination within the 5-day period to be examined.

203. While no firm basis for estimation is possible, it is unlikely that more than 15% of defendants were affected by attorney ignorance.

204. While certain courts had problems in locating facilities in the first months of the law (see text accompanying notes 86-93 *supra*), the larger courts with high caseloads usually had access. Since the diversion rate remained constant (see text accompanying notes 171-72 *supra*), even after facilities were fully available, lack of treatment programs does not account for the relative disuse of the law throughout the state.

sometimes within an hour. Court 4 had a part-time clinic, with a psychiatrist available two days a week. While Court 3 had no clinic, the presiding justice arranged for defendants to be examined at the clinic in a contiguous court. If anything, the examination resources of the four courts would have tended to increase the number of exams requested.²⁰⁵

Treatment facilities were also generally available. The Boston area had a rich array of in- and out-patient treatment modalities on which the courts could draw.²⁰⁶ In Courts 1, 2 and 4 many of these facilities were located in the community. Courts 1 and 4 operated out-patient therapy through the clinic and probation departments. In addition, a judge in three of the four courts assigned responsibility for locating and coordinating treatment facilities to a key person in the court structure (a probation officer in Courts 1 and 3, the director of the court clinic in Court 2). These persons informed judges and defendants of available resources, and created an administrative framework for smooth functioning of the law.²⁰⁷

Compared to courts in rural and western areas of the state, the courts studied had ample resources, even in the first months of 1971. Whatever problems existed lessened over time as more funds were appropriated, facilities licensed, operating procedures arranged with treatment programs, and judges grew aware of the resources. We conclude that lack of resources had no effect on the outcomes in the courts studied.

C. Judicial Attitudes

Judicial attitudes, while generally critical and sometimes hostile toward the law, had a small but important effect on defendant outcomes. As noted above,²⁰⁸ 84 percent of defendants eliminated themselves from pre- or post-trial treatment by their failure to request examination, a decision unaffected in nearly all cases by the judge's attitude toward the law.²⁰⁹ Almost half of the examined

205. One judge in Court 2 as a matter of course referred all defendants whom he suspected of being addicts to the court clinic for examination. The 6-8 week delay for exams in Court 3 led several defendants who were not serious about treatment to be examined.

206. We do not suggest that a suitable program was always available the same day. On the whole, however, with patience and a minimum of effort, a defendant could find a treatment program.

207. This included frequent communication between the court and the program with regard to availability, whether the defendant was accepted by the program, and his progress in the program. The courts were especially concerned with being informed of when defendants terminated treatment early. See Robertson, *supra* note 15, at 360-61.

208. See Figure 2 *supra*.

209. We found no case in which a defendant was deterred from requesting examination because of anticipated hostility and higher penalty from the judge, nor were examinations so disruptive that a judge would be likely to be offended by a request. Failure to notify defendants does not

defendants²¹⁰ were found ineligible by psychiatrists.²¹¹ With the remaining 9 percent eligible for treatment, judicial attitudes towards drugs and the law largely determined whether defendants received pre-trial treatment, or treatment at all.

Judicial attitudes toward the law fell into two distinct groups. One group was very hostile and disinclined to use the law.²¹² These judges sat in busy courts in high crime areas, and were the least knowledgeable about specific provisions. Sometimes they neglected to notify defendants of the right to an examination, or strictly construed treatment provisions. They regretted the loss of the Chapter 111A facility at Bridgewater,²¹³ and criticized the new unlocked treatment programs. To them the law was "a mess," "rotten," "the worst law ever enacted," and "a liberal concoction dreamed up at the statehouse."

The second group was mildly disapproving of the law, but disposed to work with it. They were younger than the first group, had less experience on the bench, and were situated in communities with lower crime rates. While they were generally knowledgeable about its provisions, they too were dissatisfied. Rather than providing a new tool for meeting the growing problems of drug abuse and crime, the law appeared to make their job more difficult. Bridgewater was closed, and many of the new programs were not immediately available. Furthermore, the emphasis on addict consent appeared to tie their hands—"We can't treat those who need it, and they don't choose treatment."

Three aspects of the law provoked hostility or criticism among judges. One was a perceived lack of examination and treatment facilities. Most judges, particularly in courts with large caseloads, expected addicts to overload court clinics and the few treatment facilities available,²¹⁴ leading to delay or release of dangerous offenders who would commit more crime. A second problem was elimination of the secure in-patient facility at Bridgewater, and the substitution of privately-run facilities, none of which could prevent defendants from walking out.²¹⁵ The judges viewed commitments

appear to have prevented many defendants from being examined. See notes 181-203 *supra* and accompanying text.

210. See text preceding note 248 *infra*.

211. Under the law the judge determined on the basis of the examination report whether a defendant was a drug dependent person who would benefit by treatment. See MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972).

212. This group was found in Court 2, and to a lesser extent in Court 1 and 4. Judges from Courts 1 and 3 comprise the second group.

213. Technically, Bridgewater was still available for commitments to penal facilities. However, it was not a treatment facility for purposes of commitments under MASS. GEN. LAWS ANN. ch. 123, §§ 47, 48 (Supp. 1972).

214. Ironically, as this study shows, the threat was a hollow one.

215. Treatment facilities were required to inform the court if the defendant terminated treatment before discharge at the end of the commitment

under the law as tantamount to outright release, and expected most defendants to walk out of the facilities in a few days or weeks, and soon be back in court on other charges.²¹⁶

A third source of concern was the expectation that procedural and paperwork requirements of the law would disrupt well-established court routines. Like many lower criminal courts, the district courts routinely dispose of a large number of cases, sometimes at the expense of legal formalities and due process niceties.²¹⁷ The elaborate provisions for notifying addicts, continuing the case while an examination is considered or carried out, and the new forms to be signed and filed at every step, threatened to slow down the disposition of criminal cases. In Court 3, for example, a request for an examination entailed an automatic continuance of 6-8 weeks. The cases of addicts who were committed to pre-trial treatment might linger on for two years. If they terminated treatment prematurely, witnesses might be lost or evidence become stale.

These attitudes had special significance in light of district court judges' role definition as community protectors. Recent increases in crime rate and drug use intensified this conception. Many of the judges saw themselves as the defender, if not the last bulwark, of the community against ever increasing crime,²¹⁸ drug addiction,²¹⁹ and deterioration of the city. As Hogwarth's research on sentencing suggests, the judges operated by informal rules of thumb based on the charge, defendant's record, and underlying penal philosophy.²²⁰ These rules screened out conflicting information and enabled judges to dispose of cases with a minimum of time and psychic dissonance. Strong, often rigid, feelings about drugs reinforced these rules, particularly where the drug was heroin and the charge sale. This left little room for considering the advantages of treatment and diversion in particular cases.²²¹

ment period. MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972). Some judges felt they could not trust the programs to do so. Cf. Boston Globe, Aug. 8, 1971, at 27.

216. At this point in the interview they would recount incidents in which they had given defendants a "break," only to have them walk out of the program and be brought before the judge on new charges.

217. See S. BING & S. ROSENFELD, *supra* note 119.

218. District Court adult complaints quadrupled in four years, from 5,000 in 1968 to 24,022 in 1971. Compare Executive Secretary, Twelfth Report to the Justices of the Supreme Judicial Court (1968), with Executive Secretary, Fourteenth Report to the Justices of the Supreme Judicial Court (1971).

219. The data supports this perception to a certain extent. Twenty-seven percent of defendants were charged with a non-drug charge as well, a 6% increase over 1970. In Court 2 the number of defendants with non-drug charges increased 10% in 1971. However, only 12% of all defendants were also charged with a non-drug property crime and only 4% with a crime involving violence.

220. See J. HOGARTH, SENTENCING AS A HUMAN PROCESS 100-101 (1971).

221. A judge in Court 2 recently set bail of \$1,000,000 on a 77-year-old man and his 27-year-old daughter charged with possession of heroin with

The effect of these attitudes appears in the judicial response to requests for pre-trial treatment. The majority of judges would not grant a pre-trial stay in the case of opiates, and almost none would if the charge were sale. As noted earlier, some judges denied that the law applied in such cases.²²² They viewed addicts as particularly dangerous persons, and the law as a device to loose them back on an overburdened community. Even if the judge were reassured that a defendant was not dangerous, or would be closely supervised, the tendency was to impose treatment, if at all, after trial rather than before.

Thus 18 persons eligible for pre-trial treatment were not diverted. Five of the eighteen were treated after conviction as a condition of probation. Two were sent to treatment facilities in prison. The other eleven were not treated at all, including six persons bound over to the grand jury and trial in the superior court. In Court 2, noted for its hostility toward the law, none of the 7 eligible defendants were treated before trial. Courts 1 and 3 diverted before trial less than 40 percent of eligible defendants requesting treatment.

Ten of the eleven defendants eligible for diversion who received no treatment were charged with opiate offenses. Four of the charges were for sale of heroin. Half of the group had four or more prior convictions. For judges with a strong sense of role as community protectors, these cases were not appealing prospects.

Judges' attitudes to serious drug cases often affected the less serious cases. In several instances, eligible defendants received no treatment at all. Five of the non-treated defendants eligible for diversion had less than three prior convictions, seven of them had no prior drug convictions, and eight of the charges were for possession or presence. Discounting two cases in which charges were dismissed, we find that 30-40 percent of the defendants charged only with possession or presence were not diverted into treatment. Similarly, of defendants eligible for either pre- or post-trial treatment, 67 percent of them were charged with non-sale offenses, and only one-third with sale. Thirty-one percent of this group were first offenders, and almost half had three or fewer prior convictions. Instead of treatment, 60 percent of the group were imprisoned or bound over to the grand jury. Although defendant and attorney variables played some role here, the data strongly suggests that

intent to sell. The judge stated that "heroin pushers" are killing scores of people every day and that to allow their release on bail "permits them to go out on the streets . . . and resume what they're doing immediately." Boston Globe, April 1, 1972, at 3, col. 7. A superior court judge called for the execution of drug pushers. Boston Record-American, July 16, 1971, at 3.

222. In a recent case illustrating these factors, the Massachusetts Supreme Judicial Court upheld the total discretion that the judge has on this decision. *Commonwealth v. Harvard*, —Mass.—, 281 N.E.2d 274 (1972).

judicial hostility toward diversion and the need for strict control affected outcomes.

We conclude that hostility toward the law and drug offenders, and skepticism about unlocked treatment facilities, prevented some judges from looking carefully at each case on an individual basis and weighing the possibility of treatment. Informal dispositional rules of thumb, aided by the informality and speed of district court proceedings, functioned as barriers to conflicting information that might necessitate a different disposition. With only 6 percent of defendants eligible for pre-trial treatment, more positive attitudes would not have measurably increased diversion over-all. However, where many defendants elect pre-trial treatment, judicial attitudes could well be determinative of impact. The lack of positive incentives for judges to divert, and the often perceived disincentives, made pre-trial treatment of eligible defendants highly unlikely.

D. Insufficient Defendant Incentives

The reluctance of defendants to request examinations and treatment explains to a large extent the ineffectiveness of the law. As we have seen, a small group (at most one-quarter of defendants) were unaware of the option and its benefits.²²³ Most defendants with or without the advice of counsel freely decided that they had little to gain from examination,²²⁴ and in some cases, much to lose. Only in a minority of cases did clear incentives to invoke the law exist. We conclude that the incentives for treatment offered by the law were insufficient in most cases to persuade defendants to invoke its procedures.

To request an examination and treatment, a defendant would have to expect a benefit otherwise unavailable to him. Theoretically, the law offered to drug dependent persons charged with drug offenses only the possibility of postponing and eventually dismissing prosecution.²²⁵ For persons with mixed charges, it offered the possibility of probation instead of prison.²²⁶ In a few cases, the benefit was admission to a special treatment unit within prison.²²⁷ In exchange for these benefits, the law required that the defendant subject himself to a possible determination of drug dependency, and produce the motivation to enter and stay in a treatment program.

Defendants, however, did not always perceive these options as benefits.²²⁸ In many cases, the benefits could be obtained by

223. See notes 199-203 *supra* and accompanying text.

224. Cf. Medalie, Zeitz, and Alexander, *supra* note 176, at 1376; *Interrogations in New Haven: The Impact of Miranda*, 1519, 1542 (1967).

225. See MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972).

226. *Id.* § 49.

227. *Id.* § 48.

228. Defendant perceptions of benefit here contrast with the general

other means. In some instances, the condition of receiving the benefit outweighed its worth. How the defendant perceived and weighed the benefits the law offered depended on his perception of his drug use, the need for treatment, the utility of treatment, the seriousness of the charge, previous record, chances on the merits, the effect of criminal conviction, and expected disposition in the case. In turn, these considerations were affected by personality, lawyer, enforcement priorities, and the sentencing practice of the district courts.

For the majority of defendants in the sample studied, the possibility of treatment in lieu of prosecution or sentencing offered little attraction. The worst drug involved in the majority of cases was a non-opiate.²²⁹ Over 85 percent of drug charges were for unlawful possession or presence.²³⁰ The expected disposition for many of these charges was as good if not better than could be obtained by invoking the law.²³¹ The requirement of treatment had no appeal, and was in fact a disincentive for defendants who were not drug dependent, were unwilling to accept their dependence, or were reluctant to enter treatment. Furthermore, dependent and non-dependent defendants alike perceived the required determination of drug dependency as more stigmatic than conviction.²³² Examination statistics confirm this pattern. In Court 4, where over 80 percent of the charges involved non-opiates, and continuance without a finding was a frequent disposition, no defendants were examined. While a higher percentage of opiate users in all courts (24%) requested examinations than non-opiate users (8%), the overwhelming majority of both groups waived examination. Even opiate users, who might be thought to be drug dependent and attracted to treatment, rejected examination three out of four times. Given the weak quality of heroin available in the Boston area, and the many occasional users of heroin, it is likely that a large portion of opiate users who rejected exams were not truly dependent (although in danger of becoming so). Lawyer interviews confirmed that nearly all marijuana and many heroin users saw no point in requesting an examination because they did not consider themselves dependent, they wanted to avoid the adverse

benefits from court employment projects, where the defendant is provided a job—something he readily agrees he needs. See note 14 *supra*.

229. In 1970, 40% of the offenses involved opiates as a worse drug; in 1971 39% did.

230. The worse charges in each year were as follows:

1970: Sale—10%; possession—70%; presence—20%.

1971: Sale—20%; possession—62%; presence—18%.

231. A charge of possession or presence could be dismissed, placed on file, continued without a finding, or in some cases, given probation. Dispositions, of course, varied with the judge.

232. A similar fear kept many British addicts from procuring heroin legally from government sources. See N. ZINBERG & J. ROBERTSON, *DRUGS AND THE PUBLIC* 135 (1972).

consequences of such a designation, or thought they would avoid conviction or jail anyway.

Where the defendant was drug dependent, court practices or personal considerations often weakened the incentive structure of the law. For non-sale offenses, a jail sentence was likely to be imposed only after several convictions.²³³ A defendant might be more willing to undergo probation or even a short jail sentence rather than abstinence and the rigorous regime of a synanon-type treatment program.²³⁴ Or a defendant ready to enter treatment might be reluctant to do so under court supervision if a disposition allowing him to enter treatment outside the criminal process were possible. Sometimes the type of program and conditions of treatment deterred eligible defendants. Intensive encounter group therapy in a drug-free setting was less attractive than a methadone maintenance program: consent might hinge on the availability of the latter. In addition, the law requires drug dependent persons who are addicts to be committed to in-patient facilities for up to two years. If treatment meant loss of freedom, defendants were less likely to choose treatment.

With serious charges, or the likelihood of jail, the benefits of the law become more attractive. More defendants charged with sale (25%)²³⁵ requested examination than those charged with possession or presence (15%). For defendants with up to four convictions, the longer the record, the greater the likelihood of examination. With very long records (more than four convictions) the exam rate drops, presumably in response to the hesitancy of judges to consider a treatment outcome in serious cases.

The range of variables prevent assessment of the effect of each factor on the defendant's decision. The available statistics and interviews, however, indicate that the paper incentives of the law provided in reality few benefits to defendants which were otherwise unavailable in the court setting. Incentives did exist for persons with long records and serious charges, which usually included opiate users, and they elected examination and treatment more often. In those cases, however, judges seldom granted treatment requests and rarely gave pre-trial treatment. In such a system, defendants with very long records did not even bother to request examination.

The incentive structure influenced to a lesser extent the percentage of eligible defendants who requested treatment. While most defendants would not request examination unless seriously

233. This observation is confirmed by interviews with defense lawyers.

234. District court jail sentences are usually to county Houses of Correction. The maximum term is two and one-half years and parole procedures release many defendants in 3-6 months.

235. The difference, however, was not statistically significant. See note 160 *supra* and accompanying text.

considering treatment, a small group of defendants, particularly in Court 3, sought examinations for purposes of delay. Others may have originally considered treatment, but ultimately decided against it—motivation may have shifted, a suitable treatment facility may have been unavailable, or a non-jail disposition may have appeared more certain. The date does not permit an accurate estimate of the influence of defendant incentives on treatment requests. We suggest that in some cases it may have been important, though judges' attitudes were likely to be the key determinant at that stage.

E. Eligibility Requirements

The law's definition of who was eligible for pre- or post-trial treatment substantially reduced the frequency of treatment outcomes. Although liberal in some respects,²³⁶ the eligibility criteria were actually quite restrictive. To qualify for treatment, a person must be drug dependent and likely to benefit from treatment.²³⁷ For pre-trial treatment, he must also be charged only with drug offenses.²³⁸ As we have seen, these requirements created a funnel effect that excluded nearly all defendants from pre- or post-trial treatment.

The requirement of dependency and benefit from treatment follows from the law's assumptions about drug use and the role of the criminal law. These assumptions are that non-medical drug users are *ipso facto* sick or mentally ill, and need treatment. It also assumes that criminalization of drug use is dysfunctional when it punishes such persons, but is justified when it provides treatment. The policy solution is to use the law to channel defendants into treatment, either before or after trial.²³⁹ Needless to say, the failure to rehabilitate or treat drug users has been a major drawback of drug policy.²⁴⁰ But other costs, such as diversion of police and court resources, police corruption, black markets, abusive police practices, reduced privacy, alienation and stigmatization of de-

fendants, reduced respect for law, and addict related crime, are equally serious and demand recognition.²⁴¹ Viewing the problem solely as one of treatment versus punishment ignores altogether the effects of criminal sanctions on the great number of drug users entering the criminal process who are neither drug dependent nor would benefit from treatment.²⁴²

The exclusionary effect of these restrictions is obvious in the relatively few examination requests, the examination results, and the number of defendants with mixed charges. Only 16% of all defendants requested examinations. Even opiate offenders waived examination three times out of four. Of defendants examined, only half were found to meet the dependency and benefit restrictions. These results suggest that a majority of defendants before the courts are not drug dependent, or if they are, want to avoid the stigmatizing label "drug dependent person".²⁴³ Furthermore, only defendants meeting this requirement and charged with drug offenses qualify for pre-trial treatment. As Figure 4 indicates, this latter condition disqualifies at the start one-third of the defendants before the court. Absent those restrictions,²⁴⁴ we conclude that

241. See generally J. FORT, *THE PLEASURE SEEKERS: THE DRUG CRISIS, YOUTH, AND SOCIETY* (1969); J. KAPLAN, *MARIJUANA: THE NEW PROHIBITION* 21-48 (1970); A. LINDESMITH, *THE ADDICT AND THE LAW* (1965); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 332-42 (1968); N. ZINBERG & J. ROBERTSON, *supra* note 232, at 201-41; Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549 (1968); Rotenberg & Sayer, *Marijuana in the Houston High Schools: A First Report*, 6 HOUSTON L. REV. 759 (1969).

242. Given the high percentage of drug defendants charged with marijuana offenses, note 229 *supra*, it is likely that 60-75% of drug defendants are in no way dependent.

243. See the discussion in the text preceding note 233 *supra*.

244. A pre- and post-trial treatment program for drug-related offenses is easily administered without a formal finding of dependency. One alternative is automatic pre-trial diversion of all persons charged with minor drug offenses, such as possession and presence of marijuana. The category might also include first opiate offenses. No examination or treatment would be required, although a special probation or social worker could give counseling, treatment information and encourage voluntary treatment. On our statistics, over one quarter of the drug caseload would be easily diverted, with many persons still seeking treatment. Alternatively, or in conjunction with automatic diversion of minor drug offenses, examinations could still be required in more serious cases, without however, a formal determination of dependency. Or, all persons who by affidavit state that the crimes charged are drug-related and who will seek voluntary treatment may be treated before or after trial, in lieu of prosecution or sentencing. Other alternatives are possible. The crucial point is that less restrictive, or self-executing eligibility criteria would greatly expand the class of treated defendants. Thus, the impact of diversion statutes depends to a great extent on the eligibility requirements of the law. The diversion program in the Philadelphia Court of Common Pleas, where over 60% of eligible defendants are diverted before trial, demonstrates the workability of more flexible criteria. See Note, *Addict Diversion*, *supra* note 13, at 678 & n. 80.

236. See note 66 *supra*.

237. MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972).

238. *Id.* This restriction is particularly troubling because it provides policemen with the opportunity, through adding one additional non-drug charge, to determine the choices open to defendants and judges. In addition, its rationale is dubious: a minor offense, such as drunkenness, or an offense of which the defendant is innocent, prevents pre-trial diversion. Robertson, *supra* note 15, at 342.

239. This position was articulated by an assistant attorney general who helped draft the law:

[T]he sole legitimate purpose served by these laws is to rehabilitate those persons who suffer physical and emotional problems in connection with their use of drugs. This purpose is most effectively served if certain of the persons arrested for violation of the drugs laws are encouraged to voluntarily apply for admission to a drug treatment program.

Cohen, *supra* note 190, at 14.

240. See N. ZINBERG & J. ROBERTSON, *supra* note 232, at 212-13.

treatment outcomes would have dramatically increased.²⁴⁵

F. Discretion

Another factor reducing the frequency of diversion and treatment was the discretionary nature of the treatment decision. Both defendant and judge had to agree on a pre- or post-trial treatment disposition.²⁴⁶ In addition, the examining psychiatrist had broad leeway in deciding whether defendants were drug dependent and likely to benefit from treatment.²⁴⁷

The exercise of this discretion contributed significantly to the findings that 16 percent of defendants requested examinations, 50 percent of those were found not to be drug dependent, and only 4

245. For example, if the 6% of the defendants treated post-trial had been treated in lieu of prosecution, the diversion rate would be 8%—a clear difference from the previous year. Ease of diversion might also attract defendants who did not otherwise elect examination because of weak incentives.

246. MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972). The only exception was in cases of first drug offenses not involving sale. *Id.* For a discussion of the ambiguity of the meaning of sale, see Robertson, *supra* note 15, at 369-70.

247. The psychiatrist had to decide whether the person was "functioning effectively," and if not, whether the failure to do so was caused or resulted in the use of a dependency-related drug. See MASS. GEN. LAWS ANN. ch. 123, § 47 (Supp. 1972). With no criteria for determining this, the psychiatrist's own views could be influential. However, it is difficult to ascertain whether the disparity among courts in percentage of examined defendants found to be drug dependent is the result of differing attitudes toward drug use and criminal sanctions, or the populations being examined. The relatively high percentages of examined defendants found to be non-dependent, in Court 3 (37%) and Court 2 (50%) may be due to non-dependent defendants choosing an exam for delaying purposes and the practice of one judge in Court 2 to send all suspected addicts to the clinic for examination. On the other hand, interviews revealed a marked difference in perceptions of drug dependency among psychiatrists in three courts in which defendants were examined. In Court 1 there was a clear bias toward non-criminal treatment of all drug offenses, and a willingness to consider some marijuana use as dependent. While the psychiatrist in Court 2 had liberal leanings, the seriousness of offenses and social problems in that court led to perceptions of many being not worth their time. In Court 3, the psychiatrist appeared to have no strong feelings about removing drug offenses from the process, and seemed to apply more rigid, objective criteria. Some support for attitudinal effect is found in the relative frequency with which marijuana (100% in Court 1, 25% in Court 2, and 0% in Court 3) and opiate (90% in Court 1, 69% Court 2, 92% Court 3) users were found to be dependent. Thus, while psychiatrists were less likely to be hostile toward the law and its purposes, they had total discretion at a key juncture in the screening process. The evidence here suggests that if anything, favorable attitudes produced more treatment than would otherwise have occurred. A possible problem, of which we found no evidence in our sample, was that of drug dependent persons being found not eligible by psychiatrists. In such a case the law provides for a second examination. See generally Robertson, *supra* note 15, at 350.

out of 22 defendants eligible received pre-trial treatment. Restricting discretion would substantially increase treatment.²⁴⁸

As with eligibility criteria, an inaccurate assumption about the criminal justice system explains the discretion frustrating the statute's goal. The assumption in this case concerns the means selected to achieve statutory goals.²⁴⁹ The drafters assumed that providing judges, lawyers, and defendants with the option of treatment would reorder the priority they gave to treatment, and lead them to choose it in most cases. The idea, however, that defendants will elect examinations and treatment, lawyers will so advise them, and judges will divert eligible defendants ignores the dynamic interplay of motivation, attitudes, tactics, knowledge, and role conception that characterizes decisionmaking in the criminal justice system.

Offering a drug addict treatment in an in-patient facility is no incentive if he will receive probation anyway. Nor does a legislative imprimatur alone overcome judicial perceptions of community needs and the evils of drug use. As we have seen, legitimating or authorizing, but not mandating a diversion decision allows subjective considerations to frustrate the purposes of the law. Unless discretion over the diversion decision is reduced, diversion statutes will affect few defendants, and have slight impact throughout the system.

G. Lack of Constituency

A final cause of the law's limited effectiveness was the absence of an organized constituency to monitor implementation and

248. The most promising change would be eliminating, in some or all cases, judicial discretion to withhold treatment. As we have seen, only 4 of the 22 persons eligible for pre-trial treatment were actually diverted—a result explicable in part by the judge's power to refuse treatment. Expanding the class of defendants beyond first drug offenses not involving sale who had to be diverted would increase the law's impact, by negating the influence of subjective or hostile judicial attitudes. The definition of this class would depend on decisions made about eligibility. See note 244, *supra*.

The other alternative—reducing defendant discretion—might also increase the frequency of diversion and treatment. Automatic pre-trial diversion, without a treatment requirement, clearly would, although defendants who wanted to proceed on the merits should have the option of doing so. Mandatory treatment, however, poses serious due process and policy questions. Overcoming the due process objections is no guarantee that widespread treatment will occur. In New York, dependent addicts refusing treatment can request a jury trial on the issue. The delay, difficulties of proof, and undesirability of available treatment lead many defendants to resist compulsory treatment. Thus in N.Y. few defendants are treated, even under a mandatory scheme. See Criminal Commitment, *supra* note 138, at 12. Given the motivational needs of effective therapy, the Massachusetts requirement of defendant consent seems a wise policy choice not to be scrapped merely to increase treatment or diversion.

249. See generally Jones, *supra* note 10, at 333.

ratifies those steps already taken, but it forces or hurries society along with regard to the steps not yet taken.³¹³

In highly emotional areas such as societal definitions of crime and morality, the directive power of law is especially limited. When change occurs, it usually ratifies value shifts that have already occurred in the body politic. Rarely does enacted law re-structure societal relations or shift value priorities of dominant groups. Social forces outside the law work revolutions. Law acknowledges the new order once it has arrived.

The limited impact of the Massachusetts statute is, in the final analysis, explained by the reflective nature of law. To have had substantial impact, the law would have had to divert and treat many defendants. This goal required eliminating judicial discretion, expanding eligibility requirements, and acknowledging defendant responsibility—measures which in moving toward decriminalization, run directly counter to prevailing assumptions about drug use, crime, and the need for strict controls. Although both intended and perceived as a liberal treatment statute, the law actually retained most features of punitive controls,³¹⁴ and hedged its novel features with such severe restrictions that they had little room for impact. The failure of the law was predictable. Laws do not get passed, and if passed cannot be implemented, where they conflict with strong attitudes of the majority. The closer to decriminalization, the greater the impact of diversion laws. Yet the nearer to decriminalization, the less likely is its enactment and implementation.

Thus there are limits to legal effectiveness:

There are things which cannot be set right by application of the force of a politically organized society, and there are others which cannot be set wholly right that way. Such further remedies as are needed must be found in some other agency of social control.³¹⁵

Our lawmakers may not know enough about a problem or enough about law to make law work. Or sufficient incentives, if they exist, may be rejected by the lawmaking process. Finally, some behavior does not change, however strong the incentives.³¹⁶ Rec-

ognizing that law is not omnipotent, however, may be the first step toward effective policy. It will force attention first to the question of whether any law will alleviate the situation; second, whether a workable law can be passed and implemented; and third, whether an unworkable law should be passed at all. Where a change deviates too much from the status quo, or is not buttressed by enforceable incentives, the small probability of impact may be offset by substantial costs. Consideration of non-legal alternatives is then in order. Everything need not be attained by law. Some things cannot be. Others will not be. To optimize legal impact, we must honor the limits of law.

QUESTIONS

1. Robertson and Teitelbaum subtitle their article "A Case Study in Search of a Theory." Could they have written their article without some theory in the back of their minds? Would you restate that (unacknowledged) theory? (Recall that theory consists of methodology, perspectives and categories.)
2. Consider the various sets of categories that we have discussed. Using each of these, how would you analyze the Robertson and Teitelbaum findings?

313. Friedman, *Law Reform in Historical Perspective*, 13 *ST. LOUIS U.L.J.* 351, 363 (1967).

314. Only persons charged with drug offenses could be diverted prior to trial; judicial discretion was broad; and drug dependent users were still subject to arrest. See *MASS. GEN. LAWS ANN.* ch. 123, § 47 (Supp. 1972).

315. R. POUND, *supra* note 277, at 78.

316. An interesting case study that illustrates these limits is the Soviet attempt in the 1920's to revolutionize traditional Central Asian Moslem peoples by employing law to alter the status of women. See Massell, *Law As an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia*, 2 *LAW & SOC'Y REV.* 179 (1968). See also Dror, *Law and Social Change*, 33 *TUL. L. REV.* 787, 800-802 (1959) (examples from Turkey and Israel).

changing potential of law and methods to optimize it. The state of the art, however, has hardly progressed beyond conjecture.³⁰³ Often legislators ignore the little that is known, falling back on traditional notions, such as the assumption that negative sanctions alone affect behavior in direct proportion to their severity.³⁰⁴ As intelligence in these areas increases, lawmaking will become a more refined and effective tool of social policy.

Another obstacle to legal impact is the political limitations on enacting incentive structures sufficient to induce the desired behavior. The fault lies less with the proponents of change than with the realities of the lawmaking process. The clash among interest groups for new law is usually also a clash over whether the law if passed will actually affect behavior. Legislative compromise often rests on removing teeth from a proposal—substituting persuasion or voluntary compliance for coercion and mandatory requirements.³⁰⁵ Enacting a fully effective law may be institutionally or politically impossible, even where desired. Thus the struggle over substantive content—e.g., whether to outlaw pollution by factories—may be less important than the struggle for enforcement mechanisms—e.g., whether to allow private suits to enforce the anti-pollution law.³⁰⁶ Beyond identifying techniques for optimizing impact, some method must be devised to assimilate those techniques into all new law.³⁰⁷

Even if fully effective in changing behavior, legal change may have little societal impact, even in the short run, because of limitations on substantive content of law. The process of making law constrains legal output toward the status quo, with most law reflecting or expressing the attitudes, values, and power relationships that dominate the social order at any time. An extreme version of this truth is Marx's view that all law reflects class interests and the existing modes of production, and therefore has no role to play in altering the material bases of society.³⁰⁸ A similar view accounted in part for the Supreme Court's reluctance to eliminate

segregation in *Plessy v. Ferguson*,³⁰⁹ and has deterred sociologists for many years from recognizing the social change potential of law.³¹⁰

Although the independent force of law is now well-accepted, even in Marxist societies,³¹¹ ideological features of law tend to restrict its content. The groups and interests that dominate the social and economic order also dominate the legal apparatus. Indeed, control of the legal system is one way that social power is measured. As a result, laws altering or deviating from dominant social assumptions and power relationships seldom get passed. Law usually reinforces existing power and resource allocations, initiating social change only when the dominant order is not threatened. A true change potential does exist on the margins, or in pluralistic situations where several sets of assumptions or interests vie for control. If one group musters enough strength to enact law reflecting its version of affairs, then the behavior of the defeated groups may be changed. This situation occurs frequently when attitude or opinion has begun to shift on an issue, new interest and power alignments are being forged, or powerful elites are in advance of the general public.³¹² As Professor Lawrence Friedman, a perceptive observer of the interactions of law and social change, has noted, it is at this point that the law has its greatest potential for impact—for initiating further change:

[F]resh law is a hybrid: half ratification, half real inducement to change. Formal legal change often comes at the middle point in a social process which requires a number of distinct steps for its completion. Formal legal change

309. 163 U.S. 537 (1896). The Court restated Sumner's famous dictum that "stateways cannot change folkways":

[T]he argument [of plaintiff] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N.Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. . . ." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

Id. at 551.

310. See Rose, *supra* note 281, at 475.

311. See Hildebrand, *supra* note 308, at 196.

312. The abortion issue is one instance where the power of law to change attitudes and eventually practices by legitimizing a course of action previously held immoral is evident. Of course this occurs only when the pro-abortionists become a minority large enough to have a law passed. Five years ago, for example, abortion still deviated significantly from dominant assumptions, and there was little legislative activity in this field.

303. See Selznick, *supra* note 10, at 121.

304. See Schwartz and Orleans, *supra* note 283, at 275.

305. See Graham, *Amphetamine Politics on Capitol Hill*, TRANSACTION, January 1972, at 18-20.

306. See generally Sax & Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004 (1972).

307. At the very least, laws with teeth permit policy evaluation, thereby performing an important intelligence function for the system. Since they guarantee some impact, legislatures and courts will be able to assess the utility of the law. Full enforcement of the fornication or marijuana laws, for example, would force rethinking about the wisdom of a prohibitive policy.

308. See H. BERMAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 15-24* (rev. ed. 1963); Hildebrand, *The Sociology of Soviet Law: The Heuristic and "Parental" Functions*, 22 CASE W. RES. L. REV. 157, 168-185 (1971).

appoint themselves to this function—either reinforcing the public one or fulfilling the role *faute de mieux*. In some cases private groups are needed to assure that the public agency does its job.

Without constant attention and pressure on officials obligated to implement law or alter behavior, a legal mandate might be insufficient. Someone must assure that reluctant administrators or legislators allocate funds, that the change is communicated to key actors, that an agency carries out its duties, and that responsible officials recognize problem areas and failures of services. Someone must resist efforts of the law's opponents to render it impotent. Without such groups, the law's ability to effectuate change in the face of hostile attitudes is severely limited. The regulatory agencies are co-opted by the regulated, enforcement funds are not forthcoming, and bureaucratic promises go unfulfilled.

The appropriate monitoring agency varies too widely with each situation to generalize about its precise make-up. An effective system may be a higher official, an appellate court, a police force, a citizen's right to sue, a special implementation panel, a citizen watch-dog group,²⁹⁷ Nader's Raiders, or special interest groups. Where change affects the behavior of lower officials, the duty to monitor is their superiors'. In other cases, the superiors themselves must be watched. Sensitivity to the actual situation can produce some effective alternatives, even though much depends on the activity of private groups. Often lawmakers can build monitoring mechanisms into the law. The Supreme Court, for example, through the exclusionary rule, created a system whereby lawyers and judges monitor police behavior. Legislators can fund implementation panels and committees²⁹⁸ or, in the area of consumer and environmental protection, relax standing requirements to give private citizens the right to sue.²⁹⁹ While there are limits to the formal devices available to lawmakers, accountability through periodic reporting requirements and independent evaluation would, in many areas, be a major improvement over present capabilities.

In most instances, groups supportive of the change must go beyond moral entrepreneurship and become enforcement entrepreneurs—self-appointed watch-dogs of new law. Without strong private advocates of the new law, the burden falls on lawmakers

to create public agencies, or facilitate the emergence of private ones. Congress, for example, could encourage public interest groups to play this role more vigorously by relaxing in certain cases restrictions on political activities of tax-exempt groups. A successful legal order requires that governmental and private actors share common purposes. By strengthening this partnership, lawmakers can increase the impact of legal change.

VI. THE LIMITS OF LEGAL EFFECTIVENESS

If the impact of law can be controlled to some extent by astute use of incentives, it follows that the degree of change and intensity of resistance do not adequately explain legal ineffectiveness. Certainly the scope of new law and adverse value systems of affected persons are crucial factors. But our framework suggests that their influence varies, and in many instances may be overcome if the lawmaker has identified key features of the problem, taken steps to communicate the change, structured positive and negative incentives, and built in monitoring systems. We do not suggest that a law prohibiting all sexual intercourse, to take an extreme example, would become workable, but if the goal is less ambitious, much can be gained even in the face of hostility. In the case studied, broadening the eligible class, limiting discretion, and monitoring judicial decisions would have increased diversion despite widespread hostility to the change.

However, the full panoply of optimizing devices may not be available. For one, effective lawmaking requires enormous intelligence about society and law, much of which is beyond present capabilities.³⁰⁰ One type of intelligence concerns the problem area: critical actors, the operative setting, and the impact of various behavioral changes. When lawmakers proceed without the necessary intelligence, minimal impact results. The Massachusetts diversion law, in its assumption that defendants would request examination and judges divert, suggests sources of intelligence—judges and criminal lawyers—who should have been consulted in the drafting process.³⁰¹

A second type of intelligence concerns "techniques for making increasingly reliable predictions of the effects" of legislative action.³⁰² A third type is precise knowledge about the behavior-

297. The Task Force on Children Out of School, a Massachusetts citizen group, is an excellent example of the monitoring function of a civic group. The Task Force issued a report which analyzed the implementation of legislation requiring educational and therapeutic services for mentally ill and retarded children, and documented the inaction, evasion, and bureaucratic inefficiency of the state department of mental health in meeting its statutory duty. See TASK FORCE ON CHILDREN OUT OF SCHOOL, *SUFFER THE CHILDREN: THE POLITICS OF MENTAL HEALTH IN MASSACHUSETTS* (1972).

298. See Robertson, *supra* note 15, at 368.

299. Sax & Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004-6 (1972).

300. See Jones, *supra* note 10, at 334.

301. There are, however, few institutionalized procedures for including judges in the drafting process. The collaboration cited in note 279 *supra* involved the chief justice directly or committees organized in a specific area. No drug committees existed in 1968 and 1969, nor had the district courts been as actively involved with legislation as they have become under the present chief justice. Still, it seems possible to have circulated a completed draft among a few interested judges beforehand. Defense attorneys certainly could have been consulted.

302. Jones, *supra* note 10, at 334.

We can say, however, that whatever the negative sanctions, their effectiveness depends on perceptions that the threat they pose is not a hollow one.²⁸⁹ Monitoring or enforcement systems are thus essential whenever negative sanctions are employed. Penalties backed by a specialized enforcement agency are obviously more persuasive than penalties alone. Indeed, the failure of negative sanctions to alter behavior is usually a breakdown in the system of invoking and applying penalties,²⁹⁰ whether it be antitrust, building code infractions, or marijuana use. While criminal or civil penalties are often attached to laws in traditionally non-criminal areas, legislators generally pay little attention to their possible effectiveness or to monitoring systems adequate for compliance. Where no sanctions are specified, even less thought is given to creating a workable structure of negative incentives. Thus, judges who refused defendant requests for treatment faced no adverse consequences.²⁹¹ Even overt non-compliance, such as failure to notify of examinations or grant mandatory treatment, meant at worst that a defendant could renew his request in the superior court.²⁹² Similarly, police officers and school superintendents often have little to lose through non-compliance with Supreme Court decisions.²⁹³ If an enforcement system cannot be included in the substantive provisions of a law, an alternative legal or non-legal policy should be considered.

Negative incentives are likely to be more effective when focused on a few key actors or elite groups, rather than a diffuse group of individuals.²⁹⁴ The more visible the role of those responsible for compliance or implementation, the more difficult or personally costly will be non-compliance. The task for lawmakers is to identify those key actors, impose on them the new duty, and hold them accountable. Lacking such leverage points, a new agency or structure might be created. While the drug diversion law had little effect on the courts, it did succeed in developing a novel state-wide network of treatment facilities that compared favorably with Chapter 111A—a result partly explicable by imposing responsi-

bility on an assistant commissioner of mental health rather than the triumvirate board that existed under the previous law.

Finally, positive and negative incentive structures work best if lawmakers have selected means that permit opposition forces the least scope of influence. Given the difficulty of overcoming hostility, even with the full armamentarium of incentives, we should look for ways of out-flanking the opposition. In the case of *Miranda*, requiring lawyers to be present in police stations at all times would have allowed the subjective views of policemen less sway than did a system of notification.²⁹⁵ In drug diversion laws, expanding the class eligible for mandatory diversion achieves the same end. An excellent example of successful strategy which circumvented hostility is the OEO community action program.²⁹⁶ The drafters' goal was to provide services and resources to the inner-city poor, mostly Black who had been cut out of their share of municipal services by the groups controlling city politics. Without equivalent political power, the poor had no remedy on the local level. One alternative for funnelling federal funds for education, housing, health, and jobs to the inner-city was through the existing state, city, and county political structures. But with their antipathy to the poor, the chances that the politically powerless poor would ultimately receive the services through this route was slight. The drafters did not attempt to overcome the hostility of local politicians or persuade them to support the program goals. Instead, they completely by-passed the local governmental structure by providing funds directly to community groups closely allied to the poor. While this device inspired opposition from city machines, it did guarantee the poor a degree of control and resources that would not have otherwise existed.

Numerous variations and combinations of these points exist. We suggest that lawmakers look closely at the positive and negative incentives likely to work with a given change, evaluate their costs, and so structure their operation that disincentives have the least sway possible. Traditional ideas that increasing penalties will produce effects need to be challenged, and the utility of rewards tested. If resort to negative sanctions is necessary, adequate enforcement machinery is vital.

D. Monitoring Agencies

Finally, legal effectiveness requires the existence of organizations or agencies that monitor communication and implementation processes and assure that response to the law is highly visible. The organizations might be publicly appointed—an existing agency or a new agency created for that very purpose; or private groups might

289. See Ball, *Social Structure and Rent-Control Violations*, 65 AM. J. SOCIOLOGY 598 (1960).

290. The breakdown may be due to insufficient resources, political opposition to enforcement, or different priorities in the enforcement agency.

291. They could not even be reversed. See *Commonwealth v. Harvard*, — Mass. —, 281 N.E.2d 274 (1972).

292. The trial de novo system gives the defendant a complete new trial, including the right to raise affirmative defenses anew. See note 118 *supra*. There was even some ambiguity as to whether the diversion law could be invoked upon trial de novo in the superior court. See generally Robertson, *supra* note 15, at 369.

293. See generally Dolbeare and Hammond, *supra* note 252, at 115-17.

294. See Grossman, *The Supreme Court and Social Change: A Preliminary Inquiry*, 13 AMER. BEHAV. SCIENTIST, 535, 546 (1970); cf. Dolbeare & Hammond, *supra* note 257, at 115.

295. This proposal assumes that the lawyers will in fact counsel defendants as soon as they are booked.

296. See F. PIVEN & R. CROWARD, *supra* note 271 at 256-82.

intimately affected their daily behavior.²⁷⁸ Including them in the drafting process would have built a personal commitment to the law's success.²⁷⁹ If other types of personal stakes can be built in, effectiveness is enhanced. Some judges might overcome their antipathy to change if increases in court budgets for probation officers, personnel, and space is tied to the number of defendants diverted.²⁸⁰ Given the Internal Revenue Code's success in getting farmers to refrain from growing certain crops, there is no reason why similar incentives would not work with criminal justice actors.

Another device is to single out for praise those who comply. Professor Arnold Rose once suggested that we consider special award-pinning ceremonies for persons complying with new law.²⁸¹ The expected or potential effects of the law can also constitute a benefit that will induce compliant behavior. The drug diversion law might have been widely used if treated defendants actually were cured of drug addiction. One reason for judicial hostility was the widespread belief that most addicts cannot be cured.²⁸² Judges therefore felt that using the law gained them nothing in their fight to protect the community against addict crime. Often conscience or allegiance to law itself provides the positive incentive, in that compliant or implementing behavior is felt to be morally right. Appeals to conscience, duty, morality, and professional ethics can be better utilized than has been the tendency in our secular society.²⁸³ Finally, the incentive may be merely the disposition to obey a superior. Governors are usually successful in persuading appointed officials of the desirability of certain actions. When faced with new law, commissioners, police chiefs, and chief justices could employ their personal power and prestige to induce compliance in

278. Similarly, considerable judicial resistance to a major revision of the California juvenile code was attributable to the exclusion of judges from the drafting process. This created a feeling of a law being imposed on them without their consent or advice. E. LEMERT, *SOCIAL ACTION AND LEGAL CHANGE* 132 (1970).

279. Recently in Massachusetts judges have begun to participate in the drafting of bail, juvenile, and mental health laws affecting the courts, suggesting that the lesson has perhaps been learned.

280. The possibility of "entrepreneurial exploitation" in the form of increased resources accounted for the commitment to the new procedures among certain judges in the Lemert study. E. LEMERT, *supra* note 278, at 167-68.

It should be noted that the carrot approach has its limitations. Offering cities or state agencies federal funds on the condition that they will plan comprehensively for its effective use does not always work, as the block grant under The Law Enforcement Assistance Administration program indicates.

281. Rose, *Sociological Factors in the Effectiveness of Projected Legislative Remedies*, 11 J. LEGAL ED. 470, 472 (1959).

282. Defense attorneys requesting treatment for drug addicts often find judges skeptical about the success of treatment. A common refrain is, "Once an addict, always an addict."

283. Schwartz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 300 (1967).

subordinates (assuming, of course, that they themselves have some incentive to increase compliance). With the impact-enhancing potential of positive incentives largely untapped, lawmakers would do well to consider the use of rewards in effectuating policy goals.²⁸⁴

Often, however, positive incentives sufficient to induce the desired behavior do not exist, or if they do, cannot be built into the law. If there are personal disincentives to compliance, allegiance to law itself will weigh very slightly, and resort to negative incentives to reinforce the moral suasion of law will be necessary. Political realities, the strength of resistance, and the change itself will determine what disincentives are feasible. Considerably more research and knowledge about the effect of legal sanctions on behavior is needed before accurate predictions are possible.²⁸⁵ Negative sanctions do not guarantee behavioral change,²⁸⁶ and sometimes are dysfunctional. Increasing negative sanctions alone may not work, as the history of drug laws shows.²⁸⁷ There may be costly side-effects. In certain instances, or for certain groups (such as businessmen), sanctions might be quite effective.²⁸⁸

284. Jonathan Swift commented as follows on the lack of positive incentives:

Although we usually call Reward and Punishment, the two hinges upon which all government turns; yet I could never observe this maxim to be put in Practice by any Nation, except that of Lilliput. Whoever can there bring sufficient Proof that he hath strictly observed the Laws of his Country for Seventy-three Moons, hath a Claim to certain Privileges, according to his Quality and Condition of Life, with a proportionable Sum of Money out of a Fund appropriated for that Use: He likewise acquires the Title of Snailpall, or Legal, which is added to his Name, but doth not descend to his Posterity. And these People thought it a prodigious Defect of Policy among us, when I told them that our Laws were enforced only by Penalties, without any Mention of Reward. It is upon this account that the Image of Justice, in their Courts of Judicature, is formed with six Eyes, two before, as many behind, and on each Side one, to signify Circumspection; with a Bag of Gold open in her left Hand, and a Sword sheathed in her left, to shew she is more disposed to reward than to punish.

Gulliver's Travels, 59 (Blackwell, ed. by H. Davis) 1965; Schwartz & Orleans, *supra* note 283, at 280 quoting J. SWIFT, *GULLIVER'S TRAVELS* 64 (Modern Library 1931).

285. See generally Schwartz & Orleans, *supra* note 283, at 274-276.

286. *Id.*; Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 U. SO. CAL. L. REV. 588, 624-26 (1968). See generally, Salem and Bowers, *Severity of Formal Sanctions as a Deterrent to Deviant Behavior*, 5 LAW & SOC'Y REV. 21 (1970).

287. See W. ELDRIDGE, *NARCOTICS AND THE LAW* 49-103 (1967). The empirical analysis there described demonstrates that increasing penalties for federal drug offenses had no impact on drug use or traffic. Even though inefficient, negative sanctions might satisfy other needs. See generally R. POUND, *supra* note 277, at 71.

288. See Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 217 (1965). See also Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703; Schwartz & Orleans, *supra* note 283, at 296-300.

municated. The welfare explosion of the 1960's resulted in part from the exhaustive efforts of legal service and welfare groups to communicate welfare regulations and welfare rights decisions to the urban poor.²⁷¹

We emphasize this seemingly simple point because the assumption that official publication of new law informs relevant actors, or that self-interest will motivate lawyers to keep clients apprised of legal change, so often belies reality.²⁷² The wide variation in understanding exhibited by judges and lawyers in this study suggests the inherent weakness of primary reliance on official publication and the knowledge of practitioners. Where legal change affects the public at large or persons without counsel, the problem of communication becomes even more difficult.

To improve this situation, lawmakers should directly confront the question of whether a given change will in fact be communicated to the relevant actors. If communication is unlikely or uncertain, they should consider adding provisions to the law that will enhance dissemination of the change. One alternative would be routinely to include provisions, backed by necessary funds, directing responsible officials to communicate change to lower officials and the public, to hold conferences or workshops on the law, or even to advertise in the mass media. Other options are the creation of a public agency whose sole purpose is communication or dissemination of new law on a selective basis or requiring regulatory agencies to disseminate certain laws and regulations to affected persons. The Supreme Court and state appellate courts should experiment with mailing copies of significant decisions to groups whose conduct is affected.²⁷³ For example, mailing a copy of the *Schempp* decision²⁷⁴ to all school superintendents, principals, and school board members would have confronted them with their legal obligation and made non-compliance more difficult.²⁷⁵ The impact of law may often depend on such supplementary channels of communication.²⁷⁶

271. F. PIVEN & R. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE*, 330-38 (1971). See also J. HANDLER, *REFORMING THE POOR* (1972).

272. The doctrine of *ignorantia juris* is more a fiction than reality. Knowing the law—even for lawyers—is an impossible task. However, permitting ignorance to be a defense would severely hamper law enforcement. Cf. Seidman, *supra* note 177, at 690, 698.

273. The impracticality of this idea is not as great as might appear. First, only certain decisions would be disseminated. Second, mailing lists are usually available. Third, a covering letter from the Chief Justice might lend extra persuasiveness to the already weighty packet. Social scientists and students of impact would doubtlessly compete for the honor of evaluating such a scheme.

274. *School Dist. v. Schempp*, 374 U.S. 203 (1963).

275. See generally Dolbeare and Hammond, *Inertia in Midway: Supreme Court Decisions and Local Responses*, 23 J. LEGAL ED. 106 (1970); Muir, *The Impact of Supreme Court Decisions on Moral Attitudes*, 23 J. LEGAL ED. 89 (1970).

276. Another aspect of communication is clarity and lack of ambiguity in

C. Incentive Structure

The third proposition merely operationalizes the assumptions about human behavior underlying the legal order. Central to law is the idea that men act and decide at least some of the time in response to their perceptions of the relative weights of incentives and disincentives contained in the law. Indeed, bringing incentives or sanctions to bear on behavior through the political power of government is the core, if not the defining characteristic, of the legal order. One can hardly quarrel with Pound's statement that:

to assure enforcement law must largely rely on some immediate and obvious individual advantage which it may use either to bring about obedience to the rule or to furnish a motive to others to vindicate or enforce it.²⁷⁷

From an impact perspective, the task is to ascertain what incentives will produce the desired behavior, and what techniques will assure that the incentive structure holds.

The requisite incentive level is a function of the degree of change required by the law, the actor's personal goals and interests, his respect for law as such, and his perceptions of the costs and benefits to him personally and to the community of compliance or non-compliance. The personal calculus is, in turn, dependent upon socialization, personality, values, political-cultural context, institutional support for the change, the likelihood that non-compliance will be visible, the chances that sanctions will be applied, the loss of prestige resulting from compliance, and the degree of organized and unorganized opposition to the legal change. Misperceptions, miscalculations, or irrationality may play a significant role in the personal calculus. Obviously the requisite incentive structure will vary with the law, the degree of change involved, and the resistance to the change.

The policy-maker has two techniques for increasing compliance: increase rewards for compliance or increase negative sanctions for non-compliance. Each requires intelligence about the incentive structures of particular actors, their perceptions of predicted consequences as positive or negative, and the likelihood that a set of incentives will induce the desired behavior.

Positive rewards for compliance range from financial reward, promotion, prestige, and praise to personal sense of accomplishment and the sense that the right action was taken. If the affected actors have a personal stake in the law, then they also are likely to support its implementation. For example, no judges participated in or were consulted on drafting the drug diversion law, although it

the rule that is communicated. For problems in this regard with the Massachusetts drug diversion law, see Robertson, *supra* note 15, at 368-70.

277. R. POUND, *THE TASK OF LAW* 88 (1944).

mental or symbolic purposes are mixed, analysis based on these propositions will clarify the instrumental potential of the law and suggest devices to maximize it.

A. Accurate Model of the Problem and Means

For law to succeed, the problem situation to be addressed must accurately be conceived and behavior that will alter some aspect of the perceived problem must be identified.²⁵⁹ As we have seen, the diversion law was deficient in both respects. Its roots lay in a view of drug use and the criminal justice system which assumed that most drug users were drug dependent, and that the major problem was the criminal law's emphasis on punishment. Despite the widespread acceptance of these ideas and their partial truth, they were largely inapplicable in the cases before the courts.²⁶⁰ Eligibility requirements derived from this view excluded most persons charged with drug offenses, and resulted in no increase in the number of defendants treated. In addition, the means-end relationship chosen to alleviate the perceived problem ignored the realities and basic dynamics of defendant and judicial decision-making, and was unable to overcome the non-treatment incentives animating judges and defendants. Elimination of discretionary options, particularly in the case of judges, would have greatly expanded diversion and treatment.

Inaccurate or distorted models of reality and cause and effect relations explain many cases of legal failure. The attempt, for example, to reduce traffic fatalities in Connecticut by enforcing a tougher speeding law was much less successful than the British and Scandinavian resort to breathalyzer tests and stiffened drunk driving laws.²⁶¹ Since alcohol is more closely correlated with traffic deaths than speeding, the conception of the problem and the means contained in the European laws account for their success. Similarly, the failure of *Miranda* warnings (even when given) to alter poor interrogation practices or the frequency of confessions is attributable to judicial misconception of the problem and of the means

likely to alleviate it.²⁶² Another example of the importance of well-grounded means is the disuse of the controversial Washington, D.C. preventive detention statute.²⁶³ The drafters expected the new procedures to work smoothly along the lines of ordinary bail hearings and overlooked the potential effect of zealous defense advocacy.²⁶⁴ With the Public Defender Service contesting each proceeding, preventive detention became unwieldy and time-consuming. In the first 10 months of operation it was invoked in only 20 cases, and successfully used in only 10.²⁶⁵ Finally, legislation requiring testing of all new-born infants for phenylketonuria (PKU) has had almost no impact on the disease or persons identified with it, again because the statutory definition of the problem situation and selection of remedial means has not accurately reflected medical realities.²⁶⁶

B. Communication of the Change

The second proposition recognizes the indispensability of complete and undistorted communication of new law to affected actors. Since persons unaware of new obligations cannot adjust their behavior in the required direction, an adequate communicative system is a necessary condition of legal effectiveness.²⁶⁷

Failure of communication accounts for many cases in which the promise of the new law was frustrated. The problem is particularly acute in developing nations, where law itself is a primary tool of development and yet where few communication channels exist to transmit legal change.²⁶⁸ However, even post-industrial legal systems suffer from this problem. Many police officers were not fully informed of *Miranda* requirements until several months after the decision,²⁶⁹ and many defendants did not exercise their rights because they did not know that they had them.²⁷⁰ Similarly, impact may be greatly enhanced where change has been successfully com-

259. Ernest Jones has made the same point:

[W]hether we view [laws] in terms . . . of the decision process that created them, or in terms of the decision process they are aimed at programming, we can analyze them into the component parts of a decision process. Specifically . . . the conception of a problem or problems embodied in a prescription, the value goals at which it is aimed, the means or course of action it permits, its model of cause-and-effect or probability relations between legal process and society, and the prediction the prescription implies concerning the impact of adopting, invoking, applying, and enforcing it at various levels of legal processes.

Jones, *supra* note 10, at 333.

260. See the discussion in the text following note 235 *supra*.

261. Compare Campbell & Ross, *supra* note 94, with Ross, Campbell & Glass, *Determining the Social Affects of a Legal Reform: The British "Thalysers" Crackdown of 1967*, 13 AMER. BEHAV. SCIENTIST 493, (1970).

262. The *Miranda* studies in the District of Columbia, Pittsburgh, and New Haven concur in the relative unimportance of confessions in police work. They also indicate the willingness of police to disregard Supreme Court commands. See Medalie, Zeitz, & Alexander, *supra* note 176; Seeburger & Wettick, *supra* note 19; *Interrogations in New Haven: The Impact of Miranda*, *supra* note 176.

263. 23 D.C. CODE ANN. §§ 1321-1332 (Supp. V 1972).

264. BASES & McDONALD, *PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS* 882 (1972).

265. *Id.*

266. See Swazey, *Phenylketonuria: A Case Study in Biomedical Legislation*, 48 J. URBAN LAW 883 (1971).

267. Prof. Lon Fuller suggests that publication or communication of law goes to the very heart of legality, and is a defining characteristic of a legal order. See L. FULLER, *THE MORALITY OF LAW* 105-106 (1964).

268. See Seidman, *supra* note 177, at 687.

269. See *Interrogations in New Haven: The Impact of Miranda*, *supra* note 176, at 1550.

270. *Id.*

ergender commitment among affected actors. The post-enactment efforts of groups lobbying for legal change can influence effectiveness in several ways.²⁵⁰ They can monitor official action, identify failures to implement, encourage more vigorous action, and generally make the process visible. Where neutrality or opposition to the law exists, interested groups may also persuade key actors of the merits of the change, excite commitment to its goals, or simply inform actors of its provisions. As Prohibition²⁵¹ and the school prayer cases²⁵² show, the failure of interest groups to continue action after passage of a law facilitates non-compliance.

Unlike most instances where a law of far-reaching significance is passed, no organized interest group led the fight for the drug law. Nor was any group opposed to the law (though some politicians jockeyed over the question of who would receive credit for it).²⁵³ At most, a handful of persons were involved. They succeeded when a politically powerful attorney general decided he wanted the law passed.

Nor did organized support for vigorous implementation coalesce after passage. Drug users have no public lobby and are not politically organized. Treatment programs struggled with the Division and politicians over funds,²⁵⁴ but since they drew their clientele from many sources, they had no brief advocating the judicial features of the law. While some of the criminal bar favored the law, no lawyer lobby formed. The chief proponent of aggressive implementation was the director of the Division of Drug Rehabilitation and the small staff that grew around him. Because of the gargantuan administrative burdens of developing and licensing treatment facilities and the non-legal perspective of the director, the Division was in no position to exert pressure on the courts or defendants. If anything, the Division exacerbated problems in the courts by not assisting them in implementing the law.²⁵⁵

Nor was the attorney general, who received credit for the bill, inclined to push for more diversion. Lacking authority over courtroom behavior, and with the burden of implementation shifted to other agencies, at most he could call for greater understanding and

use of the law. In the pre-implementation period he issued two opinions clarifying ambiguities in the statute,²⁵⁶ and sponsored a 1-day conference on the law with the Boston Bar Association. As January 1, 1971 approached, and the jeremiahs against the law increased, the attorney general backed off. His office convened a group including officials of the Division, probation, and the district and superior courts to draft amendments that would narrow its scope and presumably ease the problems the courts expected. The Division feared that the law would be weakened, and succeeded in forestalling amendments until the following legislative session.²⁵⁷

Conceivably, a well-organized interest group could have increased impact by publicizing the law among the public and lawyers, monitoring court practices, supporting the Division, and fighting for liberalized eligibility criteria. At the very least it could have hastened the educative process for judges and lawyers, and increased understanding, and possibly, commitment to goals. While an estimate of the resulting increase in treatment would be speculative, it is clear that without a lobby effectiveness suffered.

V. A FRAMEWORK FOR OPTIMIZING IMPACT

The Massachusetts diversion experience suggests several propositions about the conditions under which law alters behavior and initiates social change. Legal effectiveness depends on (1) accurate identification of a problem situation and selection of means which, if carried out, will in fact alter the situation in the desired direction; (2) communication of the law to affected persons, particularly to officials or elites directly responsible for its implementation; (3) a structure of positive and negative incentives sufficient to inspire the desired action and to counteract or circumvent inertia, resistance, and hostility; and (4) existence of organizations with official and non-official mandates for directing and monitoring the implementation process.

These propositions constitute a framework or model for explaining past legal failure, predicting success probabilities of future changes, and identifying measures which optimize legal effectiveness. The framework, of course, has no application to law-making which intends solely to symbolize the power, status, or morality of social groups and not directly to alter behavior.²⁵⁸ Where instru-

250. See notes 297-299 *infra* and accompanying text.

251. See generally J. GUSFIELD, *SYMBOLIC CRUSADE* (1963).

252. The failure of the school prayer cases to stop prayers in certain communities can be explained in part by the unwillingness or inability of proponents of the Supreme Court action to undertake implementing efforts on the local level. Without constant pressure for compliance, school board members and school officials could evade the issue and pretend that compliance did exist. See Dolbeare and Hammond, *Inertia in Midway: Supreme Court Decisions and Local Responses*, 23 J. LEGAL ED. 106, 115-17 (1970).

253. See text accompanying and following notes 52-54 *supra*.

254. *Id.*

255. When a courts coordinator was hired by the Division in June 1971, he found hostility to the Division difficult to overcome.

256. See 1970 OP. ATT'Y GEN. (Mass.) 791; Letter from James P. Kiernan, Assistant Attorney General for the Commonwealth of Massachusetts, to Chief Justice Franklin N. Flachsen, Dec. 29, 1970.

257. A bill was drafted and introduced in December of 1971. It clarified several points and generally simplified procedures, without altering the law's main provisions. H. (Mass.) 2897, 107th Gen. Ct., 2d Sess. (1972).

258. For a discussion of such laws see J. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1967).