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READINGS IN LAW AND DEVELOPMENT
CHAPTER XII
CONFORMITY INDUCING MEASURES AND A CASE STUDY: THE BANKRUPTCY LAW

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INTRODUCTION

Having defined the behaviour of a role-occupant that the law-maker desires, the task becomes to devise a legislative program likely to induce that behaviour at an acceptable cost-- that is, a program that lies within Government's capacity to implement. Traditionally, this introduces issues of formulating and implementing sanctions. In conditions of development, however, that word does not adequately capture the concepts necessary to deal with the question. Instead, we use here the words "conformity-inducing measures". In Part I, Section A we present some general theories of conformity-inducing measures; in Section B, we briefly catalogue the range of conformity-inducing measures commonly used in legislation in the United States. In Part II we examine the Bankruptcy Law as a problem in conformity-inducing measures.

This chapter puts forward an unexpected thesis for one that discusses theories of conformity-inducing measures. Most such theories purport to instruct the draftsman concerning the circumstances when it will become appropriate to use rewards, punishments, roundabout or educative measures to induce the prescribed behaviour, considering only the inherent nature of the particular measures involved. By contrast, we think these materials support the following proposition: Conformity-inducing measures cannot be considered in isolation, seperately from the circumstances within which the prescribed behaviour will take place. The legislator must consider not merely the prescribed

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behaviour and the conformity-inducing measures required, but those together with all the rewards and constraints that structure the role-occupant's and the implementing agency's arenas of choice.

PART I
THEORIES OF CONFORMITY-INDUCING MEASURES
A. GENERAL THEORIES

1. SEIDMAN'S THEORY OF CONFORMITY-INDUCING MEASURES

CONFORMITY-INDUCING MEASURES

After explaining existing behaviour, law-makers must use the legal order to restructure the arena of choice to influence role-occupants to behave in new and more desirable ways. Often law-makers assume that coercion alone can accomplish that objective. Myrdal argues that 'There is little hope in South Asia for rapid development without greater social discipline, which will not appear without general laws and regulations backed by compulsion.'¹ Here I discuss the inadequacy of such traditional sanctions in development and suggest an alternative schema.

I Concept of Conformity-Inducing Measures

A. The Traditional Definition of 'Sanctions'

Two core meanings pervade lawyers' uses of the word 'sanctions': Sanctions come from courts, and consist mainly of pains and penalties. Blackstone observed that 'with regard to the sanction of laws, or the evil that may attend the breach of public duties, it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather vindictory than remuneratory, or to consist rather in punishments than in actual particular rewards'.² In jurisprudence the word ordinarily refers only to punishments for breach of a rule.³ The core conception has both institutional and ideological sources. A truly autonomous legal system would clearly use courts to impose sanctions. During the nineteenth century hardly any other formal sanctioning institutions existed. Courts had virtually no capacity to order any except negative sanctions. They lacked power of the purse. They had no available administrative machinery except police, gaolers and sheriffs. Using these, they could only punish.⁴ The traditional definition found nourishment in nineteenth-century beliefs. First, if law reflected custom, and custom reflected values, then the law too must reflect values. Punishment threats should induce the occasional, badly brought up deviant to behave properly. Second, analytical positivism defined law as a command. A command differed from 'other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.' Law in this sense implied punishment.⁵

This ideology created a sort of word fetishism. No rule became

'law' unsupported by sanctions, that is, by punishment. Therefore, every law needed related threats of punishment. So deeply ingrained was (and is) this notion, that policy-makers frequently left the question of sanctions to the Parliamentary Draftsman's discretion.⁶ When Myrdal proposed coercion to cure 'soft' development, he succumbed to the same word fetishism. Punishment as a behaviour-inducing measure at best can effect only incremental change. It implies a particular model of social change.

I have already argued⁷ that activity becomes institutionalised when society's various repetitive behaviour patterns serve up net rewards for the participants, taking each of their arenas of choice as unchangeable. In consequence, most people come to accept the existing normative system as right and proper. They do not need threats of sanction to obey.

Negative punishments can best enforce already institutionalized law. They function merely to nudge into conformity the occasional deviant. Arnold Rose hypothesized that 'the usual punitive sanctions of fine or imprisonment are likely to be more effective where the prevailing behaviour of the majority of the population is already in accord with the goals sought by the statute'.⁸ Punishment therefore becomes the sanction governing elites and classes choose to maintain the *status quo*.

The contrary also seems true. Punitive sanctions probably will not change behaviour if deviance arises because the individual's institutional environment, legal sanctions aside, regularly rewards disobedient behaviour. Societies rarely have sufficient resources to impose the massive punishments required to induce radically changed behaviour by negative sanctions alone. Those sanctions instead will produce mainly evasion, antagonism or withdrawal.⁹

The laws concerning cash crops in Tanzania present an example. Practically every local District Council in Tanzania had a by-law, reflecting the late colonial policy, requiring farmers to grow cash crops. The North Mara District Council (Cultivation of Agricultural Land) By-Laws, 1966,¹⁰ for example, required each farmer to cultivate at least two acres of cash crops. Since few Tanzanian farmers worked more than four acres, the Ordinance bore heavily on small peasants. It carried only negative sanctions (Shs. 500 fine, or six months imprisonment). Despite these harsh sanctions, the ordinances failed. If a market for cash crops flourished, farmers needed no ordinance to grow them. On the other hand, jailing farmers for failure to sow a cash crop that the soil could not support, or which had no market, became pointless and unenforceable. Economic institutions such as marketing facilities,

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seed and other technological inputs, and the availability of financing and credit determined whether farmers grew cash crops, not the law. The threat of criminal punishment could not coerce farmers to do what, without these supports, seemed quite mad.

Laws likely to induce development, however, address issues such as did these Tanzanian ordinances, rather than those of conventional rules, that usually only reinforce approved, established behaviour. Far from reinstitutionalizing custom, development looks to inducing new and unaccustomed ways of life. Development cannot succeed unless the state somehow induces role-occupants to comply with new rules; but that states a mere tautology. Development is new roles and new behaviour. Limiting available means, however to compulsion and coercion (as Myrdal seems to do), only guarantees either that the new rules will remain immured in the statute books, or that they will look only to incremental change.

B. 'Conformity-Inducing Measures'

The sociological literature contains broader definitions of 'sanctions'. Schwartz and Selznick defined it as a court-imposed change in the life conditions of a role-occupant.¹¹ This definition, restricted to court action, omits all the other institutions through which the state might act to affect choice. Schwartz elsewhere proposed a different definition, suited to his study of sanctioning processes among Israeli kibbutz. He defined 'sanctions' as 'the administration of gain or loss to an actor. Sanction is *positive* when it results in gain for the sanctioned, and *negative* when it results in loss.'¹² This definition resonates with Skinnerian psychology, where operant conditioning serves the function that Schwartz assigns the word 'sanctions'.¹³ It lacks sufficient breadth for our purposes. Disobedience can arise for reasons apart from the reward structure — failure of communication, want of opportunity, lack of capacity and so forth. To be useful, a definition of 'sanctions' must comprehend the entire range of potential legal solutions for all possible causes of disobedience. Moreover, officials frequently act to induce role-occupant behaviour defined only in policy, not in positive law. Imprisonment for non-payment supported the poll tax in colonial Kenya. Government imposed the tax, however, to compel Africans to work for expatriate firms in the export enclave. Focusing attention upon sanctions for failure to pay the tax too easily blinds one to the law's larger purpose. The meaningful questions about sanctions concern the interplay between what government expects from the law, and the activities it undertakes to get it.¹⁴ Schwartz's definition

obscures those questions.

Arens and Lasswell defined 'sanctions' as all measures to induce compliance with legal norms.¹⁵ This is at once too broad and too narrow, for on its face it includes private sanctioning but excludes from consideration all prescriptions addressed to role occupants except formal law.

It seems better to abandon the word 'sanctions', and instead use 'conformity-inducing measures' to include the entire range of processes the state uses to induce obedience. It goes beyond the activity of judges and jailers, but excludes private responses to role-occupants' behaviour.

II. A Typology of Conformity-Inducing Measures

The measures the state undertakes in order to induce conformity invariably arise as solutions to emergent troubles. Like all solutions, they should address explanations for the trouble in question.

I have already proposed a theory to state the variables that determine obedience to law:¹⁶ the rule and its communication, opportunity and capacity to obey or disobey, rewards and disrewards, problem-solving processes and perceptions, tastes, role-self images, ideology and other subjective factors. If the particular disobedience (or expected disobedience) at issue results from poor communication, the sensible remedy will ensure the law's communication to its addressees, not administer a whipping. If the role-occupant cannot comply for lack of skills, depositing him in a dungeon will not increase compliance. If the explanation for disobedience focuses on the processes by which role-occupants decide to obey, the state ought to reform those processes, not impose fines or imprisonment.

Our general model of law and development explains behaviour in part by the activity of state officials. Where the official responds directly to the activity of the role occupant by levying punishment or giving a reward, his activity becomes a 'direct measure'. To induce cash cropping one might punish those who refuse (as in the Tanzanian ordinances mentioned above), or reward those who do. Both are direct measures.

Most official measures to change the arena of individual choice do not aim directly at role-occupants, but at the various actors who comprise their social environments. Depending upon the reasons for disobedience, the solution for not growing cash crops might improve communications to the farmer, teach him appropriate techniques and skills, provide fertilizer, seed and credit, or ensure a market for his crop. I denote any conformity-inducing measure for these sorts as

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'roundabout' measures.¹⁷

A third sort of conformity-inducing measure might be called 'educative measures'. The actor's choice does not depend merely on the environment, but also on a host of subjective factors. Government frequently attempts to induce compliance by education, moral suasion, propaganda and the like. If law-makers believe (as apparently they did in the Ivory Coast) that polygamy subverts development, one might outlaw it subject to various punishments.¹⁸ A slower, but ultimately perhaps cheaper solution might require an educational and propaganda campaign to persuade people that polygamy is bad and monogamy good. Finally, the explanation for disobedience may lie in the individual's decision-making process. Changing these processes I shall call 'deliberative measures'; this chapter does not discuss them.

This catalogue reveals the narrowness of the traditional definition of sanction. Direct, roundabout, educative and deliberative measures can all affect the role-occupant's arena of choice. The traditional definition instead limits draftsmen to punishments. That confines the law-maker to incremental change. For development, that is too narrow by half.

Here I discuss direct, roundabout and a few educative measures.

III The Limits on the Use of Direct Measures

Each of these sorts of conformity-inducing measures has its own advantages and disadvantages, which constrain its utility in particular cases. Together, these constraints make up a significant component of the limits of the legal order's capacity to effect social change. Just as society limits the effectiveness of law by limiting its communication, so does society limit that effectiveness by limiting government's capacity to mount conformity-inducing measures. This section discusses the inherent limits of direct measures.

The Paradox of Punishment. Punishment follows disobedience. Its invocation confesses that in this case its threat failed to induce conforming behaviour. The inadequacy of punishment arises from this fact. We deal with the criminal today, but impose a punishment that has already proven itself inadequate. Classical theories of punishment admitted this failure, but punished anyway, either on mystical theories of retribution, or on equally mystical theories that punishing this individual would deter others by demonstrating that (in Holmes' phrase) the law will keep its promises.¹⁹ Other theories admit the failure, and justify incarceration as providing opportunity for authorities

to rehabilitate the criminal — a notion that assumes that crime mainly stems from wrong but alterable attitudes and values.

Unlike punishment, rewards do not confess their own failure, but celebrate their success. Every time a court sentences a criminal, it publicizes the law's weaknesses. Every time the state pays a reward, the payment advertises the advantages of obedience. Rewards may induce favourable responses. Punishments frequently only persuade role occupants to make greater efforts to conceal their disobedience.

Initiation of Interaction. With punishment, the state must ferret out offenders. The initiative lies with officials, not with role-occupants. With rewards, the complying role-occupant must initiate the sanctioning process by coming forward to claim the reward. This differential initiative has several consequences. In order to punish, the state must expend bureaucratic resources to uncover non-compliance. If only a few will disobey, this may make sense. If, however, the law produces a high rate of disobedience, policing the rule may drain bureaucratic resources, probably to no avail.²⁰ Bureaucrats must live in society, and they rarely enforce unpopular laws. On the other hand, where practically everyone obeys the rules, a reward system requires an unduly large bureaucracy to ferret out fraudulent claims. A bounty for killing predators is appropriate only because only a very few people usually claim the rewards. If the number of bounty claimants grew very large, the state might more cheaply punish those who did not hunt.

Development conditions usually create many disobedient persons. Rewards will therefore usually cost less to administer than punishments. This has special importance for countries with few trained bureaucrats. Moreover, where the law threatens to punish a great number of violators, sanctioning agents cannot enforce the law against every one. Whom they prosecute depends on official discretion.²¹ Their power grows correspondingly. Prosecutors and police frequently use statutes forbidding fornication, adultery, social gambling and the like in the United States to harass political or other opponents.²² Zambia's political leadership will be sorely tempted so to use the Leadership Code, which reaches a very great many people.²³

Who initiates the bureaucrat-client relationship affects their apparent power over each other. By claiming a reward the role-occupant triggers bureaucratic activity. The role occupant, therefore, feels that he controls the administrator. With a punishment, the situation reverses. A collaborative relationship can exist only when power seems equally distributed. Obedience most easily develops in a collaborative relation-

ship. Two-way communication also readily occurs in such a context.²⁴ Rewards encourage a collaborative relationship; punishments do not. How much rewards structure participation depends upon role-occupants appearing to control officials by demanding rewards. To the extent that a reward lies in the official's discretion, the role-occupant must petition for it, rather than demanding it from him. That of course undermines the collaborative relationship. Participation calls for entitlements, not discretionary grants.

Neither governments nor judges, however, will ordinarily make rewards a matter of duty to pay. Statutes which permit rewards typically make their payment highly discretionary.²⁵ Constitutions forbid the compulsory taking of property without compensation,²⁶ but rarely forbid the granting of tax or other benefits entirely in official discretion. The same courts that hold that a person has a 'right' not to suffer punishment entirely at official discretion, will label a reward as a 'privilege'.²⁷ Even procedural rights frequently hang on that distinction. Both constitutions and the rules of natural justice²⁸ extend a right to a fair hearing before government disadvantages a person. Where, however, government granted a reward (e.g. a licence to do business), judges have labelled it a privilege, and placed it outside both constitutional and common law protections.²⁹

Inducement to Creativity. In general, punishments can easily sanction failure to perform to a set standard. They adjust poorly to varying levels of performance. Rewards, however, adapt easily to a sliding scale of performance. This fact, coupled with the initiative accorded the role-occupant by a system of rewards, makes drive, enthusiasm and creativity more likely under a reward than a punishment system.

Legitimacy. Punishments for breaching an innovative rule appear to penalize role-occupants for pursuing what they see as their own interests. Rewards, on the other hand, appear to permit non-compliance, but to reward the particular role-occupant who elects to obey. Legitimacy demands that rulers appear to govern in the interests of the governed. When a new law demands conduct at odds with customary folkways, a reward system permits the governor to appear to conform to the folkways, while nevertheless using state power to induce change. The governor seems to act only when the role-occupant desires that he act. Rewards for compliance with innovative laws do not threaten legitimacy; punishments do.

Punishment threatens legitimacy in another way. If government

commands particular behaviour on pain of punishment, disobedience too easily becomes confounded with defiance. Government places its prestige at hazard. If government merely announces that it will reward desired behaviour, any failure of the law's addressees to claim the reward does not necessarily undercut legitimacy. Especially in Africa, where legitimacy became a scarce good, governments might well avoid confrontation.

Under development conditions, the state likely seeks to implement innovative, radical rules, although possessing scant reserves of either bureaucratic resources or legitimacy. Development demands creativity. A reward system seems typically to induce changed behaviour at lower costs than punishment.

IV The Costs and Benefits of Roundabout Measures

These measures operate directly upon one set of role-occupants to affect the behaviour of another set. If government desires to prevent political leaders from engaging in private business, it can enact a Leadership Code to prohibit them from so doing under threat of punishment. Or, it might adopt roundabout measures, such as nationalizing housing (thus destroying the most abundant opportunities to violate the Leadership Code), or prohibiting banks from extending credit to leaders. Roundabout measures usually serve to ensure obedience to some government policy unexpressed in formal law. Not seeing that direct measures functionally serve the same purposes as roundabout measures confuses much sanctioning theory. One can too easily ignore the issue, whether rules that directed bankers to issue credit only to co-operatives, for example, induced farmers to join co-operatives, and study only whether bankers obeyed the rule. The direct rule or regulation outdazzles the policy addressed to the farmers.

Conversely, every law that directs A to change his behaviour towards B also restructures the environment of B, and hence becomes a roundabout measure affecting B's behaviour. This principle explains many unanticipated consequences of laws.³⁰ In Soviet Central Asia during the 1920s, the new revolutionary government sought to free Moslem women from intolerable bondage, in part by inducing women to unvell. It supported this policy by direct and roundabout measures. The unvelled woman, however, restructured the environment of Moslem male. Many responded by casting the unvelled woman into the streets, where they eventually became prostitutes. Had a government policy favoured Moslem males casting off their women, requiring unveiling would have served as an appropriate roundabout measure.³¹

age to the role-occupant and so forth.³³ All the exhortation in the world will fail to persuade Eskimos to grow roses, any more than they will do so under threat of the lash. Of the many sorts of moral suasion, this section discusses only the very existence of the rule as persuasion to obey.

How can the very existence of a law bring about a change in values or attitudes? Obviously different rules have different consequences. Laws prohibiting marijuana smoking in the United States did not change community attitudes towards its use. Laws prohibiting adultery have existed for centuries, but adultery remains a favourite indoor sport. On the other hand, other rules, at first unpopular, in time came to express popular attitudes. For example, white attitudes in the southern United States towards school desegregation changed markedly since the school desegregation decision of 1954.³⁴

Three alternative points of view exist on this subject. One holds that since law only reinstitutionalizes custom, it cannot have any independent socializing force.³⁵ At most, it can strengthen and support already existing social attitudes.³⁶ On the other extreme, another view, common among lawyers as well as sociologists, believes that the very existence of law-in-the-books has an educative effect. René David wrote a sophisticated 'ideal' Civil Code for Ethiopia, asserting that while he knew that it would take many years for behaviour to conform to the Code, Ethiopia needed a statement of the social ideal.³⁷ J. Willard Hurst has repeated that law codifies and promulgates the authoritative values of the community.³⁸ Soviet scholars made the same assertion.³⁹ Too many unhappy examples exist, however, where the promulgation of law did not result in acceptance by the population. The Indian Constitution purportedly outlawed discrimination against untouchables that has not significantly changed the values and attitudes of most Indians. The United States Constitution asserted the equality of persons before the law, without noticeable effect on white attitudes for generations.

A third position lies between these two extremes. Law can change values and attitudes only under some conditions. We must specify those conditions. The literature contains little more than speculations, and I have nothing more substantial to offer. In the first place, law will more readily change attitudes where it first changes behaviour. Attitudes then change to justify the new activity.⁴⁰ The income tax in the United States has almost universal legitimacy although when introduced a vociferous opposition attacked it bitterly. Behaviour towards untouchables in India changed only marginally; likewise attitudes towards them. The

Ivory Coast did not enforce its statute outlawing polygamy; that the statute lies in the books has probably not changed attitudes towards polygamy. The books contained many statutes presumably making bribery and corruption criminal. Where unenforced, attitudes towards corruption did not change either. Although values and attitudes follow behaviour patterns, rather than precede them,⁴¹ not every case of changed behaviour results in changed attitudes. Slaves did not all accept slavery.⁴²

A variety of conditions affect the influence of behaviour upon attitudes and values. (1) The more legitimate a new rule under existing ideologies or attitudes,⁴³ the more likely the individual will build it into his value-set. (2) Addressees will not likely internalize a rule requiring its targets to act against their own interest. (3) If addressees see a rule as worthy of compliance, they will more likely internalize it. Its source must appear authoritative and prestigious.⁴⁴ Both by their rhetoric and by their behaviour, law-makers and administrators must appear to take the law seriously.⁴⁵ (A law against corruption carries little weight when enforced by a corrupt policeman.) A respected reference group obeying the law may help. (Prestigious farmers in the area adopt a new agricultural programme.) It may help, too, to attach a serious sanction, demonstrating that the law-makers are serious about the law.⁴⁶ Finally, an authoritative communication channel through which the law comes may add an increment of legitimacy.

Scholars frequently argue that a rule will succeed in changing attitudes only if it concerns an area of life the role-occupant perceives as instrumental and not sacred. Rules concerning farming technology, for example, supposedly concern instrumental matters, but rules concerning sexual relationships, or the family, are frequently seen to intrude on the sacred. Keeting hypothesized that change will more likely occur in 'elective' areas of life.

Instrumental techniques, elements of taste and self-expression, secondary group relations, and low-status position are apt to be highly malleable, for in these areas freedom, individualism and novelty are apt to be tolerated, even encouraged, and the range of acceptable alternatives may be rather broad. Conversely, conservatism and stability are apt to be found in those areas of human experience within a particular culture which are sharply crystallized, backed by tradition, enforced by sanctions, associated with prestige and status, overlaid with symbolism and ritual, saturated with strong emotions, and judged to be essential for the good citizen.⁴⁷

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Several examples seem consistent with Keeting's speculations. Throughout Africa, wherever farmers had a new cash crop, they changed technologies and land tenure patterns very quickly.⁴⁸ Efforts to change family patterns (e.g. attempts to impose monogamy on polygamous African societies) generally failed.⁴⁹

Before accepting the proposition proposed, however, we need further data. African countries adopted many programmes to change agricultural patterns, but only some succeeded. In general, success attended adequate communications, sufficient resources, vigorously enforced measures to induce the desired behaviour, and participation in decision-making.⁵⁰ Programmes to change family patterns in Africa have never received analogous levels of resources or official commitment. None succeeded in changing behaviour. Whether concerning instrumental or sacred sectors, if behaviour does not change, the bare law-in-the-books will not likely change attitudes or values.

Finally, our assumption of the distinctions between governors and governed affects our beliefs about the educative consequences of law. If governors, and governed constitute necessarily disparate strata, then of course we must address the question of how the governors by mere enactment of a law change the values and attitudes of the governed. The question would not arise under a participatory system of social control. Genuine participation in deciding whether or not to enact a new rule would cause changed values and attitudes. Participation requires institutions that stress process over substance, and scientific method over all else. Given participation in such institutions, attitudes and values consonant with the scientific method will develop. If explanations serve as surrogates for values, then the process of problem-solving ought to bring subjective perceptions in accord with those that justify the new order.

If so, law-makers cannot rely heavily on the mere existence of law to educate in conditions of development. Those rules frequently sharply oppose the values, attitudes and myths associated with older patterns. Governments with fragile legitimacy cannot easily make law stipulating new behaviour appear to emanate from 'authoritative and prestigious' sources. If the rule requires its addressees to subvert their own well-being, they will not likely adopt its teaching. Rules of law as educative instruments in themselves provide weak tools for change.

B. Ideology

Models of the world (i.e. Ideologies) plainly help guide the discretionary choices that arise when people decide whether or not to obey a new law.

There are three available definitions. One perceives Ideology as dogma, designed to trap its targets in its rhetoric;⁵¹ another, as scientific hypothesis capable of subjecting otherwise inarticulated domain assumptions to empirical test;⁵² a third, as scientific propositions paradoxically based on an act of will, not reason.⁵³ An Ideology can fulfill a scientific function, but in the final analysis it must always rest upon an assertion of whose troubles matter.

Ideologies can, of course, motivate people to accomplish wonders. Ideologies, however, are not mere fungible rhetoric. In development, science, not dogmatics, will probably induce changed behaviour, for three reasons. Dogmatic Ideologies present a unchangeable perception of reality. Unlike scientific ones, they cannot adjust to changing circumstances and new experience. Their adherents only slowly learn by doing. Second, dogmatic Ideologies promote unthinking acceptance; scientific ones, problem-solving and creativity. Third, changed behaviour requires participation, a co-operative, problem-solving endeavour. Dogma wars with problem-solving.

Some varieties of socialist thought match the scientific mode. This element provides an alternative explanation for its attraction to the poor:

... Socialism has a very special meaning for the new nations. It becomes the ethic for a system of political discipline emphasizing science — science for its own sake as a symbol of progress and as a form of political wisdom. In keeping with this aim, socialism offers a set of unified developmental goals that stress roles functional to modernization and the achievement of workmanlike, rational society in which people lend one another a helping hand because they feel themselves a part of a community effort towards industrialization...⁵⁴

Future shock has become our special syndrome. Precisely because behaviour constantly changes, Ideologies constantly change. Whether individuals adopt dogmatic or scientific explanations will determine whether they can adapt to future shock. Development implies continuous change.⁵⁵ Educative measures that teach a scientific Ideology proceed slowly, but ultimately can become the foundation for the most efficacious and long-lasting sort of developmental measures.

VI A Catalogue of Conformity-Inducing Measures in Development

Conformity-inducing measures purport to solve problems. They must

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aim at the causes of disobedience. A catalogue of such measures must therefore rest on the explanation for disobedience earlier advances. The catalogue here limits itself to punishment, rewards and roundabout measures.

1. The state through its agents can affect the arena of choice of role-occupant in four ways only:
 - a. By direct measures: rewards or punishments imposed or awarded after the role-occupant disobeys or obeys;
 - b. By roundabout measures: efforts to change the behaviour of others whose actions structure the role-occupant's arena of choice; and
 - c. By educative measures: efforts to change the domain assumptions, perceptions of reality, role-self images, ideologies and prizings of role-occupants; and
 - d. By deliberative measures: changing the processes of decision by role-occupants.
2. Punishments have the following costs and benefits in conditions of development:
 - a. They occur after disobedience, and therefore advertise the inefficiency of the law;
 - b. With high rates of disobedience, they require many agents to police the rule; a low rate of disobedience correspondingly reduces enforcement costs;
 - c. With high rates of disobedience, officials have a correspondingly greater discretion as to when and against whom to impose punishments;
 - d. They make the role-occupant dependent upon the bureaucrat;
 - e. Where other factors reward disobedience, punishment induces efforts to evade, not obey;
 - f. Punishments do not easily adjust to varying levels of performance, and therefore do not readily stimulate creativity and increased achievement;
 - g. They tend to provoke confrontations with authority and therefore undercut legitimacy.
3. Rewards have the following costs and benefits:
 - a. They occur after obedience, and therefore advertise the efficacy

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- a. of the law;
 - b. With high rates of obedience, they require correspondingly large resources to pay the rewards; a low rate of obedience correspondingly reduces enforcement costs.
 - c. With high rates of obedience, and limited resources they increase discretion as to when and to whom to pay rewards;
 - d. If the payment of rewards does not rest on official discretion, it subordinates the bureaucrat to the complying role-occupant;
 - e. Where other factors reward disobedience, and the reward will not stimulate compliance, the role-occupant need not conceal his disobedience;
 - f. Rewards can readily adjust to varying levels of performance, and therefore induce creativity and increased achievement;
 - g. They enhance legitimacy.
4. Roundabout measures have the following costs and benefits:
 - a. Only roundabout measures can induce obedient behaviour where disobedience results from either (a) poor communication, (b) lack of opportunity or (c) capacity to obey.
 - b. Only roundabout measures can work where the state stipulates the desired activity of role-occupants as policy rather than in a formal norm.
 - c. The original cost of establishing roundabout measures will likely exceed that of equivalent direct measures; once established, they will likely cost less than direct measures;
 - d. Roundabout measures require role-occupants constantly to decide for themselves, whether or not to comply with a rule or policy without explicit threats by officials, and therefore they enhance participation;
 - e. As facilitative law, roundabout measures strengthen existing power relationships unless the state takes special measures to avoid that result;
 - f. Roundabout measures avoid confrontations between government and role-occupants, and hence maintain or increase legitimacy.
 5. Therefore, measures likely induce obedience to law looking to radically new behaviour by role-occupants will match the following table ['+' means appropriate, '-' means inappropriate]:

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Explanation Disobedience (from Chap. 8 & 9)	Punishment	Reward	Roundabout	Remarks
Failure of communications	-	-	+	Improve communications.
Physical inability	-	-	-	
Inappropriate social place	-	-	+	Change social place; decrease opportunity to disobey.
Failure of others to supply necessary inputs	-	-	+	Ensure supply of inputs.
Incapacity of role-occupant	-	-	+	Provide necessary capacity.
Costs known to role-occupants outweigh benefits	+	+	+	Changing rewards and penalties offered by other institutions leads to institutionalization; rewards and punishments by officials do not. Punishment appropriate only with a small group of expected disobedient addressees.
Inaccurate individual assessment of actual costs and benefits	-	-	-	Use educative measures or change conditions of problem-solving.
Personal goals at variance with those implicit in law	+	+	+	As above. Punishments and rewards may work. Punishment appropriate only with a small group of expected disobedient addressees. Change reward structure of other institutions.
Law requires distasteful performance	+	+	+	As above.
Role-conflict arising from internalized norms	+	+	+	Educative measures may help. Participation in problem-solving the most helpful.
Inappropriate role-self image	+	+	+	As above.
Inaccurate domain	-	-	-	
	+	+	+	

This catalogue suggests three observations:

1. Punishments ('coercion') will work in surprisingly few situations. Usually they will work best to change the behaviour of a few people where law-makers cannot alter the institutional matrix to favour them. Frequently, this occurs when the law in question abolishes or reduces the powers and privileges of existing elites or ruling classes, such as land reform laws, the imposition of higher taxes, laws improving the status of women, or the expropriation or nationalization of property. In each case, the state must invoke coercion against the strata that the new laws disadvantage.
2. Educative measures plainly do not reach most causes of disobedience directly. Suasion to obedience alone will not induce conformity.
3. The range of possible behaviour-inducing measures grows once one includes roundabout measures. Rather than increased 'coercion' to remedy soft development, alternatives to both coercion and exhortation seem more likely to work.

Conclusion

I have tried in this and the two preceding chapters to explicate a general theory of how law influences behaviour. If the legal order can help relieve poverty and oppression, it must change the behaviour ultimately of individual citizens, but also of bureaucrats, judges, parastatal managers, policemen and legislators. Obviously, any development effort must first understand the uses and limits of political society's principal tool, the legal order.

Because African legal orders have authoritarian structures, their use to change behaviour rightly conjures up fears that law and development may only supply knowledge to enable elites to manipulate and coerce the mass more efficiently. The foregoing analysis demonstrates, however, that behaviour will not easily change except through participation by the role-occupants themselves in both law-making and implementing. Only they can provide information concerning their actual access to information about the law, their opportunity, capacity, interests, beliefs and perceptions, and their decision-making processes. Unless law-makers consult them, the law-makers will only by luck uncover the roots of the behaviour at issue. If law-makers do not, they will only by equally happy accident draft successful rules.

Successful law implementation also demands participation by the law's addressees. Communication of the new rule must involve a two-way, face-to-face situation. That demands participation. Role-occupants

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will not easily change perceptions, role self-images, or domain assumptions save in a problem-solving, participatory process. The more participatory and public their decision, the more likely they will choose to obey.

Now obviously some laws demand behaviour against individual interests. If a land reform law requires landowners to surrender their property, neither participation, roundabout measures, nor increased two-way interactions will make reform more palatable. Such laws require punishments or rewards, direct, rigorous sanctions to succeed.

Most necessary behavioural changes for development, however, lay their burden on those whom they should benefit. Peasants must learn new techniques; bureaucrats, development administration; workers, the ways of workers' councils. One can effect some of these changes through coercion. According to our analysis, however, surely these will more likely to lead to soft development than real change.

This analysis, therefore, *requires* participation. The usual justifications for participation of humanism, the value and dignity of the human personality, or for its own sake too easily fall before assertions that participation nevertheless moves too slowly, and inefficiently, and too readily excites mass demands that Government cannot satisfy. Punishment, however, may well produce quick results, frequently more so than participation. But, quick changes of behaviour that punishment creates rarely become institutionalized into new, lasting behaviour patterns. The legal order as an instrument of change requires participation not merely because of ethical imperatives, but rather because over the long pull no other way works.

To induce compliance through participation requires participatory deliberative processes. It requires changing how individuals decide whether or not to conform to new rules. The success of such deliberative measures depends upon careful fashioning of appropriate direct, roundabout and educative measures. Unless the state communicates its rules, unless the addressees have opportunity and capacity to comply, unless obedience is their interest and they perceive it so, suasion, ideology and participation alike will only persuade role-occupants that they are wise to disobey. Soft development does not arise because people are stupid. It arises because they are shrewd.

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1. BALCH'S THEORY OF CONFORMITY-INDUCING MEASURES

George Balch¹ analyzed four strategies of governmental intervention: information, facilitation, regulation, and incentives.

a. Information: Where information is the main gap between potential and new behavior, the law must ensure that the law's addressees receive the necessary information.

b. Facilitation: Government can channel the addressee's behavior into desired directions by making it easier for them to so behave.

c. Regulation: Where government demands obedience, it uses regulation with penalties for contravention. Considerations to take into account:

(i) Whether regulations necessarily invade privacy and individual autonomy

(ii) Whether government has the capacity to enforce the regulations;

(iii) Whether the lawmakers believe that the law could make the products, services or behavior involved attractive enough to draw actors without the use of coercion.

d. Incentive: By using pricelike mechanisms, this leaves the maximum choice to actors.

Balch argues that lawmakers should use these four interventions in light of (a) learning theory, and (b) utility theory. Learning theory (Balch draws heavily on the work of the behavioural psychologist B.F. Skinner in this connection) teaches that behavior is strengthened by positive and negative reinforcements. Their effectiveness depends upon their amount, frequency and scheduling. Utility theory depends upon two central assumptions: (i) that people wealth-maximize; and (ii) that unrestrained wealth-maximizing

¹Balch, The Stick, the Carrot and Other Strategies: A Theoretical Analysis of Governmental Intervention, in Brigham and Brown (eds.), Policy Implementation: Penalties or Incentives? 44 (1980)

behavior (limited only by contract and property laws) will tend to produce the most efficient level of goods and services. This depends upon the internalization of all costs [a fancy way of saying that perfect competition must prevail].

Balch summarizes his teachings in the following table:

<u>Strategy</u>	<u>Works because:</u>	<u>Works better if:</u>	<u>Problems</u>
INFORMATION	<ul style="list-style-type: none"> - signals benefits available - lowers information costs - can "motivate" change 	<ul style="list-style-type: none"> - "motivation" is high - information is sought - technical or large investment planned - communication is done well 	<ul style="list-style-type: none"> - high cost - controversy of information - trade-off between amount of information and audience
FACILITATION	<ul style="list-style-type: none"> - reduces costs 	<ul style="list-style-type: none"> - "motivation" is high - specific costs identifiable - beneficiary invests/participates 	<ul style="list-style-type: none"> - reactance - ineffective/inefficient if not aimed at specific causes of market failure
REGULATION	<ul style="list-style-type: none"> - raises costs of noncompliance - people wish to evade punishment - suppresses behavior temporarily 	<ul style="list-style-type: none"> - change is: <ul style="list-style-type: none"> • discontinuous • detectable • important • achievable in few ways - effective surveillance and enforcement mechanisms - linked to reinforcement for change 	<ul style="list-style-type: none"> - inefficiency - requires much monitoring - evasive or combative response - punitive effects: <ul style="list-style-type: none"> • negative affect • stigma - stifles innovation
INCENTIVES	<ul style="list-style-type: none"> - makes change attractive - transactions become more efficient - induces positive affect 	<ul style="list-style-type: none"> - change is: <ul style="list-style-type: none"> • continuous • detectable • important • achievable in many ways - incentive is: <ul style="list-style-type: none"> • high • scheduled property - losers are compensated - change is gradual - beneficiaries are "relaxed" 	<ul style="list-style-type: none"> - reduces altruistic behavior - requires some monitoring - can exploit individuals - costs of compensating "losers" - difficulty of identifying "losers"

Figure 2: Summary of Strategies of Governmental Intervention to Change Behavior

NOTES AND QUESTIONS

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1. Remember Samuels' characterization of Buchanan's theory in their discussion of the Virginia Cedar Rust case. (Chapter II, p. --). Samuels labelled Buchanan's a "normative" approach, and his own, "positive". By that he meant that his positive theory tried to explain actual behaviour; Buchanan's normative theory stated what Buchanan hoped the world would become. Do the same categories apply to what Balch calls "learning" and "utility" theory? To what extent does utility theory attempt an explanation of behaviour? To what extent does it constitute a normative notion, of how the theorist believes society ought to organize its activities?

2. R. B. Seidman, Book Review, Harvey Wheeler (ed.), Beyond the Punitive Society: Social and Political Aspects (1973), 56 B.U.L.R. 425 (1976) 425:

.... Before discussing the book itself, I must first try to encapsulate the Skinnerian revolution and its relevance to the law.

Early behaviorist psychology—the work of Pavlov, for example—explained behavior in terms of stimulus and response. The hungry dog smelled meat (the stimulus); he salivated (the response). Skinner proposed a new model of behavior in animals. He used three components: stimulus, behavior and reinforcement. The animal is faced by an environment; he responds; as a result of his response, either the animal receives a benefit (a positive reinforcement), a detriment (an aversive reinforcement), or nothing happens. In time, the animal comes to respond to various conditioners in his environment so as to maximize his positive and minimize his aversive reinforcers. He learns by experience. He comes to behave as his conditioners would indicate, even if the conditions are withdrawn.

Extended to people, Skinner states that we are products of our environment (both material and social). Our patterns of action result from our response to environmental stimuli and experience with different reinforcers. Consciousness (in Skinnerian terms, "verbal behavior") flows from behavior, not vice versa. Our social forms and our consciousness are as they are not because of planning, but because of countless random interactions of individuals. Each person's behavior becomes another's positive or aversive reinforcement.

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In *Beyond Freedom and Dignity* Skinner asserted that our conscious systems of social control, mainly operating through law and the State, are based on punishment, a type of aversive reinforcement. Skinner's laboratory work demonstrated that punishment is relatively ineffective in bringing about long-lasting new behavior, although it quickly reduces unwanted behavior. The punisher, however, is reinforced in his behavior by the speed with which he brings about results. In addition, our intellectual tradition assures us that punishment is an appropriate technique—following Benthamite notions of the pain and pleasure calculus.

Skinner and his followers argue that, because they have developed a better technique of consciously inducing new behavior, new opportunities are opened for organizing society. Operant conditioning (sometimes called "behavior modification") is already widely used in various closed institutions, both to induce behavior that conforms to the rules of the institution⁴ and to condition the subject to obey existing law.⁵

Operant conditioning works with pigeons, with whom a patient researcher can work for hours and days, making sure that the same behavior receives the same operant conditioner, and thus reinforcing the behavior until the pigeon behaves as the researcher desires. A few states have sought to use operant conditioning techniques in "closed" institutions (prisons, hospitals for the mentally ill) to affect behavior. How useful does the concept become for the law in its efforts to affect the behavior of the citizenry at large?

3 A set of strategies (such as Balch's four-chapter catalogue of information, facilitation, regulation, and incentives) only serves its purpose if sufficiently parsimonious for a practitioner to make practical use of it, and sufficiently precise so that it directs attention to particular devices. How well do ^{as} Balch's catalogue serve?

4 In terms of the problem-solving methodology, Balch's strategies for intervention constitute general categories of proposals for solution. At what problem do they aim? What ^(implicit) set of explanatory hypotheses do they

suppose? How adequate do these explanations seem?

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5. Compare R.F.Cranston, Reform through Legislation: The Dimension of Legislative Technique, 73 Northeastern University L. Rev. 873 (1978), focussing on the control of corporate behavior. Three mechanisms exist to channel it: the market mechanism, the private law mechanism, and the public regulation mechanism. Each includes a number of techniques: For the market mechanism, laws against fraud, restrictive trade practices, and monopoly power, and perhaps even the creation of state enterprises to foster competition. Private law techniques include not only changing civil law and procedure, but also strengthening the political power of citizens in the hope that this will force businesses to modify their behavior. To this end the state may confer special privileges, such as tax exemptions or immunity from certain civil suits, upon workers or environmental and consumer groups and might also create special agencies to represent their interests in government policy-making. Government regulations employ three principal techniques: Broad statutory standards, administrative regulations, and licensing.

How useful is a laundry list of this sort? Do either Seidman or Balch do much better?

6. Balch's article gives two very general explanations for behavior in the face of law. He labels these "learning theory" and "utility theory". Consider again the explanations for behavior in the face of a rule of law that we examined in Chapter . Using Balch's vocabulary, how would you characterize the institutionalist theory there described: As a learning theory, a utility theory, a combination of these, or none of the above?

7. Compare and contrast Seidman's and Balch's theories. Do either seem very useful to a drafter engaged in practical work?

8. Consider the Patent Law (see Chapter VIII, Part II). How would Seidman and Balch each analyze that law in terms of its conformity-inducing measures? Which seems to you to offer the greater insight into the limits of measures to induce conformity to that law?

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B. A CATALOGUE OF COMMON CONFORMITY-INDUCING MEASURES

DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL (1971)

pp. 144-158

C. SEARCH FOR SANCTIONS

§ 22-1. Means to an end. Many times in drafting bills, the moment of truth comes when the drafter asks: "How do we make this all mean something in real life; how do we give it muscle?" The drafter may have trouble finding the appropriate sanction to achieve the objective of the bill. The multitude of devices available, both to penalize and to reward, makes selection difficult. The choice is not limited to a single sanction; a small arsenal can be assembled for one bill. For example, to force motorists to purchase no-fault auto insurance, legislators have: imposed criminal penalties on the uninsured, required vehicle owners to submit proof of insurance or a policy number when licensing a motor vehicle, excluded from benefits those who fail to insure, exposed the uninsured to liability for negligence, and authorized revocation of motor vehicle and driver licenses of uninsured motorists. This list suggests the varied characteristics of sanctions.

These sanctions employ steady and intermittent pressures, early and late inducements, positive and negative forces, public and private enforcing agents, and harsh and gentle mechanisms. Some of the sanctions push the citizen to semi-automatic compliance by making non-compliance procedurally difficult (those connected with vehicle licensing). Others punish violation through state action (criminal prosecution). Others use private action (the retained fault lawsuit). Private pressure to conform comes from insurance agent efforts to sell insurance and from peer pressure. Government agency enforcement comes through spot checks of cancellations and claimed insurance coverage on motor vehicle registration applications.

Often, after a sanction is selected, the bill drafter struggles to soften its impact. Sanctions should produce a satisfactory level of compliance, which need not be 100 percent; but they should not punish unnecessarily. With no-fault legislation, for example, other family members do not bear the

same exclusions from benefits or exposure to tort liabilities as does the person who should have bought the insurance; some laws even allow the uninsured car owner to collect no-fault benefits after punitive deductions from those benefits. This better serves the objective of compensating everyone, a goal which would be frustrated through the overly severe sanction of denied benefits.

The bill drafter should reduce the cost and inconvenience of a sanction as much as she can without seriously damaging its effectiveness. For example, to require the owner to include an insurance policy number on a license application costs less than to require a document from the insurance company stating that a policy is in effect. It is cheaper in time and money to the state, the motorist, and the insurance industry. Yet the difference in impact between the two is slight.

§ 22-2. Criminal penalties. The word "sanction" brings fines and jail terms to mind; yet these are less valuable means to implement legislative policy than other devices. The judicious bill drafter searches for sanctions short of criminality, making prosecution a last resort. A criminal charge is harsh even when it leads to acquittal or brings a suspended sentence. It pushes the defendant to vigorous battle, rather than to the quick and continuing compliance desired. Criminal prosecution is never self-enforcing, although the quality of being self-enforcing is the ultimate virtue in a sanc-

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tion. A criminal sanction is also expensive to the state—in the cost of prosecution, in the cost of incarceration, and in its destructive impact on the life of the defendant. In many circumstances the criminal sanction is recognized by prosecutor, judge and jury as overkill. When law enforcers find juries refusing to convict or are themselves uncomfortable with bringing particular charges, prosecution under that statute stops; the criminal sanction then becomes largely meaningless.

Severe non-criminal sanctions can also self-destruct. In one state, a statute provided that an illegal public employee strike automatically disqualified participants from any pay raise for a year. When a strike did occur, the statutory sanction made a settlement impossible until everyone agreed the statute would be ignored. The general lesson is to keep criminal and other penalties realistic, taking into account human nature. The get-tough penalty seldom accomplishes its objective, unless the objective is grandstanding rather than making good law.

When criminal sanctions are used, the legal pattern of the jurisdiction must be followed. Legislatures seek consistency and balance, so the penalty for violation of a new law must be in line with penalties for other violations. The penalty must also fit the jurisdiction's standard classifications of felony, gross misdemeanor, misdemeanor, petty misdemeanor, or tab charges. If a bill writer does not know the habit patterns of the legislature, the

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bill may be submitted to the legislative bill drafting agency with the criminal sanctions left open in order to obtain direction from the specialists. Official bill drafters have technical knowledge and a sensitivity to the attitudes of their own legislature on criminal law issues. A non-specialist may draft provisions out of tune with prevailing legislative attitudes and create negative reactions to the entire bill.

Criminal sanctions should be drawn with legislative acceptability the primary concern. The penalty actually applied is so much under the control of judiciary, prosecutors, parole board, and corrections agency that what a statute authorizes is usually not important, except to put the conduct into the appropriate level of criminality.

§ 22-3. **Civil fines; corporate sanctions.** A civil fine is non-criminal. But the fine is paid to the state, unlike civil damages which are paid to a private person. The fine does not brand the offender with the status of felon or misdemeanor, which gives it significant advantages over criminal penalties. The civil fine provides the prosecutor and judge with an especially useful alternative when commercial misbehavior occurs in a corporate setting. There the civil fine may be levied on the corporate entity, even when so many corporate employees participated in the illegal activity that criminal prosecution of individuals is difficult.

Corporate misbehavior challenges the bill drafter and the law enforcer in special ways. Penalties on

corporations, if not appropriately limited, spill over onto employees, shareholders, and even onto communities. For example, the power to terminate the authority of a corporation to do business in a state is practically useless because of all the resulting economic impacts. Cancelling a franchise or permit can also close a business and do widespread harm. The bill drafter who is writing sanctions for commercial legislation must focus some attention on the economic impact of the sanction and on the split corporate personality—real people and artificial entity.

§ 22-4. **Use of agencies.** Executive-administrative agencies implement much legislation. To carry out their tasks, agencies use whatever tools are provided in the specific legislation, plus the flexibility inherent in administrative law. Agencies can adjust law and sanctions to the circumstances of particular cases. This power to act on an almost *ad hoc* basis is both the great strength and the great evil of agency enforcement.

Enforcement of anti-trust law is a dramatic example of this flexibility. Anti-trust legislation has remained essentially the same for decades, but anti-trust law as enforced has varied depending on economic conditions and Department of Justice attitudes. The history of anti-trust illustrates that giving agencies discretionary enforcement authority produces a useful power to negotiate agreements with those regulated. The anti-trust division of the Department of Justice has often cajoled mono-

polizers to modify their activities. In tough cases the department has negotiated consent decrees foreclosing business activities it viewed as harmful to the market place. Consent decrees involve enforceable promises not to engage in specified practices.

Most agency negotiation is less formal. Since Congress gave the Products Safety Commission responsibility to define safety standards, the commission has worked extensively with manufacturers. Working together, they decide what is feasible. The standards this commission has set represent much effort to avoid extra cost and economic dislocations to industry, even at the price of slower implementation and reduced effectiveness.

State and federal environmental protection agencies engage in the same type of bargaining with various interests to decide what should be done, when it should be done, what will be done voluntarily, what must be forced, and what alternatives are available. This negotiation is continual, so new knowledge can be put into the process and decisions adjusted accordingly. If legislatures had imposed specific rules and deadlines, appropriate adjustments to new facts would be difficult.

The captive regulatory agency is, of course, a familiar phenomenon. The failure to build into laws some degree of insurance against agency surrender to political expediency is a serious problem. Too often, legislatures leave the politically tough work—laying down the law—to an agency. Al-

most inevitably, accommodation occurs between agency and industry. To protect against excessive compromise, a legislature must provide private remedies to back up and buck up the agency. A legislature must also write the law with sufficient courage to set a standard the agency cannot ignore and to limit the discretion of the agency so that it cannot sabotage the legislature's objectives.

§ 22-5. Licenses, permits, charters, and franchises. The legal system keeps control of many activities by licenses, or by permits, charters, and franchises granted by agencies or local governments. The agency granting the license may do so on a selective basis to limit participation to qualified persons, to control the intensity of competition, to ration a scarce resource like television channels, or to maintain monopolies when competition does not make economic sense, as with local telephone service. If the license is granted indiscriminately, but for a fee, the purpose may be to limit the number of participants, to raise revenue, to gather information of value to the public or government (for example, building permits), or to keep a record of those in the licensed business (for example, pawnbrokers).

An inherent part of granting licenses is the power to revoke or temporarily suspend them. This sanction is used extensively and effectively. Driver's license suspensions are obvious examples. Other examples are liquor dealer license suspensions as punishments for sales to minors, restau-

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especially effective when the victim's lawyer goes looking for others who also can get repaid three times (less the lawyer's fee).

The triple recovery is based on experience, habit, tradition, and a rough sense of justice. Experience shows treble damages are enough to deter. Legislators are familiar with the sanction. Bill sponsors who seek less are asked to explain why they are so soft on the offender; sponsors who seek more must explain why they want to enrich careless victims and sharpshooting lawyers. It is easier to stick with the familiar remedy. In circumstances where treble damages are potentially out of balance, bill drafters may include a maximum or a minimum on the recovery.

Legislation establishes many rules of law that profoundly influence private rights. For instance, the old evidentiary statute that limited testimony about conversations with dead persons made some contracts not provable and legally worthless. Legislatures have passed guardianship statutes that throw a protective blanket over wards, relieving them of liabilities they would otherwise bear. The legislatively established right to cancel some contracts during cooling-off periods is a powerful rule of private law that controls door-to-door sales practices. Statutes of limitations, as rules of law regulating private relationships, carry out a legislative policy to end old disputes. The bill drafter working on a bill must decide when disputes under the bill should terminate. Since the answer is subjec-

tive and varies from issue to issue, shaping a limitation section is one of the most difficult tasks for bill drafters and other policymakers.

§ 22-9. **Suggestions on sanctions.** A few summary generalizations about sanctions are appropriate at this point.

(a) Use multiple sanctions if possible. Different citizens respond to different kinds of pressures.

(b) To discover the range of possible sanctions, think through the circumstances of the various actors in the chronological order of events. This helps to imagine what would impel a participant to the desired action at each stage, to imagine what vulnerabilities to sanctions exist at different times.

(c) Inventory the public and private agents available and trace through their circumstances in chronological order to discover points at which, with appropriate statutory direction, they may act with most efficacy to achieve the goals of the bill. Since government agencies have imperfections, private sanctions, self-help and self-actuating devices are invaluable.

(d) Examine each bill to find ways to cushion its sanctions. The drafter and sponsor are wise to consider the effect on those who will suffer the proposed sanctions and on the associates of those who violate the legislation. Sanctions should not spill over and hurt the innocent.

(e) Piggyback enforcement on other procedures as much as possible. If some existing machinery