NOTES AND COMMENTS

THE RECOGNITION OF DIFFERENTIAL POWER IN THE SOCIOLOGY OF LAW*

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INTRODUCTION

In her review and assessment of the sociology of law, Arlene Sheskin argues that Pound, Ehrlich and Timasheff make certain assumptions about the law which are common in sociological jurisprudence and the sociology of law, but which preclude more accurate explanations of legal phenomena. According to Sheskin, traditional theories and research in the sociology of law assume among other things that: 1) the law neutrally reflects the common interests of the populace; and 2) conformity to the law is based on consensus. Sheskin suggests that more accurate and complete theories of law can be developed if we reject these traditional assumptions and recognize that: 1) the law is determined by and reflects the interests of the economically dominant classes; and 2) conformity to the law is often based on power and coercion.

Sheskin is not alone in her assessment of the predominant assumptions underlying the sociology of law, or in her suggestion of an alternative approach to the study of legal phenomena. Elliott Currie, for example, writes that the dominant model of law and society in contemporary legal sociology is "a pluralist and meliorist interpretation of American society and the American legal system, intellectually rooted in classical bourgeois sociology and in liberal jurisprudence" (1971:137). He contends that some of the most important presuppositions in the sociology of law include the conception of law as the outcome of pluralistic competition among various groups, and the tendency to view legal institutions in isolation from the broader framework of

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domination and exploitation within which they function (1971:143). He also recommends as an alternative to the traditional approach a Marxian analysis which emphasizes law as an instrument of power and/or of class domination.

Likewise, Richard Quinney (1974:22-24) asserts that the sociology of law presents a particular image of the role of law in society to the exclusion of other possibilities. In this particular image, the law serves those interests that are for the good of the whole society, and it orders human relations by restraining individual actions and by settling disputes between competing groups. Quinney sets forth an alternative to this image of law—one which recognizes that, contrary to pluralist assumptions, the law is determined by only a few groups representing a power elite. Although the law is supposed to protect all citizens, says Quinney, it actually develops as a tool of the dominant class and serves to maintain the dominance of that class.

My disagreement with Sheskin, Currie, and Quinney is not that their alternative conception of law is no more useful than the conception which they criticize. My purpose here is not to defend the pluralist—consensus image of law, but rather to argue that this image is not as dominant as Sheskin and others would lead us to believe. My argument is simply that Sheskin and others have understated the extent to which sociologists and sociological jurisprudents have recognized the crucial importance of power, economics and politics in the creation and enforcement of the law. I will attempt to illustrate my point by briefly reviewing the work of four leading jurisprudents and sociologists: 1) John Austin; 2) Eugen Ehrlich; 3) Nicholas Timasheff; and 4) Max Weber.

JOHN AUSTIN

John Austin was one of the founders of the analytical school of jurisprudence. This school is chiefly concerned with the judicial process and the force and constraint behind legal rules. Austin's work remains the most comprehensive and important attempt to formulate a system of analytical legal positivism in the context of the modern state. Austin's most important contribution to legal

theory was his substitution of the state for any ideal of justice in the definition of law.

The sociological school of jurisprudence developed in part from a dissatisfaction with the approach of the analytical school. Thus, a brief look at Austin's conception of law will shed some light on the concerns and assumptions of the sociological school. An examination of Austin's work will also be helpful because it has influenced the image of law adopted by several sociologists and anthropologists (Gibbs, 1973; Hoebel, 1973; Radcliffe-Brown, 1952; Pospisil, 1972).

According to Austin (1954:10-25), the law consists of rules set by political superiors and binding on political inferiors. Austin did not use the term "superiority" in the sense of excellence, but in the sense of *might*—"the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes" (1954:24). Political superiors, in Austin's view, are those who exercise supreme or superordinate government, and only the rules which are laid down by these political superiors may properly be called law.

Austin did not assume that the law neutrally reflects the common interests of the populace, or that it is the outcome of pluralistic competition among various groups, or that conformity to the law is based on consensus. On the contrary, Austin's conception of law assumes that the law reflects the interests of the political superiors, that political superiors lay down legal rules and force others to obey them through the threat of force, and that conformity to the law is based on fear of coercion.

Although Austin did not equate the political superiors with the dominant economic classes, his image of law is certainly more compatible with the image suggested by Sheskin than with the pluralist–consensus one. Austin, at least, cannot be accused of failing to recognize the crucial importance of power and politics in the creation and enforcement of the law.

EUGEN EHRLICH

As Sheskin noted in her paper, Eugen Ehrlich was one of the founders of sociological jurisprudence. Ehrlich rejected the

traditional notion advanced by the analytical school that the law only consists of legislative statutes created by the state and of judicial decisions made by a court or other tribunal (1936:24). For Ehrlich, law in the true sense of the term is "law which is not imprisoned in rules of law, but which dominates life itself" (1914:48). Ehrlich defined law not in terms of statutes or judicial decisions, but in terms of an ordering of social relations.

> [W]e may consider it established that, within the scope of the concept of the association, the law is an organization, that is to say, a rule which assigns to each and every member of the association his position in the community, whether it be of domination or of subjection, and his duties (1936:24).

Ehrlich referred to law defined in these terms as the "living law," so as to distinguish it from the traditional image of law defined in terms of statutes or judicial decisions.

Because of his conception of law as an ordering of social relations within an association, Ehrlich did not accept the view that the origin of legal rules can be exclusively explained in terms of a dominant minority which establishes and enforces legal rules to further its own interest. First of all, Ehrlich pointed out, it is impossible to state exhaustively the interests which motivate human conduct.

Second, and more important, the interests of the dominant minority must coincide to a certain extent with the interests of at least a majority of the other members of the association, or else the other members would not obey the rules established by the dominant minority. Ehrlich contended that if the masses were to disobey the legal rules established by the dominant minority, the association would dissolve because the dominant minority would not have sufficient means at its disposal to subdue the resisting majority. And if the association were to dissolve, Ehrlich maintained, the non-dominant majority would suffer because even an association which imposes heavy burdens on them is better than no order at all (1936:61-62, 76). Ehrlich concludes his position by saying:

> If therefore the great majority of human beings—and this includes, as can be readily seen, the whole working class—render obedience to the legal order, they undoubtedly must be actuated by a very strong conviction, though not perhaps a clear understanding, that it is necessary to do this—necessary in order to secure their own interests (1936:76).

Although Ehrlich did not believe that the law is *exclusively* determined by and reflects the interests of the dominant minority, he did recognize that the law can be a tool of domination, and that all groups do not have equal power in creating and enforcing legal norms. Ehrlich believed that relationships of domination and subjection,exist in all stages of social development, and that such relationships are a constituent part of the legal order (1936:88). In fact, Ehrlich suggested that if we wish to acquire knowledge of the living law, we must study the "facts of the law," including the relations of domination which exist in society (1936:169, 501-502).

Ehrlich distinguished between relations of domination which exist in the association and those which exist in society as a whole. In regard to the relations of domination which exist in the association, Ehrlich made a further distinction between these relations and relations of superiority and inferiority. According to Ehrlich, a command issued by a person occupying a position of superiority is made on behalf of the association, and the person occupying the position of inferiority obeys the command with a consciousness of serving the association.

In contrast, a command issued by a person who has the power of domination is made to further his own interests, and the person who is in the position of subjection is conscious primarily of serving the person to whom he is subjected. Moreover, while the association remains unitary in spite of the relations of superiority and inferiority, the relations of domination divide the association into rulers and ruled. In an association organized in terms of domination and subjection, the rulers and often the ruled form sub-associations of their own within the framework of the larger association (1936:87-88).

Although each association within society may contain relations of domination and subjection, Ehrlich asserted that society as a whole is organized in terms of differential power relationships to a much greater extent than the associations of which it is composed.

> [E]ach society has legal norms of general validity through which it acts upon the order of the associations of which it is composed. We find everywhere not only individuals who are placed under a disadvantage by society, but also associations which are slighted, outlawed, persecuted, e.g., marital relations; certain kinds of families; peoples; religious communities; political parties, to whom society makes life a burden. . . . The inner order of society, to a much greater extent than the inner order of the associations, bears the stamp of an order of domination, of conflict. To a great extent, it is the expression of the relation of the associations that rule in society to those that are being ruled and of the struggle of the associations that constitute organized society with those that refuse to be fitted into the organization (1936:152).

Not only did Ehrlich recognize that relationships of domination and subjection are a constituent part of the legal order, he also understood that the content of the law is determined to a great extent by the structure of the economic system.

> Inasmuch as the law is an inner order of the social associations, its content is determined with absolute necessity by the structure of these associations and by their method of conducting their economic enterprises. Every social and economic change causes a change in the law, and it is impossible to change the legal bases of society and of economic life without bringing about a corresponding change in the law (1936:52-53).

While recognizing the importance of the economic order in determining the content of the law, Ehrlich argued that it would be a great mistake to consider only economic phenomena and to ignore all other social phenomena. According to Ehrlich, the state,

the church, education, art, science, and entertainment all play a role in the life of society and in the development of the law no less important than that of economic labor. These non-economic factors have a pervasive influence on the relations of domination and subjection, and on the law of possession and contract.

Nevertheless, Ehrlich warns, we must not forget that the economic situation is the presupposition for every form of non-economic activity, and that an understanding of the economic order is the basis for an understanding of the other parts of society, especially the legal order (1936:115-16).

In sum, Ehrlich did not assume that the law neutrally reflects the common interests of the populace, nor that conformity to the law is based on consensus. On the contrary, Ehrlich maintained that the law primarily, but not exclusively, reflects the interests of the ruling associations in society; that conformity to the law is often based on relations of domination and subjection; that society to a great extent is an order of domination and conflict; and that the structure of the economic system is a major, but not the only, determinant of the content of the law.

NICHOLAS TIMASHEFF

Timasheff, one of the first sociologists to study legal phenomena, defined law in terms of two other forms of social coordination: ethics and power. According to Timasheff, ethics are a social force because ethical values are embodied in human attitudes and behavior through group-conviction--the similar conviction of group members which emerges from social interaction. Group-conviction is ethical to the extent that its content is the evaluation of social behavior from the standpoint of 'duty" (1939:14, 73-74).

Power, Timasheff's second form of social coordination, is based not on consensus, but on attitudes of dominance and submission. In some social groups, Timasheff contended, a small number of members possess centralized power which they use to impose patterns of conduct on the rest of the group. Such power may exist either as an active process or as a latent disposition. Power exists as an active process when commands are made by the

dominators and acts of obedience are performed by their subjects; it exists as a latent disposition when this sequence of events is repeated and acts of submission become habitual (1936:13-14, 179-80).

Timasheff believed that it was natural for ethics and power to combine to form a system which simultaneously includes the features of both. This combination of ethics and power is what Timasheff defined as law.

> Legal rules are ethical rules or norms. . .for every legal pattern of conduct can be expressed in a proposition with the predicate 'ought to be'. At the same time legal patterns of conduct are supported by centralized power and its coordinating activity, and not merely by the mutual social interaction which produces and reinforces the ethical group-conviction (1939:15).

Timasheff based his conception of law as the union of ethics and power on four propositions: 1) legal rules are recognized by group members; 2) legal rules are obeyed by group members; 3) legal rules are recognized by the members of active power centers; and 4) legal rules are supported by the members of active power centers (1939:248). Timaheff's second and fourth propositions are the most relevant here because they demonstrate that Timasheff recognized the importance of power in the creation and enforcement of the law.

Timasheff expanded his second proposition by stating that legal rules are obeyed by group members "as the generalized commands of the rulers within certain power structures" (1939:253). Timasheff noted that modern jurists often deny the proposition that legal rules are obeyed. They assert that legal rules are not commands, but directions for proper conduct. Timasheff rejected this assertion on the ground that if legal rules are merely "directions," they are indistinguishable from friendly advice. The only way to make this important distinction, Timasheff argued, is by reference to power structures: "legal rules always express dominance and therefore, they are commands" (1939:253).

Timasheff identified three specific motivations for obeying legal rules: the direct imperative motivation, the direct attributive

motivation, and the indirect motivation (1939:253). For our purposes here, the first is the most pertinent. Timasheff contended that the roots, instruments and forms of the direct imperative motivation to obey the law are exactly the same as the roots, instruments and forms of obedience within power structures, i.e., dominance, submission, unequal social interaction and power relationships (1939:254, 171-77). The effect of the direct imperative motivation to obey the law is that individuals abstain from conduct which they would have preferred simply because the law prohibits this preferred behavior and demands an opposite (1939:254-55).

Timasheff expanded his fourth proposition—legal rules are supported by the rulers—by saying:

> The recognition of legal rules by active power centers, like any recognition of ethical rules, includes a tendency to impose the recognized rules upon the behavior of others.... On the other hand, as recognized rules are simultaneously general commands of the active centers, all the considerations which commonly influence an active center to carry out prestige policy are applicable: the power center must insist upon legal rules being followed by everyone, because their non-observance would mean disobedience, and disobedience undermines power structures (1939:263-4).

Timasheff, like Austin and Ehrlich, did not assume that the law neutrally reflects the common interests of the populace, or that conformity to the law is based on consensus. Timasheff believed that the law reflects the interests of those who form the active center of the power structure, and that conformity to the law is often based on a direct imperative motivation—submission and fear of coercion. Furthermore, Timasheff cannot be fairly accused of ignoring the prominant role of power in the creation and enforcement of the law because he defines law in terms of power and devotes three whole chapters (1939:171-244) to a discussion of power.

MAX WEBER

Weber's image of law contained two separate but interrelated aspects. First, Weber viewed law as an order—a normative system according to which actors mutually orient their conduct. According to Weber, this mutual orientation to an order includes the recognition that the rules or maxims of the order are binding on the actor, or at least that they constitute a desirable model for him to imitate (1947:124; 1954:3).

Weber asserted that this recognition of the obligatory nature of an order may be guaranteed or upheld in a variety of ways. For instance, the binding force of an order may be guaranteed purely subjectively, and this subjective guaranty may be either affectual, value-rational, or religious. In addition, said Weber, the binding force of an order may be upheld by the expectation of certain external effects. In Weber's view, the binding force of the legal order is guaranteed in this latter manner (1947:126-28; 1954:5-6).

> An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose (1954:5).

The second aspect of Weber's image of law emphasizes the role of law in supporting systems of domination. Weber believed that the law may play a crucial role in establishing and perpetuating systems of domination because it can provide a justification for the exercise of power. Every system of domination or authority, argued Weber, seeks to justify itself, just as every person who is in a favored position feels the need to look upon his advantage as somehow deserved (1954:335-36).

> It is an induction from experience that no system of authority voluntarily limits itself to the appeal to material or affectual or ideal motives as a basis for guaranteeing its continuance. In

> addition every such system attempts to establish and to cultivate the belief in its 'legitimacy' (1947:325).

Weber identified three principles of legitimation to which systems of domination may appeal in attempting to satisfy their strong need for self-justification. First, claims to legitimacy may be based on a belief in the sanctity of immemorial tradition which prescribes obedience to some particular person (traditional authority). Second, claims to legitimacy may be based on a belief in the exceptional character of a savior, prophet or hero and in the rules revealed by him (charismatic authority). Finally claims to legitimacy may be based on a belief in the "legality" of a system of rational rules and in the right of those elevated to authority under such rules to issue commands (legal authority). Under the first two principles of legitimation, obedience is given to a particular person, while under the last principle obedience is given to the rules themselves (1947:328; 1954:336).

In addition to its role as a principle of legitimation, the law, in Weber's view, is intimately related to power in another way.

> The structure of every legal order directly influences the distribution of power, economic or otherwise, within its respective community. This is true of all legal orders and not only that of the state. . . . Power, as well as honor, may be guaranteed by the legal order, but, at least normally, it is not their primary source. The legal order is rather an additional factor that enhances the chance to hold power or honor; but it cannot always secure them (1946:180-81).

What is unique about Weber's discussion of power and the influence of the legal order on the distribution of power, is that he does not view power solely in terms of economic factors. "Man", wrote Weber, "does not strive for power only in order to enrich himself economically" (1946:180). For this reason, Weber identified two distinct types of power structures: economic and social (1946:181, 194).

The economic order refers to the way in which economic goods and services are used and distributed in society (1946:181).

Weber used the concept of class when analyzing the distribution of power within this type of order (1946:181-86, 194). Class situation, argued Weber, is ultimately market situation, and the two basic categories of class situations are "property" and "lack of property." These assertions are based on "the most elemental economic fact that the way in which the disposition over material property is distributed among a plurality of people, meeting competitively in the market for the purpose of exchange, in itself creates specific life changes" (1946:181).

In contrast to the economic order, the social order refers to the way in which social honor is distributed in society (1946:186-194). Weber used the concept of status when analyzing the distribution of power within this type of order (1946:186-194). The key element of status is honor.

> In contrast to the purely economically determined 'class situation' we wish to designate as 'status situation' every typical component of the life fate of men that is determined by a specific, positive or negative, social estimation of honor. This honor may be connected with any quality shared by a plurality. . .(1946:186-7).

According to Weber, the relationship between the social order and the economic order is complex. Although the two orders are not identical, the social order nevertheless is conditioned by the economic order to a high degree, and in turn reacts back on the economic order (1946:181). Status honor may be linked with a class situation, but that is neither necessary nor inevitable. In fact, said Weber, status honor normally stands in sharp opposition to the pretensions of sheer property; both propertied and propertyless people can and frequently do belong to the same status group. Furthermore, social status may partly or even wholly determine class status, without at the same time being identical with it (1947:428).

For our purposes, Weber's distinction between the economic order and the social order is important because Weber took the position that the law serves to maintain not only economic interests, but also status interests.

> Law (in the sociological sense) guarantees by no means only economic interests but rather the most diverse interests ranging from the most elementary one of personal security to such purely ideal goods as personal honor or the honor of the divine powers. Above all, it guarantees political, ecclesiastical, familial, and other positions of authority as well as positions of social preeminance of any kind which may indeed be economically conditioned or economically relevant in the most diverse ways, but which are neither economic in themselves nor sought for preponderantly economic ends (1954:35).

In short, Weber, like the other writers discussed above, did not adopt a pluralist-consensus image of law. Weber viewed law as an order whose binding force is guaranteed or upheld by the probability that coercion will be used to bring about conformity. He also recognized that the law may play a crucial role in establishing and perpetuating systems of domination because it may serve to legitimate the exercise of power. Finally, he acknowledged that the law protects the interests of the dominant groups in society, but he argued that the dominant groups are not necessarily economic and their interests are not necessarily material.

CONCLUSION

By reviewing the work of four leading sociological jurisprudents and sociologists, I have attempted to demonstrate that the pluralist-consensus image of law is not as pervasive as Sheskin contends, especially in the work of Ehrlich and Timasheff. I have argued that a number of sociologists and sociological jurisprudents assume that conformity to the law is often based on coercion, that the law is an instrument of power and domination, and that the content of the law reflects to a considerable extent the interests of the dominant groups in society.

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