LAWS AND THE CONSTRUCTION OF CRIMINAL BEHAVIOURS

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The Four Major Institutions and the Two Discourses

In this course we are looking at four major institutions which create, foster and influence or explain the "behaviour of law" in society - parliament (which makes laws), the police (who enforce the laws), the courts (which evaluate the cases) and corrections (which administer the judgments of the court). In each of these four contexts, the problem for us is to separate the determinants of "the behaviour of law" in terms of two contrasting perspectives.

(1) On the one side is JURISPRUDENCE - the legal reasoning, principles and philosophies that dictate the course of the law. This is an "internalistic" perspective. It holds that society is made possible by the laws (ie. Hobbes, The Leviathan - the social contract is essential to prevent the war of all against all). In this view, the law is AUTONOMOUS from society - independent of petty interests and distorting influences.

(2) The other perspective is THE SOCIOLOGY OF LAW - the idea that law is an outcome of social forces, that it is a PREDICATE or effect of society. This is an externalistic perspective. It emphasizes how laws are created and utilized by social groups to secure their own advantages and ideals.

Four Ideals of Good Law

In his analysis of the grounds of good law in the English tradition, Roscoe Pound describes four things that are required of good laws. The **first** of these is the political nature or POLITICALITY of law. Does the law reflect the will of the body politic that makes up the state and is it a legitimate state-manufactured law (as opposed to the law of the jungle, a mafia law, a church law, etc)? Democratic government is representative, elected by the entire adult population with each vote counting equally (which is problematic in cases of gerrymandering - ie electoral boundary changes to influence the number of voters needed to get elect a member of parliament- in some jurisdictions a government can obtain a majority of seats in parliament with as little as 35% of the popular vote). Politicality also raises the question of the responsiveness of the parliament to the aspirations of the electorate (ie passing laws which do not enjoy societal support - or failing to pass laws which do). In both cases the political legitimacy of governments is called into question. Many theorists trace the origins of political violence to the failure of democratic institutions to provide an avenue for non-violent change.

In Canada we have another issue of politicality of laws in which a local population finds itself under 'foreign' domination due to imperialism, european settlement and the like. Some cases:

- the 1755 Oath of allegiance which the British tried to extract from the francophones settled in Annapolis valley in the Bay of Fundy which led to the expulsion of the Acadians and their return to the Mirimichi River valley in New Brunswick over the next quarter century (as well as re-settling in Louisiana)
- the suppression of the Metis republic under Riel in 1869 and the subsequent suppression of the French culture in western Canada in the Manitoba School Act of 1890 (which ended bilingual schools - contrary to the BNA Act - a fact pointed out by the Supreme Court in 1990 - requiring all the provincial laws to be written in both languages)
- the de facto suppression of Native rights, laws and customs by annexation during the period of European settlement in the absence of treaties

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Second, is the law UNIFORM? That is, does the law apply to all people equally; can anyone be exempted from the law because of irrelevant characteristics, such as social status, wealth or political connections?

- The case of R v A (1974). An attempted rape was plea bargained to indecent assault permitting the accused to receive a suspended sentence requiring payment of $1000 to the victim in

compensation. "A" had managed to keep the charges secret from his family, the press and the public. The sentence had the effect of nullifying any criminal record.

- Mandel's study of employment records suggests that for persons who commit the same kind of crime and are convicted, those who are NOT employed are sentenced more harshly. The implication he draws is that people who are not employed are viewed as relatively less worthy of consideration.
- The RCMP security force broke into private places and stole private property. The crimes were recorded originally as 'break, enter and theft'. When individual Mounties were identified and brought to justice (by other Mounties) they were charged with 'failing to obtain a warrant' - permitting them to receive a conditional or absolute discharge (hence no criminal record) and no consequences in terms of being unfit to serve as a peace officer.
- The old soliciting law (1972-1985) which made it a crime to solicit in public for the purpose of prostitution was typically laid against the sellers - women - and many courts refused to hear cases involving men caught by undercover female officers in 'sting operations' designed to catch them. If it takes two to tangle, the law was only applied against the seller (yet prostitution per se was not a crime - i.e. the seller was not any more criminal than the buyer).

SPECIFICITY is the **third** characteristic. It refers to the accuracy with which laws describe forbidden behaviours. Good laws spell out what constitutes a violation in detail, while poor laws are too general. You can't send a meaniongful signal to citizens with laws that say something like - *do not drive too fast*. You have to say how fast you can drive before breaking the law. But we have some parallels in the criminal laws which are like this.

- Vagrancy - made it a crime simply to be in public, without being able to give a good account of what the person involved was up to, and usually to be without any visible means of support. The law did not require that you actually had to DO anything illegal. Were such a person doing something illegal they could be charged for that SPECIFIC crime, or even for 'causing a disturbance' - which, while being another relatively vague offense, at least had to consist of some specific obnoxious behaviour.
- The Obscenity Law. Prior to about 1950 throughout the common law world, an obscene publication was defined by the *Hicklin* rule. Hicklin arose from a British case in the 1860s. It defined an obscene publication as one in which 'the tendency of the matter is to deprave and corrupt those whose minds were open to such influence and into whose hands an item of this sort might fall'. The Canadian criminal code attempted to tighten up this vague law with a change currently contained in s 163. The law says anything is obscene which consists of "the undue exploitation of sex, or sex in conjunction with crime, horror, cruelty or violence". This means that writers and film-makers could explore sex if this was done DULY. However, the courts have held that such a state is to be based on community standards. These are supposed to be national in character, objective (not a judge's opinion), and standards of tolerance (i.e. what you would tolerate your neighbour to watch, not what is in good or bad taste). R v Butler (1992) attempted to put the matter straight by suggesting that if the materials were harmful, this would be UNDUE EXPLOITATION.

Lastly (**Fourth**), laws must have a penalty or PENAL SANCTION to give gravity to the conviction of offenders. However, the penalty should be meaningful by being only as severe as the transgression. This means that the penalties must be JUST, ie measured. However, there are a number of conflicting theories which justify different kinds of penalties. The problem raised is this: there are so many different justifications that justify just about any penalty. Here are the leading theories of sentencing:

- incapacitation - protect society by locking offenders away from society
- retribution - punish the offender to symbolize society's rejection
- denunciation - condemn the offense verbally to represent society's rejection of the behaviour
- compensation - make the offender re-pay the losses caused by the crime
- deterrence - punish the crime only so much as to offset the gains of crime (this also raises the q of specific deterrence - the effect on the accused versus general deterrence - the effect on other

potential offenders versus marginal deterrence - the effect of one kind of punishment versus another kind of punishment
- rehabilitation - reform the offender to help the offender re integrate into society as a law-abiding citizen

The Canadian Sentencing Commission pointed out that different judges follow different penal philosophies, and that there are differences in sentencing "follow no discenible pattern". This raises questions again that point to problems in the area of UNIFORMITY.

These four characteristics above are studied by students of jurisprudence and are rarely discussed by criminologists. The major issue discussed among contemporary criminologists is whether the laws have been invented to serve the interests of particular groups or whether the laws are derived from a situation of value consensus and are an expression of the collective will. Speaking generally there are few proponents of the idea that most or even the most important of our laws reflect the feelings of the majority of people in society. **James Q Wilson** is one of the few theorists who adopt a consensus approach. He stresses that crime, especially predatory crime and crimes of theft, undermine the feeling of community and the citizens' feelings of security (and that such is NOT the case with white collar crime or crimes by businesses or governments). The contemporary debate in criminology is animated by the extent to which interest groups are able to dominate governments to ensure that the laws reflect their own interests. Marxists take the view that the state and the legal apparatus is an arrangement for the perpetuation of the capitalist system of production. Generally, criminal law is seen as a device to protect property and to prevent interference with the capitalist process of production. Other conflict theorists argue that whatever the economic basis of society, elites will struggle for control over the scarce resources of society and will employ law as a weapon to control dependent and subordinate classes and groups.

The sociologies of law differ on where the influences arise. There are three approaches that I would emphasize:

(1) Marxist theories: which are either economic reductionist or dialectical. The former argues that laws are dictated by economic necessity. The dialectical approach allows for more complexity - there are struggles among different capitalists, and there are in-roads made by disadvantaged groups through law reform which wrestle some power away from the elite and win greater equity in the legal process.

(2) Durkheim and the Labeling Theories: these argue that social movements and charismatic leaders can introduce reforms which arbitrarily make behaviours criminal. The leading examples concern the prohibition movement and the criminalization of narcotics use. Labeling theory stresses that the prosecution of crime re-emphasizes moral boundaries - and that sometimes crimes can be invented when they do not occur naturally. These leading cases are witchcraft - and the Red Scare in the Soviet union in 1937-38. These prosecutions were functional in terms of 'boundary maintenance' in societies facing challenges to their orthodox beliefs. However, for the victims falsely called before the Inquisition (in Europe) or the courts (witchcraft was a felony in England), or before the secret trials in Russia, the results were fatal.

(3) Weber and bureaucracies. Sometimes the initiative for law creation comes from members of the law control bureaucracy themselves.

All three approaches stress externalistic influences on law - but differ on where these influences arise. These lectures examines examples of laws that reflect a number of these perspectives. Some laws have clearly evolved from the influence of powerful political and economic forces in society. Others have been fostered by the success of moral leaders in the society, others by attempts to control minority groups, others by an expression of the collective will and still others by struggles within society to reform previous laws.

Illustrating Economic Determinism: Vagrancy in Africa and Engalnd

One of the best examples of laws of this type is discussed by William Chambliss and concerns the introduction of poll taxes and registration taxes in Colonial East Africa in the period 1890-1930. One of the major problems facing English settlers in Uganda, Kenya and Tanganyika after colonization was that of getting large numbers of natives to leave their traditional lifestyles of herding and slash and burn agriculture to work on the large English plantations raising tea, coffee and sisal for export. The new agriculture depended on the creation of large pools of cheap labour and the legal code was at the forefront of the solution to this problem. The "poll tax" and "registration" laws required everyone of working age to

pay a small tax, purportedly to support the colonial rule. Since the natives were subsistent agriculturalists, they had never previously participated in a money economy--until this law forced them into it. This situation was actively endorsed by colonial administrators. In 1895 Sir Harry Johnston stated:

> *Given abundance of cheap labour, the financial security of the Protectorate is established. . . .All that needs to be done is for the Administration to act as friends of both sides, and introduce the native labourer to the European capitalist. A gentle insistence that the native should contribute his fair share to the revenue of the country by paying his tax is all that is necessary on our part to ensure his taking a share in life's labour which no human being should avoid.*

To guarantee the unwilling African's compliance with this "forced labour" arrangement, fines, imprisonment and corporal punishment were imposed on people who failed to pay the tax. Even this was not completely successful and more comprehensive and sterner guarantees were required. Labourers were required to register fingerprints so that runaways could quickly be returned to their plantation employers. Vagrancy laws prevented natives from leaving their reserves for anything but becoming wage labourers. In addition, wages were kept extremely low to prevent workers from generating sufficient cash to quickly pay off the poll tax and quit work.

This sort of situation was not limited to exotic colonial societies but was found even in England, the home of the common law tradition. Chambliss (1969) reviewed the history of the vagrancy law and showed that this residual type of social control was redefined and interpreted over time to serve the interests of the shifting power blocks in English society.

The English Vagrancy Laws

In **1274** a pre-vagrancy statute was passed that made it unlawful for travellers to live off the largesse of the abbies and religious monasteries and houses, for the biblical injunction to feed and house strangers and travellers was becoming a grave economic burden for religious orders. This, however, was not a true vagrancy law.

In **1349**, a law was passed making it a crime to give alms or handouts to any beggars who were able, but unwilling, to work for a living. Consequently, beggars would be forced to take work to support themselves. The law also made it illegal for any man or woman without a trade to refuse work, and gave the individual who apprehended the latter the right to his or her service at a fixed wage for two years. This law overlapped with the Statutes of Labourers (1349-51) which fixed the price of labour, made it unlawful to accept more than this, made it unlawful to refuse work, and made it unlawful to flee one county to another to avoid offers of work or to seek higher wages.

According to Chambliss, the rationale for these laws was purely economic. The Black Plague had wiped out about half of the English population, creating a general labour shortage. The labour-intensive manorial system was put into jeopardy. The 1349 vagrancy law effectively minimized the ability of freemen to move about to maximize their economic self- interests. The net effect of the laws was to impress into jobs all those who were available to work and to make it difficult for anyone to move about to exploit wage differentials and thereby threaten the manorial reliance on peasant labour. The law had an obvious economic motive, despite being a vagrancy law.

Following 1349 punishments for vagrancy became more severe. The initial penalty of 15 days in jail changed to indefinite terms in the "stocks" until an employer could be found. With later population growth, the statute appears to have become dormant and unimportant.

In **1530** a new vagrancy statute was written to specifically cover what we would recognize as criminal and potentially criminal activities. It identified as vagrant those persons without any visible means of support, as well as those who lived by gambling and trickery. The punishments for vagrancy at this point were extremely cruel. Whipping and mutilation (e.g., cutting off the ears) were expanded in 1535 to include the use of the death penalty for repeat offenders. Chambliss argues that the vagrant was now conceived as a serious felon and not just a vagabond who did not want to work. In 1547, vagrants were branded on the chest or the forehead, indicating in a permanent way the view that such persons were inherently dangerous, rather than being mere nuisances. This was formalized in a 1571 law that laid down the conditions for first-, second- and third-time offenders (first--grevious whipping and burning "thru the gristle" of the right ear; second--impressed for two years forced work; third--death without benefit of clergy).

Chambliss argues that the change in the definition of vagrancy reflected the power of the new interest groups, the manufacturers and traders whose business in wool and cloth grew to international proportions in the 15th and 16th centuries. In 1400 there were 169 wool merchants in England. A century later there

were 3000. Vagrants were prosecuted because of the threat they posed to the safe transportation of merchant's goods. The vagrancy act identified the vagrants as threats specifically on the highways:

> *.....Whereas diverse licentious persons wander up and down in all parts of the realm. . .and do continually assemble themselves armed in the highways, and elsewhere in troops, to the great terror of her majesty's true subjects, the impeachment of her laws, and the disturbance of the peace and tranquility of the realm; and whereas many outrages are daily committed by these dissolute persons, and more are likely to ensue if speedy remedy be not provided.....*

The last notable change in the vagrancy laws occurred in 1743 when the vagrancy categories took a more modern twist, de-emphasizing the danger to trade of marauding bands and labelling the destitute wanderers and other marginal actors as threats to public order. The law was aimed at beggars, gamblers, runaways, vagabonds and the like. These were largely the sort of things found in the first Canadian criminal law on vagrancy: the people identified were less a specific threat to trade, and more an undifferentiated threat to normative life styles and the public peace and order.

In Canada - aside from economic concerns - the vagrancy law was used until 1972 to make it a crime to be a prostitute found in public (this was Vagrancy C - and it was criticized because it made a crime out of being some kind of disvalued person - not for actually DOING anything wrong - ie it did not prosecute prostitution, but people standing around waiting for 'dates'). Also in 1985, vagrancy was changed to cover convicted pedophiles found within 500 feet of school yards - where they might reasonably be expected to be stalking children).

But in general, he vagrancy laws shifted their focus over time to include different categories of "enemies" or "delinquents." When the manorial system required labourers, the law was used to force labourers into the manorial system. When the merchants required freedom from threat of highway robbery, the law was re-tooled to serve this interest. And when the needs of the merchant class passed in importance, the law came to serve a more general interest in the control of marginal people.

Some of these same historical forces were important in the decision of the famous Carrier case, in which for the first time in English history a transporter or carrier who was legally bailed with the goods in his possession was found guilty of a felony for keeping them. This historic case shows again the way in which the criminal law can be manipulated to serve the interests of a specific group.

The Carrier Case of 1473

What was the problem in this case? A foreign merchant, probably an Italian, hired a man to carry some bales for him from London to Southampton. The carrier took the bales, legitimately, and broke them open, taking the contents--which was illegitimate. Under English law the merchant could bring a civil action for "trespass to goods." But under the common law governing criminal action, it was difficult to argue that any crime had happened. Certainly, a wrong had occurred, but not a crime. The common law required of theft the element of trespass. Presumably to steal someone's property you would have to trespass first on his land. But the carrier had not trespassed to get the goods; he was given them voluntarily. Nonetheless the merchant successfully had a charge of felony laid, and the case was heard before the Star Chamber. At the outcome, contrary to the common law, the carrier was convicted against the opinion of the Chief Justice.

The problem is, how did this particular change come about? Jerome Hall's study of this case suggests three forces. First, there was a moral force underlying the decision. Though the King may have manipulated conditions to serve his own interests, the merchant was at least morally considered to have been victimized. Second, because of the political upheaval prior to the case (i.e., the War of Roses and defeat of the Lancastrians), Edward IV was distrustful of his ministers and tended to dominate and control them, as well as his judges. Notably, the case was heard in the Star Chamber, which was especially vulnerable to his personal influence. Third, because of his guarantee of safety to the foreign merchant, the King could have been held liable for the merchant's losses. Also, with the demise of the agricultural feudal system and the rise of the trade in wool, shipping and trading merchants were becoming increasingly influential especially for Edward IV who relied on them for financial and political support. Also, Edward was himself a trader in wool, and wool was the major stuff of trade in the new society. Hence for a series of economic reasons, some of which were personal and others national, Edward appears to have exploited his power over the judiciary to gain a new interpretation of larceny, at the expense of the common law. In other words, he co-opted the criminal law in the interests of business.

The 1970 U.S. Drug Bill

These historical cases are distant in time and exotic in place. William Chambliss cites an example that hits somewhat closer to home. It concerns passage of the 1970 Comprehensive Drug Abuse, Prevention and Control Act in the USA. Of interest to us are the efforts made by the leading drug manufacturers to control the labelling of certain drugs as "dangerous." The statute was designed to control the distribution and use of "dangerous" drugs, and included a controversial provision allowing drug enforcement officers the right to enter private homes without notice or permission. Certain disturbing things became clear during the House of Representatives' hearings.

First, there was substantial evidence to document the dangerousness of certain "legitimately" produced drugs; that is, products from leading pharmaceutical companies. Notwithstanding this, the legislators, under pressure from the lobbyists for the drug companies, managed to confine the focus of the state on drugs taken by youth and lower-class slum dwellers: cocaine, pot, heroin, and LSD. Consequently, the drug companies insulated their profits from possible interference by the federal drug regulations.

The law was drafted by the Nixon administration, with the assistance of, and after consultation with, the leading pharmaceutical corporations. This was passed in spite of the following sort of evidence. Each year in the USA the pharmaceutical industry produces tens of billions of amphetamines, meta-phetamines ("speed") and two closely related compounds: valium and librium.

The widespread use of these compounds by middle-class housewives, students, businessmen and athletes has created several widespread negative effects: a) the drugs create psychological dependence b) continued use (especially of librium and valium) produces extreme depression c) the Bureau of Narcotics and Dangerous Drugs cited librium and valium as precipitating factors in 36 suicides and 750 attempted suicides d) evidence from the National Institute of Mental Health suggested that continued long-term use of these compounds often resulted in malnutrition, prolonged psychotic states, heart irregularities, convulsions, hepatitis, and brain damage. Therefore, the drugs' harmfulness was well documented.

The second item of evidence concerned the diversion of drugs. Eight billion amphetamine pills were marketed legally, for the most part through prescriptions written by doctors. However, the Bureau of Narcotics and Dangerous Drugs estimated that about 75-90% of the illegally used "speed" was manufactured legally in the country, and therefore the drug companies were producing the bulk of the traffic in speed. Apparently there is widespread forging of prescriptions, duplication of prescriptions, and the distribution of open-ended prescriptions, which allow the "patient" to return at will to the drugstore to have a supply refilled. Also, the major drug companies were not terribly careful about who they sent the drugs to. According to Chambliss (1974: 19), one federal agent obtained 25,000 pills in the mail by signing his name as a doctor.

The third item of evidence concerned the actual utility of these pills in medical treatment situations. Most of the 53 submissions suggested a specific medical application, "for the early stages of a diet program." About 99% of all prescriptions were written for this purpose in spite of the fact that their utility in this regard was extremely limited. Instead of being used several times over a period of a week, the pills have undergone a widespread and consistent use. Apparently obesity has become an excuse to get high on speed, and all this in spite of the testimony from one Vanderbilt Medical School doctor who testified that a few thousand pills would meet the real medical needs of the entire United States (Chambliss, 1974: 20). However, this would not meet the economic needs of the drug companies. Hoffman-LaRoche makes tens of millions of dollars annually from the profits on valium and librium alone, compounds that are virtually equivalent to "speed."

In the end, the 1970 legislation was directed at and confined to the users and manufacturers of compounds like LSD, cocaine and marihuana, and was drafted with the assistance of those drug companies with large stakes in the production of "legitimate drugs," despite the evidence that these were at least as harmful as the so-called "dangerous" drugs marketed by independent entrepreneurs. This example again illustrates the fashion in which interest groups manipulate the law to serve their own ends.

Reforms - Illustrating the Dialectical Marxist Perspective

In the various case studies, the Colonial poll tax laws, the vagrancy laws, the Carrier case and the 1970 comprehensive drug bill, it is apparent that power blocks in the state have influenced the creation of criminal and administrative laws to maintain or protect their own political and/or economic status. Marxists have argued for a century that the ideas of the ruling class are the ruling ideas. Ideas, including laws, are determined by the all-important economic substructure of the society. The cases examined above appear to broadly bear out this observation.

Yet, the idea that law=class power cannot survive for very long. It draws into question the legitimacy of the legal structure, it challenges the idea that "the rule of law" is autonomous or independent - and if people lose respect for it, it no longer governs their behaviour. This point is made by Edward P Thompson in Whigs and Hunters. This is a study of the Black Act of 1724. This law introduced about 200 NEW capital crimes in England - including putting pitch on one's face and going about the countryside after dark. The law was designed to suppress the 'hunters' who lived in the forests which were bought up by the new business class - the new Liberals or Whigs - who were building huge new estates outside London and who were pushing people off the land who had lived subsistently for generations, and whose rights to do so, in theory, were protected by forestry law. Thompson points out that the law was clearly a class biased law - but that it created a framework which even the disadvantaged could call on for their own purposes, especially after the working classes arrived and expanded in the cities after the age of steam (post 1790). Thompson - a Marxist - said that "the rule of law was a cultural discovery of universal significance" - quite a position for someone who typically reduces all superstructure (including law) to substructure (the economy).

Thompson's work raises the question of how political states with biased laws could survive without becoming simply naked oppression. But in the English tradition, the laws were never generally so regarded. The laws always had a sense of autonomy.

After the Norman conquest (1066), the French rulers instituted a system of justice based on (1) independent circuit judges who tried cases at arms length from politics, (2) a special form of reasoning called the common law which based decisions on previous insights and considerations from previous judges - ie. Jurisprudence and (3) a provision for trial by one's peers, or neighbours. These 3 factors were crucial for establishing justice as an independent force in English society - even after the Norman conquest and the demise of Anglo-Saxon power structures.

Douglas Hay argues that in the 1700s, when the law was biased in favour of the business classes, the rule of law continued to have an independent sense, and the society was governed with neither a uniformed police force nor a standing army because of the perceived legitimacy of the justice system The three key elements he stressed were (1) the 'majesty of the law' - all the dramatic trappings of the pomp and circumstance of the courts, the wigs, the formalities etc. (2) a stress on the peculiar logic of law (jurisprudence) and exacting, precise procedures (without which no one could be tried or convicted, and (3) the royal prerogative of mercy which allowed the Crown to pardon felons who enjoyed popularity. So while the law was extremely harsh, the elite ingratiated itself to the poor by being so merciful!

Let's get back to some of the specific studies which outline how some marxists continue to see the role of economic issues playing into the legal process, although indireclty, obliquely, and without drawing into question the issue of bias or non-legitimacy in the rule of law.

Let's look at reform movements. After all, we tend to think that most modern changes in legislation are the results of enlightened individuals seeking to undo injustices of the past. However, not all reform movements have a strictly liberal orientation. Some reform movements ironically serve the interests of the very groups they are directed against.

Recall from your theory classes: the introduction of the 12 hour working day (from Marx in Das Kapital) - where the manufacturers asked for a state intervention to interfere with industries to make changes - reforms - they could not make on their own. The dialectical approach stresses that there is often competition between capitalists - that there is a degree of autonomy even in capitalist law, and that law reform can and does improve conditions in society without revolutionary change.

Gabriel Kolko argues that the 1906 reform of the meat packing industries in Chicago played into the hands of the larger capitalist entrepreneurs.

Readers of Upton Sinclair's novel THE JUNGLE will be familiar with the dangerous and unsanitary working conditions found in the meat packing industries in Chicago at the turn of the century. "Everything but the squeal" was used in making the meat loaf, sometimes the hapless workers included. Partly as a result of Sinclair's book and partly as a result of the public's concern over the quality of the meat, there was a wide call for reform of the conditions in the industry. And, since the unsanitary conditions were producing unhealthy meat, there was a fall in reputation of the product that affected the export market in Europe, hurting the packers financially. The sanitation laws were passed with the cooperation of the large packers in an attempt to clean up the industry. One provision of the law required that the meat inspectors be paid for by the companies themselves, even though inspectors were government employees. This had a different effect on companies of different sizes. Large companies were able to spread their costs over a

large volume of goods while many of the small companies went bankrupt or were bought out by the large outfits. Hence the law to regulate the industry had the effect of concentrating business in fewer hands. The inspectors gave the new meat a government seal of approval, boosting the reputation of the product and helping the export picture. Clearly this attempt to regulate the industry was subsequently co-opted to further the industry's objectives, and the "reform" inadvertently accelerated the centralization of the industry. However, other reform movements have not met with the same fate. Nonetheless, they tend to be self-serving for the groups who propose them.

Labeling Theory (Durkheim): Laws as Symbols of Morality

Much of the sociological literature on law reform has centered on changes in law designed to regulate unsavory lifestyles, habits and deviations. This literature argues that from time to time certain groups in a society effect changes in law that have a largely symbolic significance. Unlike the economic entrepreneurs who try to gain legal control over business regulations, these moral entrepreneurs, as Howard Becker calls them, seek changes in the law for symbolic ends. In other words, they seek passage of laws to degrade and criminalize the activities of other groups and consequently to upgrade, through invidious comparison, the moral superiority of their own group. Often, the laws they have passed are purely symbolic. That is, the laws do not change, but merely deprecate, the behaviour of the outgroups. The leading examples of this process are found in attempts to control elements of lifestyle and leisure, and surround the creation of laws against the use of liquor and drugs.

Prohibition

An important case is prohibition. The classic sociological study in this area is Joseph Gusfield's SYMBOLIC CRUSADE. The periods of temperance were different in the USA and Canada. In the USA, the 1919 Volstead Act made the 18th Amendment enforceable. This Act was repealed in 1933, ending prohibition. In Canada, a Prohibition Act was passed by the federal Parliament allowing provinces the right of separate ratification. Except for Quebec, provincial ratifications of the prohibition appeared over a two-year period following1916, and continued to 1924: even after 1924, when provinces began to opt out, there was widespread exercise of "local option," that is, decisions at the village, city, town or county level on whether to go "wet" (i.e., allow beverage rooms) or stay "dry." There was a one-year period from November 1919 to October 1920, when the law was not enforceable on inter-provincial trade, allowing persons in a dry province to import liquor from another province. We tend to equate prohibition with these well-known periods in the second and third decades of this century. However, the prohibition movement was a widespread 19th-century movement that effectively banned the trade in liquor in many local jurisdictions.

James Gray's popular study of this episode in Canadian history in BOOZE: THE ROLE OF WHISKEY IN THE PRAIRIE WEST indicates that the use of liquor among the white settlers of British North America was staggering. In Upper Canada in 1842 there were 147 distillers and 96 breweries serving a population of 500,000. This constituted about one manufacturer for every 2,000 men, women and children. In Winnipeg, in 1881, for the population of 8,000 people, there were 64 hotels with bars, 5 breweries, 24 wine and liquor stores. In 1882, the number of hotel bars jumped to 86, and there were 64 grocery stores selling bottled whisky, as well as a score of "wholesalers" in wagons. We do not have figures for the volume consumption of alcohol in Canada over time, but our consumption is probably comparable to the Americans. Table 1, which shows total per capita volume alcohol consumed, indicates that 19th- century and early 20th-century consumption was higher than today.

Table 1: Annual Consumption of Alcohol in the U.S. (Gusfield, 1963: 132) ----------

1850 2.07 gallons / person over 13 yrs old
1911-15 (average) 2.56
1940 1.56
1957 1.91

The dramatic change in drinking habits is also reflected in the type of alcohol consumed. In 1850, 90% of the volume consumed was distilled spirits (i.e. hard liquor) and 7% was beer. In 1957, 40% was spirits and 50% was beer. Rorobaugh in THE ALCOHOLIC REPUBLIC suggests that drunkenness was a major problem in 19th century America as farmers turned part of their grain and corn crops into more profitable beverage products-which drove the prices down and resulted in an increase in consumption.

With this volume of consumption, there was a proliferation of temperance movements. In 1835, the Montreal Temperance Society was founded. In 1836 in Montreal there was a convention of 30 societies

from numerous jurisdictions. In 1847, the Sons of Temperance was founded in New Brunswick, Nova Scotia and Lower Canada. The Independent Order of Good Templars flourished across British North America in the 1850s with a total membership of 20,000 as did the Women's Christian Temperance Movement and charters of numerous American groups.

Who were the backers of these movements? According to Gusfield, they were predominantly fundamentalist Protestant, white settlers, largely from rural areas, and initially of middle-class background. They were the icons of the old Protestant ethic and valued hard work, self reliance and self-denial.

What theory accounts for their participation in the temperance movement and the ultimate enactment of the national prohibition laws? Gusfield argues that increasingly over the 19th century the traditional settlers of Canada and the USA experienced a loss of social status compared to the urban classes and a challenge to their traditional values with the increases of urban, non-Protestant, and non-Anglo-Saxon immigration. Consequently, their social status vis-a-vis others was tending to fall. The temperance movements were a form of status politics, not class politics, whose aim, unlike the vagrancy laws and the poll tax, was not economic gain but the reaffirmation of the prestige of a lifestyle. They tried to obtain these ends by getting others who were viewed as individual sinners or "backsliders" as well as alien groups like the urban Irish Catholics, or the beer-loving Germans, to accept the values of the temperate and the abstainers.

In the early period of the movements (1825-1875) the norms of the Protestant middle and upper class dominated the societies. The strategies of the movements were those of education, persuasion, and the reform of social conditions that caused excessive drinking. However, as the industrial capitalists rose to power with the success of American mining and railway conglomerations, the temperance movement's members fell in status with increases in urbanization, and non-English immigration, and the tactics changed from "assimilation" to coercive reform; that is, from a temperance movement to a prohibition movement. The fight for prohibition represented the attempt of the old middle class from rural and small-town communities to enforce their ideas on the rest of the population, even if only symbolically.

What is unclear about these laws is whether they radically altered drinking behaviour over the long run. In the USA, the federal government passed the Volstead Act, but did not approve the required expenditures to increase the civil service to assure it would be enforced. Local stills sprang up everywhere, and organized crime grew to replace the vacuum created by the temperance movement's lobbyists. While before prohibition every saloon required a license, prohibition actually multiplied the number of operating saloons. Now that it was illegal, no one was worried about the license, and everybody who wanted to open up a bar, but was previously restricted by the law, was now unrestrained, at least by the licensing boards. In Canada the volume of illicit liquor manufactured and consumed is nearly impossible to calculate. However we can be fairly certain that Canadian palates did not do without alcohol just because of the law; just as we are fairly certain that nowadays anybody who wants marihuana or hashish need not go without if they are prepared to flout the law.

However, in rural areas, and especially in the west where the temperance movement was strongest, drinking fell to 20% by volume of what it had been earlier (Gray, 1972). Where did the 20% come from? Contrary to popular opinion, it was still legal to manufacture alcoholic beverages for the export market and for medicinal purposes. Much if not most of the Canadian liquor manufactured for export was illegally diverted to domestic sources or illegally exported south of the border. This was the experience of the early Bronfman operation in the fledgling distillery in Yorkton, Saskatchewan.

Also, alcohol could be obtained by doctor's prescription from a pharmacy. James Gray (1972: 92) relates an instance from Calgary where a party of fishermen heading for a day at Banff, and fearful of "catching a chill" had a prescription filled for a quart of Scotch at the local pharmacy. Lastly, breweries were permitted to produce "temperance beer," a weak beverage ranging in strength from 0.5% to 4% depending on the year and the province. However, strong beer (5%-7% alcohol by volume) was often brewed and substituted in the taverns. Needless to say, the new laws dampened the rowdiness of the bars. No matter what was coming through the spigots, it was imperative to maintain an appearance of respectability to avoid the involvement of curious RCMP officers.

After 1924 the province-wide dry laws were repealed, though local option continued to keep many places effectively dry until the last two decades. The 1923-24 votes that removed prohibition replaced it with strict laws that turned over the retail distribution of liquor to provincial government control and regulated the operation of beverage rooms under provincial laws. Thereafter there were to be no more wide-open towns and no more rambunctious saloons. The new drinking laws forbade such things as standing on the table, singing in the bars and standing with a beer in hand.

If we contrast the reformist elements of the sanitation laws and the prohibition laws, we find that the

sanitation laws, though designed to control the capitalist packers, actually played into the hands of these parties. In this case the state mediated what the individual producers could not impose on themselves. By contrast, the reformists who pushed for prohibition were responsible for the curtailment of the legal marketing of alcohol, but this served the symbolic interests of the temperance backers--the rural, traditionalist, fundamentalist classes, and, inadvertently, the interests of illicit entrepreneurs in organized crime. These laws scored a temporary symbolic victory over the newer elements in the ideological interests of a downwardly mobile sector of society. The temperance movement was an attempt to re-assert the righteous lifestyle of this formerly dominant group. Consequently, the rise of the prohibition laws was symbolic, not economic. Nonetheless, the demise of the laws reflected the economic interests of the legitimate brewers and distillers, and, with government in the business of distributing liquor, created an alliance between government and business by which government was given a share of the retail profits as well as the liquor taxes, and business, which had continued throughout this period to make liquor allegedly for for export, was guaranteed a legitimate system of distribution in the home market. What this suggests is that to explain the rise of particular laws, we ought to examine the competing interest groups that arise to contest new laws and to reform old ones, and the moral as well as the economic elements that underlie the respective positions of such groups.

Summary

This brief examination of several different laws illustrates that social causes or conditions dictate or influence the laws a society adopts. Laws do not respond to some external ideal of universal justice that transcends society and to which society naturally aligns itself. Only in mythology are laws passed from gods to mankind. In democracies, laws are passed by politicians, and are formed under a variety of conditions. We have focused on several of these. First, we examined laws passed and changed in response to the economic aspirations of certain elite groups of society. This was reflected in the evolution of the vagrancy laws in England, and in East Africa. In the guise of controlling unruly public behaviour, vagrancy was a method of exerting control over marginal or rebellious elements of the labour force. Economic considerations likewise controlled the evolution of the law of theft in the Carrier Case where, contrary to the common law, the absence of the element of trespass was disregarded to register a conviction, thereby safeguarding the English trade in wool.

The second type of situation that contributes to the introduction of criminal law is law reform. Laws are frequently passed to correct a perceived harm. We examined cases in which the circulation of supposedly harmful drugs, as well as tainted meat, was brought under control by new laws. However, in the case of the regulation of the meat-packing industry, we saw that state intervention was actually in the interests of the elite members of the groups being regulated.

So even laws introduced as reforms of illicit conduct can have an underlying economic aspect. Also, in examining attempts to reform behaviour, we explored the role of moral entrepreneurship. This may be undertaken by specific interest groups, as in the case for prohibition led by the temperance movements.

In the introduction to this lecture, we identified several elements that are relevant when determining whether laws are good laws. These were politicality, uniformity, specificity and penal sanction. These are not narrow concerns of jurisprudence but are important ideals in democratic forms of society. They provide grounds for making and for challenging laws. The question of politicality has arisen in most of the illustrations we have examined. The thrust of the vagrancy laws, the drug laws, and prohibition are of note in sociological studies because they smack of one-sidedness, of political domination of one group over another by virtue of its control over the legal apparatus. In other words, they raise questions about the politicality of the law. In addition, we find many of these laws objectionable because they defy the ideal of uniformity. For example, the punitive narcotics legislation pinpointed Asian users and avoided the high-status medical pushers; contemporary narcotics legislation targets potheads for criminal processing but fails to regulate corporate valium pushers. The differences in penal sanctions reflect this differential labeling: entrepreneurs who import illicit narcotics face a minimum sentence of seven years while entrepreneurs who import valium deduct the costs from their income tax and operate with impunity despite the harmfulness of their brand of narcotics.

Politicality and uniformity exist in a special tension in democratic states. To recognize that laws are political or conventional, and that they are self-serving for those groups who control their passage, is to detect a loss of innocence in man-made law that was never problematic when laws were given to society from above. To say that the laws are politically motivated is to raise the question of who is benefiting and who is suffering from them. The standard of uniformity tends to control the politicality of the law. While

legal systems in every country are politically organized, the hallmark of democratic societies is the uniformity of law. This puts enormous importance on the legal standards by which criminal behaviour is judged. Obviously, to be judged criminal one must be more than simply a foreigner and more than merely unusual. The distinguishing elements of criminal behaviour have preoccupied students of law for centuries.