

Offprint from **LAW AND THE SOCIAL SCIENCES**,
Leon Lipson and Stanton Wheeler, editors,
© 1986 by Russell Sage Foundation.

~ 9 ~

PRIVATE GOVERNMENT

Stewart Macaulay

University of Wisconsin—Madison

Much of what we could call governing is done by groups that are not part of the institutions established by federal and state constitutions. If governing involves making rules, interpreting them, applying them to specific cases, and sanctioning violations, some of all of this is done by such different clusters of people as the Mafia, the National Collegiate Athletic Association, the American Arbitration Association, those who run large shopping centers, neighborhood associations, and even the regulars at Smokey's tavern. It may be necessary to draw a sharp line between public and private governments such as these in order to think about law, but in reality there is no such division. To the contrary, one finds instead interpenetration, overlapping jurisdictions, and opportunities

NOTE: Much of this paper has been shaped by the contributions and critical editing of Dr. Jacqueline R. Macaulay. Other demands on her time made it impossible for her to do any of the writing, and so, at her request, she is not listed as a co-author. My colleague David Trubek read the manuscript critically and offered extensive suggestions. Professors William H. Clune, Marc Galanter, Robert W. Gordon, Willard Hurst, Ellen R. Jordan, Leonard V. Kaplan, Marygold S. Melli, Sally Falk Moore, Theodore Schneyer, and Diane Vaughan read some or part of the drafts of the manuscript and made very helpful comments. A draft was written while I was a visitor at the Centre for Socio-Legal Studies, Wolfson College, Oxford, in 1979, and I benefited greatly from discussions with many people there. I presented part of the text in a paper called "Private Government and Functionalist and Marxist Theories of Law" at Osgoode Hall Law School, York University, Toronto, Ontario, in 1980. Again I benefited from the reactions of those who attended the lecture. The last section was presented at the Conference on Reflexive Law and the Regulatory Crisis, held at the University of Wisconsin—Madison, July 18–21, 1983. I learned a great deal from the responses of the European and North and South American participants. Yet after all of this help, of course, I am still responsible for all errors.

for both harmony and conflict among public and private governments. Formal legal process typically plays a part only indirectly and as a last resort. We are likely to be seriously misled if we assume that there are sharp distinctions between public and private governments and between formal and informal processes. We must recognize that these concepts are only rough generalizations useful for emphasizing aspects of reality rather than accurate descriptions of things existing in the world.

These are not new observations. The concept of private government goes back at least to Ehrlich's theory (1913) of the "living law." However, despite this distinguished lineage, scholars often have failed to see the importance of private social control as it interacts with and affects the formal legal system. Fitzpatrick (1984) points out that even legal realism narrows its focus to formal legal process and doctrine.

Academic legal knowledge is generated by applying a certain idea of law to the world. This approach cannot extend to social forms which do not find expression in terms of legal process or doctrine. The integrity of "law" is thus obliquely but potentially affirmed in areas of scholarship that claim to be fundamentally skeptical of it. [p. 135]

At the same time, far too often, work in law and the behavioral sciences implicitly accepts the distinction between public and private spheres and assumes that one can study the roles played by law in a society by considering only the actors who play official parts. What is needed is a "private government perspective" which both recognizes private associations that affect government and also treats distinctions between public and private spheres as doubtful rather than as given. (Cf. Spitzer 1984.)

At the outset, I will try to give some shape to the amorphous term "private government." While any formal definition would be arbitrary, we need some idea about what we are and are not discussing. Once this is done, we can turn to specific topics in legal studies and consider possible contributions of a private government perspective which emphasizes private rule-making, interpretation, application, and sanctioning as well as the artificiality of drawing any hard line between public and private governing.

PRIVATE GOVERNMENTS AND THEIR RELATIONSHIPS WITH THE PUBLIC LEGAL SYSTEM

What Is a Private Government?

The term "private government" draws an analogy intended to highlight certain features of something that is not a public government. As we shall see, if we put aside for a moment our skepticism about the public/private distinction, we could call many actions of individuals and groups "government" (see Evan 1976, pp. 171–85). The test of any analogy is its usefulness as balanced against the risks of overlooking ways the things being compared differ. Probably those engaged in the social study of law should consider first those private governments that bear some close relationships to public ones.

When might we draw a plausible analogy between private social control and public government? It is easiest to label as a private government a formally defined organization which makes rules, interprets them in the context of specific cases, and imposes sanctions for their violation. The analogy might seem more apt if the organization attempted to mimic the public legal system. For example, at least in the past, "company towns" often

sought to govern by using the forms of legal rules, courts, and police—all controlled, however, by a business corporation rather than the citizens.

More typically, however, organizations attempt to take over only some of the functions of public government and mimic only part of the public legal system. Trade associations “legislate” rules of practice and suggest standard forms of agreement (see Leblebici and Salancik 1982); a number of groups “adjudicate” disputes by offering arbitration to their members; corporations establish their own private police to guard against (or engage in) industrial espionage. These groups may borrow some structures and symbols from the public government—for example, private police wear uniforms, badges, and guns; arbitrators may run their hearings by procedures approaching a trial; trade association rule-making may involve established procedures that suggest a legislature and often bring forth political tactics. Even a duel can be viewed as a kind of legal procedure with highly technical rules (cf. Schwartz, Baxter, and Ryan 1984).

Yet we can go beyond these fairly obvious analogies. Any group of people who more or less regularly interact tend to adopt rules, interpret them in light of specific situations, and sanction their violation (see Ford 1983; Schall 1983). If the group has some permanence, and if the actors within it tend to be the same people who value participation, we have what Moore (1978) calls a semi-autonomous social field. These social fields affect the operation of the legal system in many ways. For example, those involved in organized crime have rules that govern buying and selling of illegal goods and services as well as competitive practices and a range of sanctions to support them (see Reuter 1984; Adler and Adler 1983; cf. Cressey 1973). Many of these rules and sanctions serve to make enforcing the law against the group more difficult.

We could call even less formal and temporary relationships private governments if it served any purpose to do so. For example, people are linked in loosely coordinated social networks which may not be as structured, permanent, or valued as a social field (see Hammer 1980; Lee 1980; Nauta 1974). People learn norms and anticipate sanctioning for their violation appropriate to situations such as attending a dinner party with strangers or riding as a passenger on an airplane. We could talk of the legal system of the elevator. There are norms about looking at, talking to, and touching others in such temporary encounters (cf. Taylor and Brooks 1980; Baxter 1984). Sanctions include being ignored, ridiculed, and even threatened with physical violence. Probably these rules and sanctions contribute a great deal to our judgments about the safety of public places; it may be that our greatest demand for the physical embodiment of the criminal law—the uniformed police officer—comes when we see the private government of public places as inadequate. Black (1983) asserts that a “great deal of the conduct labeled and processed as a crime in modern societies . . . is intended as a punishment or other expression of disapproval, whether applied reflectively or impulsively, with coolness or in the heat of passion.” He continues,

most intentional homicide in modern society may be classified as social control, specifically as self-help, even if it is handled by legal officials as crime. From this standpoint, it is apparent that capital punishment is quite common in modern America . . . though it is nearly always a private rather than a public affair. [pp. 35–36]

However, at some point the analogy becomes strained and unsatisfying. There are widely accepted norms about when one should give relatives and friends birthday and

Christmas gifts, and there are sanctions for violating those norms. Nonetheless, most of us probably would be uneasy with the idea of the private government of a friendship or an "illegal" failure to give a Christmas gift (see Caplow 1982).

Another way to define a term is to ask how people have used it. The term "private government" has been used even where there was not a close approximation of public governmental procedures and structures. The most common use of "private government" has been as a rhetorical device in aid of arguing that large corporations ought to be accountable for their actions, somewhat as nations and states are held accountable. Employees, customers, suppliers, and those living in cities who are dependent upon corporate decisions, in this view, ought not be subject to arbitrary action by public or private government; the "citizens" of a corporation ought to have a right to free speech and the like. Whatever the merit of these positions, the argument focuses on amount of power and its impact rather than on the presence or absence of such things as judges in robes, doctrines speaking to the use of power, procedures, and the symbols of legal action.

A number of writers, drawing on anthropological tradition, see us living in a world of legal pluralism, subject to the jurisdictions of overlapping and partially conflicting legal systems (see, for example, Galanter 1981; Fitzpatrick 1984; Nader 1984). In this view, the legal system studied in law schools is but one of many. Here the concept of a legal system is expanded, often implicitly, to cover such things as the norms of the Jewish community living in an area, those of the neighborhood and tenant associations there, those of a particular apartment building and of a particular landlord-tenant relationship, as well as those found in the city's building code and the state laws governing landlord and tenant, property and contract as they are enforced. In this kind of analysis, a great deal of private rule-making and sanctioning is analogized to processes in the formal public legal system; again, usage seems not to demand a particularly close approximation to public government.

The major research on relatively institutionalized social fields is part of a yet unpublished project, "Legal Regulation and Self-Regulation in American Social Settings," by Marc Galanter, a law professor well known for his work in the field of dispute resolution. As part of his study, Galanter collected newspaper articles, accounts from the trade press, magazine stories, and reports of academic research dealing in a wide variety of contexts with what most of us would call governing. Galanter stresses that the relatively institutionalized social fields he has been studying show a much wider range of activities than simple dispute resolution (see, for example, *Harvard Law Review* 1949; Ellickson 1982).

One of the organizations studied by Galanter is the American Institute of Architects (AIA), which has drafted, and continues to revise, an elaborate set of terms and conditions for the construction of buildings. These rules have, effectively, become the law of this industry. While parties could negotiate contracts on some other basis, they seldom do so because it is much easier to use the well-understood and accepted AIA forms, perhaps amending them in one particular or another to cover special situations. For practical purposes, the AIA operates as the legislature in the area of building construction (Havighurst 1961, p. 97); its legislative activity features lobbying and logrolling by various interests, just as we would find at state capitals (Sweet 1978, 1983; cf. Johnstone and Hopson 1967, pp. 329–54). The relationship structured by the AIA standard form contracts is one in which the architect, who is the owner's representative for most purposes, is also the arbitrator of disputes about the meaning of the plans and the quality

of work performed. While such a mixed role neglects classical ideas about autonomy as a guarantee of impartiality, it allows a quick and inexpensive way to solve common problems that arise during construction (see Johnstone and Hopson 1967, pp. 315–28). Architects who abuse their role in one contract face problems in future transactions; builders have a number of ways to retaliate for unreasonable decisions; and an architect's reputation is likely to be known within the social field composed of those builders, architects, officials of financial institutions, and others who work together in a particular area. Many other trade associations enforce decisions and impose social control through their power over entry into a field and privileges members would dislike losing (see *Yale Law Journal* 1954). For example, in the international diamond trade, one must be accepted into the group in order to do business at all, and reputations must be carefully guarded in order to continue in the trade (*New York Times* 1984).

The legal pluralism approach shows that in American society the processes of rule-making, dispute avoidance, and resolution take place in a variety of settings apart from public governmental institutions. Even public government itself often participates in semi-autonomous social fields as it attends to its affairs—the Civil Aeronautics Board and the President of the United States interact with an association of airlines operated by private corporations and by national governments in setting international airline fares, for example (see Hannigan 1982; Cain 1983).

Many kinds of groups exercise governmental functions. Some are fairly structured entities which sometimes go to great lengths to mimic the procedures and symbols of public government, while others exhibit only a few of these features. What Galanter calls “mini-governments” vary widely in terms of the formality or informality of their operations, rules, and sanctions; their connection with one or more aspects of social life—some deal with a narrow part of the economy, others with living arrangements, with the family, or with multiple aspects—and their power over their members and their autonomy as against outsiders.

We could plausibly analogize many of these private legal systems to public government if it proved useful to do so. However, we are concerned with studies of the place of law in society and not with writing a dictionary. Thus, we should limit our analogizing to legal-like systems which are relevant to understanding the operations and functions of public government. What, then, are some of the relationships between the public government and these other governments? Which of these relationships seem worthy of attention in the social study of law?

The Relationships and Merging of Public and Private Governments

Often it is important to trace the relationships between public government and groups that carry out functions which are thought to be governmental or which deflect the impact of legal action. However, conceiving the problem this way assumes a distinct entity which we call public government and other distinct entities which operate in its shadow. As we shall see, a private government perspective requires that we both see the amount and nature of private governing and recognize at the same time that public and private governments are interpenetrated rather than distinct entities. First, I will consider some of the relationships, and then I will discuss how distinctions between what is public and what is private are questionable.

There are a number of relationships between public and private governments. Social fields govern in areas where we might expect public government to exercise control. Sills (1968) notes that

[it] is difficult to overstate . . . the part played by voluntary associations in the actual business of governing the United States, in the sense of making decisions on policy and of providing services to citizens. . . . In large cities, voluntary associations seem to serve largely as important pressure groups; in medium-sized cities they virtually run the municipal government. . . . In small towns the decision-making role is filled by families and cliques, leaving to voluntary associations such service tasks as raising funds for the library, decorating the plaza, and maintaining the cemeteries. [p. 375]

Professional groups, for example, practice "self-regulation" in order to ward off public regulation. At times this is done totally apart from public government. At other times, however, a profession or an occupational group "captures" a public agency and exercises self-regulation in the guise of public regulation. Many state statutes, for example, facilitate self-government by organized occupational groups. Often members of state boards that license occupations or professions must be members of these groups.

Large corporations may assume functions usually thought of as governmental when they want control and little accountability. Many organizations have their own private police forces which offer everything from crowd control to protection of executives in foreign countries (see Livingstone 1981). O'Toole (1978) reports that

General Motors has a force of 4200 plant guards, which makes its corporate police force larger than the municipal police departments of all but five American cities. And the Ford Motor Company has twenty-four ex-FBI agents on its payroll to counter threats ranging from dishonest employees to industrial spies. The business world seems to believe that law enforcement is too important a matter to be left to the police. [p. 42]

(See also Ghezzi 1983; Kakalik and Wildhorn 1977; Shearing and Stenning 1983; Stenning and Shearing 1979.) Spitzer and Scull (1977) note that private police can seek to deter or gain restitution rather than gather evidence for criminal trials, and they can use more sophisticated, scientifically advanced, technical equipment than most law enforcement agencies could afford or would be allowed to use under rules specifying constitutionally acceptable evidence.

Large corporations often handle theft, embezzlement, and appropriation of trade secrets by employees by what has been called the "second criminal law system" (Cole 1978). Employees suspected of criminal activity are demoted or fired, and sometimes they are forced to make restitution. Procedures and standards of evidence differ sharply from those found in the public criminal law system in its formal operations; the mere appearance of wrongdoing may be enough to cost an employee his or her job or prompt a transfer to a less desirable position; the employer does not worry about proof beyond a reasonable doubt or the hearsay rule. Indeed, in this process the "facts" may never be established. The employer may have only strong suspicions. The employee may admit nothing or the employee may never be confronted with a charge of wrongdoing and may never be sure why he or she was transferred, demoted, or fired.

In the 1970s, failure to prosecute white-collar crime became a political issue in the

United States. However, few who took stands against soft treatment for such criminals recognized the existence and operation of the second criminal justice system. It may be that both "defendants" and "prosecutors" in this system are better off than had cases been tried before courts. Employees accept this resolution of the situation in exchange for a promise not to initiate prosecution in the public criminal process or to make public their wrongdoing. The corporation, by using the second criminal justice system, may avoid damage to its reputation since a public prosecution might bring into question the adequacy of its supervision of its employees, and an accused employee might make countercharges of wrongdoing directed at other corporate officers. On the other hand, the second criminal justice system has costs as well as benefits. Those wrongly suspected may have no opportunity to establish their innocence. Those rightfully suspected may be free to move elsewhere and embezzle or steal company secrets again, unless the story is passed on by a gossip network.

Unionized employees who appear in a grievance procedure before a labor arbitrator could, perhaps, be said to participate in a third criminal justice system. Arbitrators may consider past alleged misconduct such as pilferage on the job, illegally obtained evidence, and information gained by wiretapping (see Fleming 1961, 1962), none of which could be used in a public criminal proceeding on the question of guilt or innocence. Again, this means that some of the values entailed in the public criminal justice system will not be implemented in this private proceeding.

Public government can attempt to facilitate the growth and operation of particular social fields in order to serve some public end. For example, during the Carter Administration, many saw the legal system as failing to cope with disputes within the family; in neighborhoods, workplaces, and retail markets; and in the landlord-tenant relationship. Accordingly, in the 1970s, a number of neighborhood justice centers were established with support from the Law Enforcement Assistance Administration of the Department of Justice and from some private foundations. Members of a community were to bring their disputes before trained mediators for help in resolving them. Evaluation studies indicate that the programs had only modest success (see, for example, Felstiner and Williams 1978, 1979; Snyder 1978; Tomasic and Feeley 1982). Generally, people did not voluntarily bring cases to these centers. Many of the cases handled came to the centers when prosecutors, clerks of court, or judges diverted criminal charges to mediation. For example, a husband might be charged with beating his wife. When faced with the choice of a neighborhood justice center or a criminal trial, both husband and wife often preferred the less formal setting. However, when there was no outside coercive force pushing everyone inside the doors, those with power to settle scores on their own terms had little reason to play. Landlords, creditors, and retailers, for example, tended to be satisfied with existing structures for the exercise of their power.

Often where delegatized dispute settlement has been successful in the United States, it has been tied to groups viewed as culturally distinct from mainstream American society and subject to discrimination because of bias. Chinese-American, Native-American, and Jewish groups all have mediation systems. It is difficult to leave these communities without paying a high price in lost relationships. Thus, the groups are able to induce their members to participate and accept decisions. In short, one cannot create a community by creating a court. Public government can foster existing social fields and institutions, but if new ones are to be created, there must be incentives to participate in them.

Relationships between public and private governments also may involve partial or total conflict, more or less openly recognized. At one extreme stands the crusading prosecutor heading a strike force attempting to battle organized crime or the British government seeking to control the "Provisional Wing of the Irish Republican Army" (see Burton 1976). Colonial powers long imposed a version of the common law or a civil code on top of "native law." While, in theory, there were principles to coordinate the two systems, often the reality was legal pluralism and competition. In many countries today there are internal colonies wherein national and indigenous governments exist in a variable relationship of conflict and cooperation.

Religious groups, too, may have practices that violate the law of the state, with varying outcomes. The state tried to stamp out polygamy among the Mormons, but special exemptions to formal laws have been carved out to relieve the Amish from the requirements of compulsory education. Sometimes the official law is stated as applicable to everyone, but it is not enforced against members of particular religious groups or is enforced only in response to a complaint from an outsider with power.

Another mixed relationship can be seen between public government and trade associations. While self-regulation by professionals long has been accepted as offering certain values (see Barber 1978), those championing the interests of consumers complain that self-regulation often discourages competition by erecting barriers to entry and fixing prices for services. During the 1970s, various units of the United States government challenged a number of trade associations in the name of competition. One such challenge won lawyers the right to advertise, although the risk of losing professional reputation keeps many from engaging in this kind of competition for clients (see Macaulay 1985).

In addition to these areas of conflict, there are others in which private organizations act counter to official policy (see Biersteker 1980). When American labor unions refuse to unload ships carrying cargo from Communist countries, it makes it difficult for the State Department to implement a policy of increasing trade with eastern European nations in order to lessen the dependence of those nations on the Soviet Union (see Bilder 1970; Friedmann 1957; Miller 1960). This kind of conflict occurs also in less recognizable forms. For example, in the late 1960s, when official United States policy imposed a boycott on Cuba, the Ford Foundation sent a number of Third World scholars and government officials to visit Havana. The foundation could do "privately" what the United States government did not wish to do publicly. However, such action may have furthered United States interests (see Arnove 1977), and so the conflict may have been more apparent than real.

Another kind of conflict between public and private governments may be prompted when members of an organization turn to the legal system seeking to change the balance of power which works to their disadvantage. On the one hand, there are battles before courts and legislatures for rules which, it is hoped, will benefit the less powerful. On the other hand, rules are not self-implementing, and often a battle to vindicate any rights gained is waged before courts and administrative agencies. For example, a faction of a religious group may seek to oust those in control; courts have been asked to arbitrate conflicting versions of the true faith in disputes about control of church property.

While it is important for many purposes to chart relationships between public and private governments, this schematic statement of the task can be misleading. Implicit in

the idea of "relationships" between public and private sectors is the idea that they are separate and distinct. Sometimes this is the case, but often it is not. The American legal system has relatively open borders even in its formal description: jurors drawn from the community act as triers of fact; judges and prosecutors often are elected; critically important roles are played by lawyers who typically are thought of as private professionals serving as officers of the courts (see Schmidhauser 1979). The rules of law themselves often are justified as the will of the people or as the product of a pluralistic bargaining process.

"Backstage" one finds even greater penetration of the public sector by the private. "Power elite" theories seek to establish links between private centers of economic power and governmental officeholders and activities (see, for example, Mills 1956; Dye 1978; Hopkins 1978; Kerbo and Della Fave 1983; Milward and Francisco 1983; Useem 1983). Effectiveness of reform legislation often turns on the existence of face-to-face sanctions in a social field that encompasses both governmental officials and private leaders of various kinds. (Cf. the work of Lindblom 1977; see Tilman 1983 on reactions to Lindblom's work.) The effective boundaries of social fields are unsettled and often are the focus of struggle and change (Weyrauch 1969, 1971). Some people are leading actors in a social field, while others are bit players. Yet this relationship can change gradually or rapidly.

Semi-autonomous social fields are likely to be found at the margins of public government itself. For example, American courts are faced with many cases involving personal injuries caused by automobiles. Litigation has grown since the early days of motoring, and there has been the parallel development of insurance to cover liability. This has prompted the growth of professional insurance adjusters who determine what the company is willing to offer in settlement, plaintiffs' lawyers who work for contingent fees and bargain or litigate to increase the amount paid, specialized insurance defense lawyers who come forward when litigation threatens, and experts of many kinds who sell their opinions about the condition of products and patients. All of these actors find themselves in a continuing relationship mediated by judges and clerks of court, governed by a loose system of rules and sanctions (see Ross 1970), and so they are "repeat players," interested in the impact of what they do in today's case on next year's transactions (Galanter 1974). As a result, the vast majority of cases are settled out of court by these specialists, whose moves are governed both by rules enforced through powerful though informal sanctions and by explicit or tacit threats to file a complaint and litigate in court.

Within the criminal justice system, a similar field involves those who regularly prosecute and defend criminal cases. Assistant prosecuting attorneys and defense counsel play leading roles. Other important actors include trial judges, clerks of court, police officers and officials of the department, the public defender's office, and even newspaper reporters and editors (see Carter 1974; Pritchard 1985). In a corrupt city, one might also include the leaders of organized crime and key political officials (see Block and Thomas 1984). Any of these people can look forward to sanctions from some of the others if they make work in the social field more difficult. All find their tasks easier to carry out if they can count on cooperation and favors from the others. Mileski (1971) comments:

One attorney . . . noted that whenever he obtained an "unreasonable" acquittal, the prosecutor penalized him by not calling his cases until the end of the day's session. This "penalty" would last about a week after the disapproved disposition. Not only the lawyer but also his client, then, must sometimes sit all day in court

for reasons irrelevant to the substance of the cases at hand. Ordinarily, clients with attorneys have their cases scheduled for very early or very late in the day's session. The court thus allows the attorneys to salvage most of each day for out-of-court matters. Defendants without attorneys are told the day, but not the time, of their court appearances. This favor may add to the court's leverage in coaxing attorneys toward routine cooperation. [p. 489]

Generally, those who interact repeatedly over time will find themselves in a semi-autonomous social field with rules and sanctions which reflect some balance of the long-term interests of all the actors in that field. Often this balance is not totally congruent with the official definition of roles (see Mechanic 1962). Many studies have shown that agencies charged with enforcing a law may try to mediate, educate, or persuade the targets of the regulation to comply with some part of the law or with its spirit, rather than going to court to seek sanctions for violations. Wherever this kind of "soft" law enforcement exists, there is reason to look for a social field with rules and sanctions of its own that apply both to the targets of regulation and to the regulators.

Anyone familiar with the social study of law will see the relevance of many of these examples of nongovernmental governing to concerns in the field. This review of the relationships between the legal system and various kinds of organizations and social fields which are formally outside the boundaries of government suggests that we must be concerned not only with private associations which mimic the structures and symbols of public government but also with those social fields closely related to the legal system which affect its operations. Ultimately, however, judgments about what the label "private government" requires turn on the usefulness of the analogy. This calls for the consideration of several problems in the field, asking what would be gained by a focus on various kinds of associations that do some of the work of the formal legal system or affect its operations.

PRIVATE GOVERNMENT AND TOPICS IN THE SOCIAL STUDY OF LAW

A private government perspective could improve work in a number of areas of law and the behavioral sciences. I will consider three major examples: (a) private government and the limits of effective legal action; (b) social fields, the legal system, and stability and change in society; and (c) the autonomy and accountability of private associations.

Private Government and the Limits of Effective Legal Action

At least since Pound's essay in 1917, "the limits of effective legal action" has been a classic problem, but one lacking classic answers. Much of the writing assumes a state issuing commands to individuals who, acting alone, choose to comply or evade in view of the benefits of crime and the costs of punishment considered in light of the risks of being caught. However, Moore (1978, p. 58) suggests that the limited success and unintended and unwanted side effects of innovative social legislation can be explained partly because "new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence. Legislation is often passed with the intention of altering the going social arrangements in specified ways. The social arrangements are often effectively stronger than the new laws."

Developing this suggestion, I shall consider the functions of informal, relatively unstructured social networks, more permanent social fields, and then structured private governments of some complexity. Finally, I will examine implementation of regulations calling for affirmative action to hire and tenure women in universities as an example showing how structure and social fields involving both regulators and regulated interact to blunt the impact of laws seen as of questionable legitimacy by many of those affected.

The Impact of Increasing Degrees of Structure Relatively unstructured informal networks can serve as gatekeepers, rationing access both to illegal goods and services and to government services and benefits. In both instances, such networks affect the impact of law. Those who sell illegal goods and services seldom can operate at a fixed address with a sign over the door inviting the public to trade nor can they advertise in the newspapers or in the Yellow Pages. Loosely structured social networks of people channel customers to those who can supply what is wanted, filter out unwanted individuals such as police officers pretending to be customers, and serve to insulate most levels of criminal organization from detection and punishment. For example, a visitor to a city can ask a hotel employee, a cab driver, or a bartender for aid in finding prohibited drugs, gambling, or a prostitute. If the visitor has selected the right person, he or she will be sent to one or more people guarding access to the illegal goods or services. Those experienced in finding illegal items will be able to read hints, body language, and situations to minimize difficulty in making links with suppliers. Each person in the network usually can screen out unwanted customers and possible police officers. Those participants at street level are easiest to find, but they know only what they need to know in order to minimize the risks to others in the criminal network. There is a system of rewards and punishments to hold the system together. Those who channel wanted customers can make money; those who tell police too much can be injured or killed.

Such networks sometimes can be used by law enforcement officials, with more or less success, as leverage points for applying the law against major entrepreneurs as well as the street-level sales force. Officers posing as potential customers buy the illegal goods or services and arrest those involved. Prosecutors then sometimes are able to trade a favorable plea bargain for information or testimony against those higher up in the chain of distribution. This works, of course, only when the value of the plea bargain outweighs the danger of retaliation from those who control the criminal network.

Similar networks can ration access to government services. Elected public officials at all levels do "casework" for their constituents (see Lineberry and Watson 1980; Abney and Lauth 1982). Sometimes this involves sending people to the right official with the necessary information. In a close case, at least, it is easier for an administrator to say yes than to reject a claim and explain the denial to a mayor, a representative, or a senator. Union shop stewards, religious leaders, and community leaders also perform such brokerage roles, sending people to the right place and exerting what influence they have on the decision that is made. Friends at school, at the workplace, or at the playground or laundry also can offer more or less accurate information on how to cope with government systems—where to go, whom to see, and what to say to gain access (see Nelson 1980). (Cf. the situation in the Soviet Union. See Simis 1982; Di Franceisco and Gitelman 1984.)

This rationing of access to public services often has impact on the effectiveness of reform law. Those who lack information and endorsements may be at a disadvantage:

they fail to ask for services to which they are entitled or their claims may get lost in bureaucratic procedures, prompting them to give up. Moreover, there is reason to expect that the well-connected who can use endorsements from various kinds of leaders to affect administrative decisions will come from some groups in the society rather than others. Some officials are bribed to produce favorable decisions, but bribery costs money. Some will have more opportunity than others to influence action this way (see Deysine 1980). Thus, laws that purport to apply equally to those entitled to their benefits will serve some and not others. Furthermore, some benefits are granted only if certain conditions are met; this is done to influence behavior. Insofar as lawmakers attempt to regulate in this manner, they will be only partially effective to the extent that gatekeepers channel services to some people and keep them from others. Those left out will have little incentive to modify their behavior in the desired direction.

Finally, those who serve as brokers of information and access may tell their clients how to comply with the form and not the substance of the law or how to hide the fact that they are not entitled to licenses or benefits. Here, too, brokerage systems may influence the impact of law. For example, a particular office of a state motor vehicle department may have an informal policy of failing teenage males unless they pass three "rule-of-thumb" tests which the inspectors think demonstrate respect for traffic laws. A group of friends at school may tell X, who is reckless and has great contempt for traffic laws, about these tests. X carefully complies and passes the three tests when he seeks his driver's license. X may pass and be licensed, but his recklessness and contempt may even be encouraged since he has beaten the system.

Lawyers sometimes serve the same function, telling clients how to comply in form but not in substance. Even if few lawyers show clients how to avoid having crimes detected, there is at least anecdotal evidence that many clients think lawyers will provide such service. Lawyers, then, may be hired to serve as substitutes for the gatekeepers involved in informal social networks, offering information about the operation of government agencies and, in some cases, influence over the content of decisions (see *Vanderbilt Law Review* 1984).

The kind of *social field* discussed by Moore as "often effectively stronger than the new laws" usually is more structured and permanent than the informal networks considered so far. Social fields can serve most of the functions of informal networks but their structure and permanence allow them additional means of warding off the influence of legal commands. There are a number of examples of social fields playing this part: Moore's own work considers an elite in an African nation attempting to implement a socialist program in the face of resistance from village and tribal units. In our country the closest analogy to the situation described by Moore might be a religious group that withdraws from ordinary society in order to continue a religious practice deemed illegal by state or federal law. Governments and religious groups have battled, with mixed results, over sending children to secular schools, polygamy, and the use of drugs in ceremonies.

Social fields need not be as structured, permanent, or distinct as a settled community to succeed in warding off regulation by the state. For example, those who work together or who are regulars at a bar may deal in stolen goods. Employees of a lumber yard may offer good bargains on stolen building materials to the group (see Henry 1981). Those who work in restaurants may help each other minimize their income tax burden by devising and sharing strategies for reporting as little income as possible on tax returns. It

might look suspicious for a waitress to report no tips, but she may welcome help in determining how little she can report safely. Those who identify themselves as professional criminals may form a fairly structured network to aid their activities. One of the functions of a prison is that of a center for developing and reinforcing criminal networks. For example, safecrackers can share techniques and information about good places to rob, and those in the business are identified so that they may be contacted when ex-inmates resume their criminal careers and need help.

Social fields serve to undercut the impact of law in a variety of ways. A group can delegitimize compliance and make violation seem ordinary and acceptable. Those who would comply or even suggest doing so may be the subject of ridicule, ostracism, or even violence. In such a case, if membership in the group is valued, one has to consider risking loss of his or her position before complying openly. Alternatively, evasion can be legitimated in a number of ways. The definition of a situation can be transformed so that members can deny that they are violating a legal norm. For example, those who take goods from their employer can argue that it is not really stealing but a customary right and part of their compensation (see Tersine and Russell 1981). Or if members of the group have to acknowledge they are violating the law, violation can be rationalized, and this rationalization can be repeated so that it becomes part of the common sense of the field. For example, those who work in restaurants and receive tips justify not reporting all of them on their tax return because of all of the loopholes in the tax system benefiting the rich, the general unfairness of the tax system, or the senseless way in which governments spend money.

Members of the group also can teach techniques of evasion which minimize the risk of detection. Those interested in stealing by subverting the computers that control so much of modern business can share the latest techniques and ways to counter safeguards against tampering. If members of a social field regularly meet for legitimate purposes, this serves to cover their discussions of plans for breaking the law. For example, parents who attend the same church may plan on how to initiate prayers in their local school despite rulings of the Supreme Court. If they are all tied to the community, those who might object and try to blow the whistle could be subject to many powerful sanctions. Their children might be subject to ridicule and ostracism, their businesses might be boycotted, or their homes vandalized. In a small city, no one might be free to object to prayers in the local schools.

Moore's position stresses the power of social fields to resist unwanted regulation. Nonetheless, one wonders how far these groups can ward off the larger society when those who hold power are offended by or fear the social field. The Federal Bureau of Investigation had great success in undermining the Communist party during the 1950s; it had less success in similar attempts against groups in the civil rights and antiwar movements of the 1960s and 1970s. The Brazilian and Uruguayan governments seem to have defeated urban guerrilla movements which were well organized private governments seeking to overthrow public authority, but the British government has not been able to overcome the Provisional Wing of the Irish Republican Army. It seems unlikely that an adequate explanation of these differences can be found in the structures or processes of the revolutionary groups in the various countries—indeed, the processes and structures of most contemporary revolutionary groups draw on a common literature, including, importantly, the writings of the Brazilian Carlos Marighela (1971). At least part of the explanation for the different degrees of success in repressing guerrilla movements might involve the

unwillingness of the British to use all of the tactics that the military regimes found acceptable. Probably public governments can overcome most, if not all, social fields if it is worth the price. However, undercover work attempting to infiltrate the group, harassment, and manipulation of public opinion to turn the group into a pariah require skill and money. They also cost valued privacy and freedom of association. More repressive measures carry a higher price.

Social fields also may act in ways apparently serving to implement the operation of the legal process. Groups can support those seeking to enforce their rights under existing laws or to change the rules. A group may supply money and access to lawyers and others who know how to litigate, negotiate, and lobby. It also may serve as an audience, applauding appropriate behavior. If, as often is the case, lawmaking and law enforcement must be triggered by complaints, a group can provide not only resources but a shield against retaliation. In fact, one who speaks out may find it hard to back down and settle or drop the matter if the group defines this as selling out. Of course, all these valuable functions will be supplied only for a price. Groups will not support those they oppose, they will not campaign for legal action against their interests, and they may focus retaliation against the one seeking legal action that offends other members. As a result, individuals may be given powerful incentives to transform their desires and translate them into a vocabulary approved by whatever groups are available. In this way, for example, labor unions can limit the effectiveness of laws designed to give rights to individual union members against union leaders; an American Association of University Professors chapter on a campus can help insulate the administration from challenges by faculty members denied tenure or contract renewal and frustrate laws designed to affect such decisions.

When we turn from informal networks and social fields to what we more comfortably can call *private governments*—formally structured complex organizations such as business corporations, universities, and major charitable foundations—we find still additional barriers to effective legal action. Organizational structure and process itself is an important variable in attempts to control behavior, as a number of writers are beginning to recognize. I will begin by viewing the deviance of business corporations from a private government perspective, generalize this analysis by applying it to universities, and then attempt to show that complex organizations such as corporations and universities cannot always be viewed as something distinct from public government. Social fields often cut across organizational boundaries with important consequences for the impact of law.

Corporations are subject to a wide variety of direct legal controls in all Western societies. However, in the past few decades many have become concerned about the limited effectiveness of rules designed to protect the market, the environment, consumers, or the political system. Apparently, business organizations have a good deal of power to deflect what reformers think is or ought to be the law.

Public government also attempts to induce large organizations to implement certain policies less directly. An enforcement agency may pursue a policy of “soft” law enforcement, seeking to persuade large organizations to comply with agency directives. The threat of legal action may serve as part of the agencies’ negotiating power, but this threat is often limited by obvious difficulties in applying sanctions. Also, if an agency can succeed in getting a large business corporation to agree to change practices, it, in effect, gains the use of the private organization’s internal communication and sanction system to change the way things are done in local offices and places of business throughout the

country. Governments also deal with private organizations by using contracts. By using the benefits of holding a government contract as an incentive, an agency can often gain agreement to carry out social policies more or less related to the transaction. For example, federal contractors must pay certain minimum wages and offer their workers certain conditions of employment. Despite these techniques, however, reformers worry that corporate deviance or mere token compliance is unacceptably high (*New York Times* 1985).

Several authors have stressed the effects of structure and process in studies seeking to understand unlawful organizational behavior and to fashion innovative and more effective sanctions. Coffee (1981) and Vaughan (1982, 1983) draw on sociological theories about the functioning of organizations, while Braithwaite (1982), Fisse (1981), and Fisse and Braithwaite (1984) base their analyses on an empirical research project in which over 200 senior executives of 50 transnational corporations, as well as many government officials, have been interviewed. I will first describe this group of studies, and then I will offer some additional considerations.

Vaughan argues that the environment in which organizations operate and their own processes generate incentives for individuals working within them to engage in deviant activity. Following Merton (1957a, 1957b), she argues that the goal of organizational success is so highly valued that the importance of attaining it outweighs concern about the means used. Businesses seek economic success measured in ways such as market share or the price of the corporate stock. Great efforts have been made in modern business corporations to create decentralized structures and sophisticated accounting systems so that those responsible for profit and loss can be rewarded or punished. At the same time, normative support for succeeding only through legal means has been progressively lessened.

For example, the definition of deviance usually is doubtful. Reforms will not be perceived as sensible and right if they make it harder for managers to gain rewards and avoid punishments within the organization. While reformers may see programs that minimize environmental pollution as highly beneficial, a manager may see only that they increase the costs of operation making it harder to reach the target for return on investment. Also, since it is costly and difficult to prosecute a large corporation quite able to defend itself, government agencies frequently resort to negotiations and informal proceedings. Those who violate the law are seldom sanctioned severely, and, as a result, only a few examples of wrongdoing are publicized. The fact that deals are made may suggest that the subject is not an important issue of right and wrong. Coffee points out that a sanction severe enough to outweigh the benefits of violation would have to be so great as to threaten the existence of the corporation. As a result, sanctions tend to be mere tokens; they are more like fines for overtime parking than punishment for truly wrongful behavior. Since government so often cannot enforce the law, managers evade and achieve success. Thus, illegal action becomes accepted within an organization as just the way things are done. Managers who attempted to comply with the law would face a serious handicap when compared with those who cut corners to get results.

Vaughan recognizes that her structural incentive argument fails to explain the behavior of all corporate actors. Many, if not most, business people do not violate the law. Others violate it but are not aware they are doing so because they do not know the rule or they misunderstand what it commands. She cites with approval Coffee's explanation for

illegal behavior which rests on an interaction between psychological and structural factors. Coffee notes that modern corporations tend to be multidivisional and decentralized. Top management allocates funds to managers of profitable divisions and disciplines those who fail to meet targeted goals for return on investment. Thus, the manager responsible for operational decisions is increasingly separated by organizational structure, language, goals, and experience from the financial managers who plan for the future and decide on rewards and punishments. Coffee argues that this means that "the locus of corporate crime is predominantly at the lower to middle management level" (p. 397). He explains that

[t]he middle manager is acutely aware that he can be easily replaced; he knows that if he cannot achieve a quick fix, another manager is in the wings, eager to assume operational control over a division. The results of such a structure are predictable: When pressure is intensified, illegal or irresponsible means become attractive to a desperate middle manager who has no recourse against a stern but myopic notion of accountability that looks only to the bottom line of the income statement. [p. 398]

Vaughan recognizes that incentives to violate laws are not a sufficient explanation for corporate crime; there must be opportunities for unlawful conduct as well. In large complex organizations unlawful behavior may be both encouraged and hidden from insiders at other levels as well as from outsiders. Officials of subunits are likely to defend their domain whatever the claims of other units or outsiders. Control over subunits largely rests on accounting systems which disclose the consequences of various practices but obscure other things. In Coffee's terms, this allows senior managers to "piously express shock at their subordinates' actions while still demanding strict 'accountability' on the part of such managers for short-term operating results" (p. 410).

The analysis in these articles could be carried further. Vaughan notes that corporate managers may have ties outside the corporation that provide incentives to comply with the law or not to get caught violating it. She says that "[a]lternative skills, alternative sources of income, and alternative validating social roles reduce financial and social dependence on the firm. Consequently, external rewards and punishments may reduce the organization's ability to mobilize individual efforts in its behalf, despite processes that produce a normative environment supporting unlawful conduct" (p. 1392). Obviously, corporate managers, like the rest of us, have acquired complex attitudes about following rules from family, neighborhood groups, schools, mass media, and experience. On the one hand, there are general messages indicating that we should obey the law. On the other hand, we often learn in school, and particularly from competitive athletics, that we may cheat for a good cause. From newspapers and television we learn that respected figures break rules in all kinds of social games. Corporate life can be seen as a game where winning is the only goal.

At the same time, social fields and organizations such as business corporations may reward compliance with the law. In at least some corporations there are ways to avoid the kinds of pressures described by Vaughan and Coffee. For example, one may be able to use members of the legal staff as a way to support compliance rather than violation. Lawyers can be blamed for increasing costs by fashioning procedures in response to new regulations, and a manager may be able to bring his or her department's activities to the

attention of the general counsel's office so that he or she will appear to be forced to comply. The legal staff may welcome a chance to symbolize respect for the law since the techniques of compliance are within its domain, and the need to respond to regulation enhances its power within the organization. A manager may be able to dress an ethical stance in prudential garb: complying with the law can be justified in terms of the negative consequences of the likely bad publicity if the firm was caught violating a regulation.

This is not to say that Vaughan and Coffee are wrong in stressing the pressures to evade the law, but more emphasis on possible offsetting pressures supporting compliance would seem warranted. We know little about when the balance falls one way or the other. Furthermore, corporations that have suffered serious blows to their reputations as the result of publicity surrounding getting caught violating the law may modify their incentive systems to ease the pressures for deviance—at least temporarily. Of course, as Coffee stresses, while the formal message from a corporate president's office may call for compliance, the real message communicated may be, rather, "don't get caught."

Coffee's argument that the locus of corporate crime is middle management seems only partially true. Undoubtedly, in many cases the pressures he describes are real. Nonetheless, some kinds of corporate crime must involve the participation of top management. For example, decisions to sponsor a military coup to overthrow the government of a nation which has threatened corporate interests, to bribe high governmental officials, to continue participation in international cartels during wartime with corporations based in enemy nations, and the like are not usually within the power of middle management to make or implement. Certain multinational corporations, moreover, interact with governments, pursuing what could be viewed as their own foreign policies. Lowenthal (1978) observes that

[in] a curious sense, it is much easier for the [United States] government to manage its relations with the Soviet Union or China than with Chile or Peru. Latin American and Caribbean countries are very strongly influenced by decisions taken by Exxon, the American Smelting and Refining Co. (ASARCO), United Brands, Citibank, Manufacturers' Hanover Trust, or Chase Manhattan, to name just a few examples. And some of the main problems in inter-American relations—especially access to capital and technology—are issues over which the U.S. government has considerably less influence than non-governmental actors. [p. 122]

For example, during the Carter Administration, it was United States foreign policy, reinforced by legislation, not to supply arms to nations that repressed the human rights of their citizens. However, American corporations could evade government policy by channeling sales through their foreign subsidiaries. It seems likely that the decisions to make such sales were made at the upper levels of management.

A Case Study: Affirmative Action for Women in Universities Finally, the discussion in these articles draws a rather sharp distinction between public and private spheres and fails to cover social fields that include both the regulators and regulated. We will turn to an extended example—affirmative action for women at universities—to stress that the structure of a large private government and the existence of social networks cutting across formal boundaries can work together to blunt the effectiveness of regulation. In other words, we will use a private government perspective to analyze the limited

impact of a legal reform. We will stress both the relationships between public and private spheres and the interpenetrations of the two areas. The example also will make clear that much of the analysis in the articles just considered is not limited to business corporations but applies to other complex organizations as well.

Women have faced barriers to becoming and remaining university professors throughout the history of higher education in this country because of conscious policy or circumstance (Bernard 1964). By 1972, there were three bodies of law designed to eliminate discrimination against women and members of minority groups by large academic institutions. First, Title VII of the Civil Rights Act of 1964 was extended to universities and colleges, allowing academic women who saw themselves as victims of discrimination in hiring, promotion, or tenure to sue for court orders directing that they be granted the position to which they were entitled, damages, or both. Groups of women also could form a class and sue on behalf of themselves and others, seeking judgments placing a university under judicial supervision to ensure the abolition of discrimination. While there were some notable victories, courts have been hesitant to substitute their judgment for those of professionals about the quality of teaching and scholarship. Second, under the Equal Pay Act academic institutions may not pay different salaries to men and women with substantially equal qualifications who occupy substantially equal positions.

Finally, under Executive Order 11375 universities which receive large federal contracts must submit a plan to take affirmative action to overcome the effects of past discrimination against women (see, generally, Prager 1982). Employers must analyze their work force and the pool of qualified potential employees and establish goals so that the composition of a work force eventually will reflect the percentages of women in the pool. This is not a quota system nor a requirement that women less qualified than available men be hired. Rather, the federal contractor must show some progress as a result of good faith efforts in meeting goals when required reports are made.

Generally, this regulation of academic hiring received mixed reviews from the regulated. University professors and administrators did not object to the Equal Pay Act, and few had difficulty with the idea that a woman who had suffered discrimination ought to have a remedy. However, most of them expected almost no valid claims because they believed that universities, with but few exceptions, hire, promote, and grant tenure on the basis of merit. Some were concerned with the potential burden of defending a discrimination claim even when it lacked merit. Most senior professors and administrators saw affirmative action as unsuited to a university.

In the 1970s, women's organizations, along with minority and handicapped groups, sued the federal agencies charged with enforcing the requirement of affirmative action and negotiated promises that the law would be enforced. Nonetheless after more than a decade, members of these organizations remain dissatisfied with the amount of compliance with affirmative action laws by universities while federal grants and contracts continue to flow to them (see, for example, Abramson 1977; Hornig 1980; McKenna and Denmark 1975; Page 1978; Vladeck and Young 1978).

A sketch of the process involved in attempts at enforcement over a decade at a major campus of a state university—called State University at Fillmore for purposes of this study—will illustrate the complex and multileveled interactions when a private government is reluctant to carry out the demands of public government (see J. Macaulay 1980). In 1970, after complaints of nonenforcement of the law were made by national women's

groups, representatives of the Office of Civil Rights (OCR) of the Department of Health, Education and Welfare visited State University at Fillmore. They told university administrators that they saw a pattern of underutilization of women and of salary discrimination. The 1970 campus affirmative action plan was found to be inadequate, and campus officials signed an agreement to produce an acceptable one, update it annually, and submit the plan and the reports to OCR. The OCR staff announced that it planned a follow-up visit to the campus in January 1971.

The president of State University then issued a directive to all campuses in the system, including the one at Fillmore, to appoint an affirmative action officer (AAO) and a Committee on the Status of Women. This was done at Fillmore, and the AAO and the committee gained a measure of power from the threat to federal contracts and grants posed by the OCR visit and planned return. Salaries were investigated, and a number of extreme cases of discrimination were uncovered. Deans and department chairpersons were told to grant raises to remedy these inequities. A number of women were discovered teaching a major course load without permanent positions and at low pay. Many of these women were promoted to tenure track positions or given tenure in recognition of their long service and the unfairness of their past treatment by the university. A utilization analysis was done, and it revealed a pattern of underrepresentation of women in the majority of departments at the campus.

Once these steps were taken, however, a pattern developed which was to be repeated throughout the decade. The AAO would work on an affirmative action plan and write reports with data on the hiring, promotion, and tenuring of women. Field personnel of the various federal agencies which successively were given enforcement responsibility over universities would write or visit the campus. Members of a social field composed of women with some connection to the university who were dissatisfied with progress on affirmative action would meet with the federal personnel and point out defects in the plan and statistics. The field personnel would recommend that the Fillmore campus be required to take certain steps or have contracts and grants disapproved. But then the threatening clouds would blow away and officials in Washington would pronounce the Fillmore campus still approved to receive contracts and grants although it never produced the kind of plan or data which would seem to be required in order to comply with the letter or purposes of the law.

Moreover, although the number of women hired increased, the proportion of those with permanent tenured positions rose very little. Women's promotion chances remained low, and departments that never employed women in proportion to their availability continued always to fall short of their goals. One year a state civil rights agency found probable cause to believe that a university department had discriminated against a woman when it refused to grant her tenure; another year a state commission on women found the university's efforts in affirmative action to be inadequate. Women, and members of minority groups, continued to point to figures showing that the university was falling far short of its announced goals. Still the university kept saying that it was fully complying with all laws and regulations, and federal agencies took no action against it.

Four explanations stand out for the success of State University at Fillmore in warding off the impact of these laws: affirmative action lacked legitimacy; the structure and process of the university diffused responsibility and made it hard to find reliable data; social networks that included both regulators and the regulated had the power to deflect

enforcement; and the consequences of cutting off contracts and grants to a great research university were unacceptable. They will be examined in turn.

Affirmative action for women at universities progressively lost legitimacy in the eyes of those with the power to make decisions. The academic community can be viewed as a loosely coordinated social field, and its culture operated to undercut the legitimacy of this program. Affirmative action was sharply attacked in a number of books and articles written by professors (see, for example, Lester 1974; Posner 1979; Sowell 1976). This literature tended to paint an idealized picture of university life, glorifying an unselfish pursuit of truth, devotion to students, and decision based on merit—the academy was pictured as something like a religious community, fundamentally different from factories and business offices where affirmative action might make some sense. Affirmative action regulations were labeled “reverse discrimination,” as the title of one book put it (Glazer 1975). Whatever the merits of the arguments presented, these books and articles helped professors and administrators justify evading or minimally complying with the letter of the law (cf. Lipset 1982).

In addition to questionable legitimacy in the eyes of those making hiring, promotion, and tenure decisions, government officials charged with enforcing affirmative action regulations faced problems of structure and process. Most prestigious universities have a complex structure characterized by a tension between the powers of those who administer and those who teach and do research. Formally, usually a university is run by a governing board which delegates power to a chief executive officer. This administrator, in turn, appoints deans to administer various subunits. Within these divisions, there are departments charged with teaching and research in their own area. In theory, deans and chairpersons administer while the faculty makes policy within boundaries set by statutes or a charter and the decisions of the governing board. In practice, however, professors are “street level bureaucrats” (cf. Prottas 1978; Carter 1974) who operate relatively autonomously with little direct supervision. The faculty claims, and often has, power to decide who is to be hired, promoted, and given tenure. Those higher up the chain of command have veto power, but custom demands that it be used only sparingly. Obviously, there is great opportunity for negotiation and politics within the formal decision-making process.

Just as Vaughan and Coffee suggest, this decentralization of power had important consequences for the enforcement of affirmative action requirements. It was hard to detect violations and noncompliance as long as those in the departments making the hiring and tenuring decisions knew enough not to post signs saying “no women need apply” and to make gestures such as advertising positions and interviewing at least a few women along with the men being considered in the usual course of recruiting.

Government officials exerted pressure for affirmative action at higher administrative levels. Professors usually learn about affirmative action regulations not by reading the law but from directives coming down from above. Those who wrote the directives at Fillmore tended to simplify and pass on interpretations which would not upset traditional practices very much. Professors also learned about the rules from atrocity stories passed along by deans and chairpersons that told of the costs and burdens of red tape and bureaucratic procedures. These stories may well have undercut any impulse to make significant changes in departmental recruiting and decision-making.

Since most important hiring and tenure decisions take place in the departments, administrators were able to close their eyes to evasion as long as they could find some

apparent or symbolic compliance. The day-to-day burden of dealing with affirmative action usually is placed on an assistant to the university head. Such assistants have had relatively little power unless the president or chancellor wanted to push for compliance. Assistants who want to keep their jobs are likely to negotiate for gestures and proceed cautiously (see Liss 1977). They have little incentive, from the standpoint of their careers, to make available information that might embarrass the university. Rather, all the incentives are to interpret the data as showing progress in hiring women. (Cf. Weiss and Gruber 1984.) If this proved difficult, assistants could at least make a case for good faith effort to comply in the face of adverse economic conditions, budget constraints, and less hiring and tenuring.

In addition to the questionable legitimacy of affirmative action and structural characteristics of the university, there is also a social field comprising those who are supposed to enforce these laws and those university professors and administrators who are the targets of regulation. For example, State University at Fillmore had acquired a reputation as a leader in affirmative action for women because of its early efforts to correct clear-cut examples of discrimination. As a result, in 1974 its AAO became a consultant to the Department of Health, Education and Welfare. Her role was reflected in a memorandum written in February of that year. She reported that she was "spending almost half of every week in Washington, D.C., trying to win a modification or deletion" of rules such as those requiring the compilation of data about employees. Without these data complete statistical analyses for evidence of underutilization of or discrimination against women could never be done. Moreover, she described her plan to go only so far in complying with the letter of the affirmative action regulations as to be able to comply fully within ninety days if and when the federal government ever insisted that the Fillmore campus meet them; her constant contact with officials in Washington apparently enabled her to judge when it would be necessary to begin to compile a precise plan and detailed and accurate statistics.

The AAO was a member of the faculty of a department at Fillmore, an officer of the campus administration, and a consultant to the federal government's enforcement agency. Her role crossed formal organizational boundaries. The consequences for the impact of the law were shown by events in November and December of 1974. In November, an assistant to the president of State University wrote HEW's director of the Higher Education Division, asking how the affirmative action plans of various campuses of State University should be submitted for approval by HEW. The director and the AAO of the Fillmore campus were well acquainted as a result of all the consulting and lobbying in Washington. On December 3, the director telephoned the AAO at home in the evening after working hours. The AAO's memorandum concerning the conversation states:

[The director] indicated to me that the agency did not wish to engage in general institution-wide compliance reviews while the standards and procedures . . . [then in effect] are still extant. She further indicated that to the best of her knowledge and belief no major university could be today found in compliance if . . . [these] standards are applied. Consequently, she stated she believed that an on-site review at this time, as required by Revised Order 14 for approval of an affirmative action plan, would find many or all . . . system schools out of compliance, without regard to any excellence or lack of it in real progress in affirmative action. She expressed the further belief that the target of such reviews

would automatically become the . . . [State University at Fillmore] . . . and that we were very likely therefore to go to fund cut-off.

She indicated that she felt such compliance reviews in the present circumstances would be very destructive, supportive neither of affirmative action nor of educational goals. But, she noted, in view of the currently pending suit in which NOW, WEAL and others have charged HEW with nonenforcement, she was not at liberty to instruct . . . [the assistant to the President of the University] . . . in writing not to submit the plans.

In view of all these circumstances she asked me if I could insure that the plans were not submitted.

The AAO's solution to this problem was to "draft a tentative letter" for the HEW director to send to the assistant to the president "indicating that the plans *could* be submitted but that the agency maintained a reviewing schedule to which, absent some pressing necessity, it preferred to adhere." The letter was written, the Fillmore campus plan was not submitted, and this threat to the flow of federal money passed.

This was not the only instance of informal contacts designed to blunt compliance with the letter of the regulations. Whenever the threat looked serious, administrators of the Fillmore campus and influential professors were able to go over the head of the field investigators and the regional offices and take their case to top officials in Washington. Those at the top of the chain of command in the agencies charged with enforcing affirmative action regulations are part of the higher education social field. Whatever formal organization charts might indicate, these cabinet officers, top level administrators, and their staffs often were former university professors, foundation executives, or others who held graduate degrees and were sympathetic to the traditions of higher education and who were often linked by friendship or long association with officials in national educational associations if not directly with those who ran the Fillmore campus. These federal officials were not "captured" by the university administrators; they just understood one another and shared similar attitudes and values. Often, during the 1970s, those ultimately responsible were former academics temporarily serving as cabinet officers or administrators. As the Fillmore campus chancellor's lawyer told a group of law students, when a contract or grant was held up because of questions about affirmative action at this campus, administrators, professors, and representatives of higher education organizations in Washington "have been able to find the people who are ultimately responsible for whatever the regional office is off on and help to get them back on the track."

Finally, we have to look to the consequences of enforcing the affirmative action regulations to the letter. If the federal government had cut off all grants and contracts to State University at Fillmore, it would have crippled a major research and teaching center. Both public and private universities are dependent on federal funds. Moreover, if administrators and professors at Fillmore had been forced to comply with the federal regulations as they were written, traditional hiring practices would have been overturned and many members of the faculty would have been antagonized. Yet this price did not have to be paid because affirmative action for women did not have great public support, and those who ran State University at Fillmore had friends with important positions in the legislative and executive branches of the federal government. In short, it was far easier to have symbolic but unenforced regulations than to pay the price for implementing them.

Social Fields, the Legal System, and Stability and Change in Society

Those writing broad social theories often see a need to account for law and legal institutions. One interested in the social study of law frequently finds these accounts unsatisfying because the theorist posits a formal picture of law. When one adds private governments, social fields, and networks to a sociological view of law, much found in these broader social theories seems inadequate if not wrong. Of course, turning from normative claims or theoretical statements about the functions of legal systems to a description of law in operation makes neat theories messy and complex, but oversimplification seldom is a virtue.

While this is not the place to describe and distinguish the variety of existing social theories and their accounts of the role of law, I will consider elements common to many of them and then discuss how concern with private governments, social fields, and networks might add to or question these theories. I am not offering a worked-out picture of society that accounts for the parts played by law and the legal system, but rather examples that suggest some of the things that any theory must deal with if it is to be useful to those concerned with the place of law.

The Roles Played by Law in Various Social Theories Before one can question the treatment of law in a social theory, it is necessary to sketch the way in which it deals with it. Here I will describe briefly and generally the account of law in structural-functional, conflict, and Marxist-derived theories. In the next section, I will consider how elements in these theories might be questioned if a broader view of the place of law were taken.

Many social theorists have offered what are called *structural-functional theories*. Here the focus is on social structure—the more or less enduring patterns of the ways people interact. Social phenomena are seen as interdependent as in a biological system. Action taken in one social unit affects the functioning of others. For example, economic and legal systems affect each other: an impoverished society cannot afford complex legal institutions, but modern industrialized nations have developed legal institutions where police, judges, lawyers, and regulatory agencies importantly affect the way business is conducted.

In most social theories, a major problem is the explanation of social order and the operation and continuation of societies. Most structural-functionalists see law as an important factor in such an explanation (see, for example, Bredemeier 1962; Grace and Wilkinson 1978; Koch 1980; Lamo de Espinosa 1980; Mishra 1982; Parsons 1962; Wilkinson 1981). They draw pictures of a relatively harmonious and stable society with the legal system playing a key role at its margin. People have expectations about the behavior of others and how others expect them to behave. Thus, one can rely on what others will do and pattern one's own conduct in order to fit in. People learn how to act in particular situations, and the norms governing social behavior become part of their psychological make-up. Most obligations are fulfilled naturally, and external sanctions play only a secondary, and often indirect, role. While there is much normative regulation, law is only an objective and visible part of a pyramid of habits, customs, norms, rules, and law.

Compliance with social norms may be enforced by sanctions inherent in reciprocal relationships, which exist in great numbers in any society. One has friends, interacts in groups for recreation, and repeatedly engages in business dealings with the same people.

One who complies with the expectations of others in these relationships will continue to receive whatever benefits are involved, which may range from love or esteem to profitable business opportunities. One who disappoints the expectations of those in continuing relationships risks being subject to a range of sanctions: one's partners may frown, use sarcasm or ridicule, discontinue the relationship, or retaliate by using violence. (Cf. Griffiths' 1984 comments on gossip systems.) Only in extreme situations will one's partners call the police or file a lawsuit.

Those disputes that occur despite internalized norms and relational sanctions will be the product of ambiguity in the application of generally held values to particular situations. This creates a need for arbiters who can impose, or threaten to impose, sanctions so that their decisions about the proper interpretation of the norms will be carried out. In this way, legal activity serves the function of social integration by aiding the coordination or unification of various parts of the society.

Adjudication clarifies values in light of changing situations. In most instances, the decision of a court or arbiter will be accepted and does not have to be imposed. However, the legal system must be related to the state so that its monopoly of the legitimate use of force ensures that legal norms override any inconsistent social norms. In a few rare cases, a display of force may be needed to assert the priority of legal norms over all others by sanctioning those deviants who are not contained by other means of social control. Sanctions can be imposed only when permitted by the rule of law: one may be arrested, tried, convicted, and imprisoned for robbery only when the elements of the crime are present. If sanctions could be imposed apart from the rules, they would lose some or all of their normative force.

Some particularly important social values will be institutionalized as special legal agencies are created to protect them (Mayhew 1968). Certain kinds of equality are at least symbolized when a government creates an Equal Employment Opportunities Commission; certain patterns of coping with labor disputes are institutionalized by the creation of a National Labor Relations Board. These agencies must then have access to the people who violate the norms being protected. This means that those aggrieved must have incentives to participate in bringing problems to them.

When important disputes do come to the legal system as complaints, causes of action, or pleas for services, the system can then serve other functions which also carry out social integration. Disputes signal policy-makers and the interpreters of norms that there is need for an adjustment so that similar disputes or claims do not arise in the future.

Many theorists also see actual decisions as serving to legitimate society, the legal system, and the particular judgment in a case in a number of ways. The norms selected for application are seen as appropriate, and their application is consistent with the expectations of those observing the legal process. The legal system itself may have enough prestige so that members of the public will see any norms applied or interpreted by it as just, simply because they are crystallized in legal doctrine. Acceptance flows from at least two sources. First, the legal system is viewed as autonomous and not dependent on other centers of power. It can make and enforce its decisions impartially. Second, legal officials are selected in ways that most members of the society see as appropriate—they are experts who are selected in recognition of their skill, they have long practical experience, they are elected by the people, or they are appointed by those who symbolize the society. Finally, legal action promotes legitimacy because the legal system is perceived as having

enough effectiveness to implement the norms it serves; it is more than idle rhetoric and pious preaching in the face of reality.

Conflict theories attack structural-functionalism, but, generally, this perspective tends to criticize ideas about the functions of law in society rather than offer a complete theory of its own (see, for example, Chambliss and Seidman 1971; Chambliss 1973, 1979; Quinney 1975). Conflict theorists see society not as harmonious and stable but held together by the use or threats of force. Law legitimates police violence and other uses of power to undercut attacks on the system. The reality of law is a police officer with a club or a SWAT team with automatic weapons attacking any group that threatens the stability of the existing order. Law supports the structures of property and exploitation. Under a system of division of labor, people are not self-sufficient, and they need cash to buy their needs. This means that they must have jobs and keep them. However, one's claim to a job under the law is always questionable. Those who challenge their employers risk being fired and gaining a reputation as troublemakers so that substitute employment will be difficult to find. These threats, rather than a general normative consensus, dampen open dissent and explain the persistence of societies in which few of the people share most of the benefits.

Conflict theorists turn structural-functionalism on its head. Instead of normative consensus, they say there is a great deal of dissensus and cynical knowledge. Instead of seeing the society, its legal system, and particular decisions as legitimate, they see cheating, manipulation, or simple resignation as the ways to cope with an unjust system which cannot be confronted directly. People at the bottom of the distribution of wealth and status do not accept their place as part of the natural order of things or as their just reward for lack of effort or skill. They see people at the top of the society as having gained their position illegitimately or as descendants of such people. Business executives cheat on their taxes, bribe American and foreign government officials, and foist shoddy products on the public. Elaborate rationalizations are fabricated by those at all levels for violating official norms.

Conflict theory tells us that, contrary to the claim of the structural-functionalists, the legal system and particular decisions seldom yield legitimacy. People do not see law as salient to their lives; at best, it is a background factor with limited impact. While the daily operation of law possibly might reflect common sense, people hear only about extraordinary cases. The acquittal of the man who attempted to assassinate President Reagan did not create legitimacy for either the criminal justice system or the insanity defense (see Hans and Slater 1983). Indeed, those decisions which are publicized are likely to provoke anger and dissensus. One need mention only the opinions of the Supreme Court concerning school prayers, abortion, and racial integration of the public schools as examples. People suspect that legal decisions often turn on wealth and connections rather than on apolitical, rational norms applied by an autonomous body of experts. Awareness of institutions such as plea bargaining and the settlement of personal injury cases would seem to reinforce such a view. Legal procedures do not reassure most people that the game is fair. Rather, they appear to be ploys in a game benefiting the economic interests of the legal profession and those who can pay the best lawyers to play for their side.

Austin Turk (1976) points out that, even when it is not corrupt, the legal system may promote conflict rather than social integration. Control of the system, for example, is a

prize about which groups can fight—the power to appoint judges and administrators is one of the things gained by winning elections. Moreover, the chance to mobilize whatever power courts possess can be an incentive to abandon acceptance of the status quo. *Brown v. Board of Education* (the school desegregation case) was one of many factors provoking the civil rights movement and conflict in an effort to change traditional ways in the South (see Harding 1975). The chance of victories before courts and legislatures may undercut compromise, generating more conflict rather than stabilizing the society.

Marxist-derived theories show a different view of the functions of the law in postcapitalist societies. (For reviews of this literature, see Greenberg and Anderson 1981; Jessop 1980.) Most of these theorists, rather like the structural-functionalists, see society as composed of a number of subsystems and structures. While in a Marxist-inspired theory, the economic system and class relations will be central, the state and law are seen as necessary or useful in attempting to cope with contradictions, inconsistencies, and imperfections in the interest of the dominant class. Koch (1980, p. 6), in an essay highly critical of Marxist-derived theories, finds that they typically see the state and law fulfilling functions such as “the guarantee of legal relations, especially the relations of private property, the provision of general material conditions for production activity (the ‘infrastructure’), the regulation of the conflict between wage-labour and capital and the defence and expansion of total national capital on the capitalist world market.”

Many of these theorists see traditional bourgeois law as undercutting the possibility of effective class struggle, as working toward the acceptance of exploitation through mystification. In liberal states, individuals are formally equal before the law and are bearers of rights. Balbus (1977), in an often-cited article, argues that capitalist legal systems make people into citizens, abstracted from their personality and actual social situation. In this way they can be made to appear equal, despite all the real differences in status and power between the dominant and dominated classes. This militates against the formation of class consciousness. “[T]he ‘community’ produced by the legal form contributes decisively to the reproduction of the very capitalist mode of production which makes genuine community impossible” (p. 580).

Related theories see law as part of the battle for common sense (see Femia 1983). Except in times of stress, all classes accept a world view in which the existing order is seen as natural and proper. However, this view advances the interests of only the dominant class. Traditional intellectuals rationalize concepts of social order as the material basis of the dominant class’s power change. Law and legal intellectuals are but part of this larger picture. For example, as economic crisis during the depression of the 1930s began to prompt greater governmental regulation of the economy, economists and law professors in sympathy with the New Deal fashioned a rationalization for action which previously had been thought unconstitutional. Simplified versions of the new ideology were passed along and ultimately became part of the vocabulary of both major American political parties. When economic conditions changed and New Deal regulation inconvenienced business, another generation of economists and law professors appeared ready to champion efficiency, free markets, and other symbols of a capitalist world view.

Adding Private Governments, Social Fields, and Networks to Social Theory
None of these theoretical pictures adequately incorporates the roles played by private governments, social fields, and networks and their complex relationships with the formal

legal system. In particular settings some writers recognize that theories must be expanded to cover individuals acting in groups (cf. Zimring 1981; Gottlieb 1983; Nader 1984). However, this has been the exception rather than the rule. I will consider a number of instances where the theories seem to assume a state or legal system on one side confronting an isolated individual on the other. I will note where social groups have been added to the analysis. Finally, I will suggest what might be added to these theories if a broader perspective were used consistently.

"Legal" Functions Are Played by Private Systems. At the outset, recall that the state and the legal systems often face competition from private governments which perform some or almost all of their functions. In talking about the effectiveness of law, I noted that corporations may be able to socialize employees to internalize norms different from those of the larger society, and they may be able to sanction noncompliance with corporate norms. If the public law calls for measures to protect the environment, but the cost of these measures threatens the economic health of the corporation, officials must cope with this conflicting set of signals. On the one hand, these officials can comply with the law but seek to influence elections so that new legislators, governors, and presidents will change the rules or enforcement practices. On the other hand, they can try to evade the command of the law, and often do so with great skill.

Other forms of competition with public government were noted earlier. Private governments such as corporations, churches, and labor unions can pursue their own foreign policies, in concert with or in opposition to official policy (see, for example, Kowalewski and Leitko 1983; Teulings 1982). Nations may form alliances with large multinational corporations or such corporations may seek to overthrow governments. Churches may battle nations about human rights, seeking to affect what is called world public opinion. Labor unions may boycott goods from certain nations. Private governments often take over what we think of as state functions. Corporations often provide their own police when the public police seem inadequate to serve their interests, and I have already noted how white-collar crime is often handled privately. Trade associations often make rules governing members, devise standard forms to facilitate making contracts, and arbitrate or mediate disputes.

In short, a social theory cannot assume that public government has a monopoly on those functions the theory assigns to "the legal system" (see Greenberg 1976). Of course, a theorist can escape this problem by expanding the term "legal system" to include whatever agency, public or private, performs what the theorist wishes to call legal functions. However, such a move glosses over whether it makes a difference if a particular function is performed publicly or privately. It seems likely that the more private and decentralized the structures for performing a social function with broad impact, the greater the problems of coordination and integration.

Channeling and Filtering Matters In and Out of the Legal System. Not all problems, disputes, claims, and the like existing in society come before legal officials, and many of those that do are not handled in ways that these theorists assume. Thus, functions assigned to the legal system by many of these theories become questionable. Here I will consider the consequences for these theories of two aspects of social fields and networks: the filtering and channeling done by gatekeepers to the legal system and the coping with recurrent legal problems that takes place on the margins of law.

There has been extensive study of dispute processing during the past decade. Relying

on some of this work, Luhmann (1981) expands structural-functional theory to show that whether or how the legal system will play an integrative role is uncertain. He offers a theory of "thematization thresholds" as a barrier to transforming problems into legal questions. While law can stabilize people's expectations in interaction as these theories assume, for this to happen legal norms must be made into the theme of discussion between the parties—concrete situations must be "thematized" as legal questions: a buyer's dissatisfaction with the quality of a new car, for example, could be discussed with the dealer in terms of warranty and the remedy limitation in their form contract rather than in terms of other kinds of norms. However, in many situations there are good reasons to avoid invoking legal norms. By openly confronting another with the question of whether she is acting legally, one shatters the comfortable consensus that is normally assumed in a social relationship. Legal themes introduce the possibility of disagreement about interpretation of norms or the history of the situation and tend to force discussion into a dichotomy of right and wrong. Assertion of legal right is an attempt at coercion, and it may be a challenge to fight to defend one's honor. Interaction is moved from the domain of family life, a continuing economic relationship involving trust, and the like. In these domains what is given up now is likely to be rewarded by benefits that come later. It is difficult to threaten divorce and still keep a marriage alive; it is hard to contest issues in a divorce proceeding and continue to interact afterward.

Whether or not one will cross this thematization threshold is determined, Luhmann says, in large part by the prospects of social support in case conflict should arise. Turning to law usually means withdrawing from the relationship in question, and often one needs support to replace the benefits of the situation rejected. A legal discussion may initiate a chain of events with an unpredictable outcome, and the more uncertain the future, the more support is needed.

FitzGerald, Hickman, and Dickins (1980) see members of relevant social fields and networks serving not only as supporters but also as audiences, reality-testers, and defusers when disputes arise. For example, the group at the bar separates likely combatants; networks of friends and relatives repair defective products so the buyer does not have to confront a seller and demand a remedy; the women watching over small children at a playground work out potential neighborhood disputes. People in social fields can suppress disputes by making fun of one who voices a complaint or by reacting in such a way as to communicate that an asserted claim of right shows weakness and a lack of self-reliance (see Engel 1984). Baumgartner (1985) suggests that middle-class people may be less willing to use the legal system than those lower on the social scale. The threat of disapproval by one's peers may serve a gatekeeping function. At times those in a social field can act as champions or mediators, offering ways to communicate with the other party in the dispute, suggesting solutions, or adding their own power to press for resolution (see Eisenstadt and Roniger 1980). Significant others, on the other hand, can pour gasoline on the fire and raise consciousness—one can be told to fight and how to do it. Such an audience, moreover, may make it difficult to back down and compromise or withdraw without a loss of face.

Who plays these roles? Members of social fields or networks centered in the workplace or neighborhood may be called on. Ethnic or religious communities may be invoked when members do not view themselves as autonomous. However, Ladinsky and Susmilch (1983) find that in consumer disputes people tend not to contact third parties but to act

alone. It may be that people have a repertoire of disputing techniques in certain areas but not others (see Sharp 1980). It may be that Americans, at least, face a complex of norms about "not airing dirty linen in public" and "what will the neighbors think."

Rather than ignoring a problem, acting alone, or consulting acquaintances, some Americans go, or are sent, to lawyers. Social fields and networks may still play a part in dealing with the dispute. Usually, the client is buying access to the social field in which the lawyer acts. The lawyer has contacts and can get things done; the lawyer can act as mediator or go-between; the lawyer can suppress a dispute, encourage the client to fight, or attempt to work out a settlement (see Macaulay 1979).

Most social theories ignore the activities of lawyers and officials and deal with law in its most formal aspect. Law tends to be seen as adjudication or a supreme court giving meaning to guarantees of equal protection. Yet adjudication and the interpretation of norms are only part of a larger process involving negotiation, bargaining, and the assertion of power. Probably the key finding of nearly three decades of the social study of law is that a descriptive model of the legal process in the criminal area involves plea bargaining with trials and appeals operating at the margin as factors to consider during negotiations. On the civil side, insurance adjusters meet injured victims or their lawyers and work out settlements in which the chance of trials and appeals affects what is offered and accepted. This kind of patterned dispute processing frequently is carried on by private governments, social fields, and networks where there are identifiable roles, rules, and sanctions. In some bargaining arenas recurrent problems are dealt with by a relatively fixed cast of characters. For example, those who prosecute and defend criminal cases play defined roles but so do police officers, social workers, and others who are regularly involved. In these arenas the problems of individuals tend to be channeled into limited repertoires of solutions which have been developed by specialists who are influenced as much by their own goals and those of the institution as by the needs of disputants. In such arenas facts are not established beyond a reasonable doubt and rights are not vindicated. Rather, rights and facts are only factors in reaching a deal in which the interests and power of all participants will be reflected.

Even when we find adjudication in its more formal dress, we cannot assume that particular decisions solve the problems and define the rights once and for all (cf. Lindgren 1983). A particular appellate opinion may be but a battle in a larger war. For example, retail gasoline dealers battled the large oil companies for about forty years, seeking to enlarge and redefine their rights. The relationships were structured by lawyers for the large companies so that the dealers would have few, if any, rights. Individual dealers first sued, offering novel legal theories backed by atrocity stories to justify a change in the balance of power. Generally they lost. Eventually their trade associations mobilized and directed resources into a long battle. They also sought relief from administrative agencies. While they often failed to gain a change in the rules, they did gain the services of agency staffs as coercive mediators. Finally, the organized dealers turned to both state and federal legislatures. Here they won what appeared to be major victories. Under some of the statutes that were passed dealers could not be canceled except for cause; under others a requirement of good faith was imposed. However, the war was not over. The large oil companies went to court seeking interpretations of the statutes and challenging them on constitutional grounds.

During the whole course of this legal warfare, the oil companies used their economic

power to shape relationships with their dealers. The chance that dealers might win rights from courts and legislatures may have affected the companies' actions, but neither this chance nor the rights ultimately won put dealers in control. The cases and statutes were battles in a war rather than authoritative interpretations of ambiguities in values. Social theories that neglect the impact of legal decisions on bargaining position or fail to see that bargaining power rests on far more than legal rights explain almost nothing.

These social theories tend to identify law's role with conflict. However, much of law in any social system is facilitative. Do we drive on the right-hand or the left-hand side of the street? Can people act in groups with limited liability? Is there a way to notify others about my claims to your property? Can my less tangible claims serve as security for loans? Can we drink the water and milk and eat the lettuce with reasonable assurance that we will not be ill tomorrow? Will there be roads and bridges, and will the snow be cleared from them so we can transport our products to market? Will the conditions exist for a workable system of insurance? Will there be schools, hospitals, libraries, and parks? Private governments, social fields, and networks all draw upon these facilitative resources provided by the public legal system, and often legal regulation provides a focus for the formation or continuation of a relatively private group. In short, social theories must deal with interactions between and interpenetrations of public and private units.

Legitimacy and Mystification as Mediated by Social Groups. Social fields and networks also qualify in other ways some of the social theories we have considered. For example, both structural-functional and Marxist-derived theories tend to assume that societies are held together, at least in part, by a consensus about values. Of course, in one theory the writer talks of legitimacy while in the other the consensus is the product of false consciousness. Law is supposed to serve social integration by *clarifying* values so that disputes will be avoided and expectations realized. However, it is possible that *ambiguity* in the interpretation of generally accepted social norms and inconsistency in their application may in fact aid in holding societies together (Mills 1983). As Galanter (1979, p. 17) points out, modern society is "a world of loosely overlapping partial or fragmentary communities." Americans, at least, tend to be spatially and ideologically segregated. Certain ethnic and religious groups maintain a separate identity, more or less willingly. Those who live in upper-income suburbs see themselves as distinct from factory workers, who distinguish themselves from the poor who inhabit inner cities. People also form distinct but partial communities based on lifestyle. One way all of these communities can coexist in relative harmony is by the overestimation of consensus on values as well as by a fair amount of physical and cultural isolation.

Sometimes members of a society share allegiances to values at a high level of abstraction, but differ about interpretations. Sometimes our values may have contradictory implications so that people are free to draw their own conclusions without renouncing the value. For example, all Americans might agree that they favor equality, free speech, and constitutional government. However, members of one group may stress equality of opportunity while those belonging to another group advocate affirmative action to offset past discrimination. Some will tolerate freedom for the thought they hate while others distinguish free speech from treason or from pornography that incites violence against women. Some stress the rights of the accused while others remind us of the rights of victims and potential victims.

When matters can be left ambiguous, the members of each social field can support the

general norm and be comforted by an interpretation favoring their interests or point of view. As the conflict theorists remind us, an authoritative interpretation through the process of adjudication and appeal may only provoke anger and division rather than integration. Sometimes some of the strain may be reduced by discretionary enforcement. In theory, an authoritative interpretation by a court of last resort settles matters. In practice, those who must enforce the law may hesitate to force groups whose members feel intensely about the matter to comply with a law that affronts them (see Macaulay and Macaulay 1978). Moreover, normative ambiguity allows regulators and the regulated to evade the authoritative interpretation and rationalize their action in terms of fundamental values. They do not have to see themselves as outlaws. Those advocating the official interpretation may be dismayed by what they see as hypocrisy, but those responsible may be unwilling to pay the price of coercing a sizable minority into compliance (cf. Hagen, Silva, and Simpson 1977).

Some writers have turned to social fields to explain deviance. If, following structural-functional theories, one sees social order as resting on internalized norms, perhaps reinforced by sanctions based in reciprocal relationships, how then can crime be explained? Many have found the explanation in deviant subcultures which promote norms counter to the official ones. For example, one can point to adolescent gangs in large cities where one proves courage and gains status by a willingness to engage in violent conduct and to risk arrest. For these people, law provides an official norm to violate, and the police and the rest of the criminal justice system provide the opportunity to display skill in evading, manipulating, or coping with the demands of authority.

There are a number of distinct subcultural theories. Some writers see younger people as surrounded by those who transmit conventional social norms and others who transmit procriminal norms. The ratio of these associations determines whether younger people learn one or the other pattern (Sutherland and Cressey 1978). Other writers stress social learning in interactions with those who can reinforce or punish and offer models of conventional or criminal behavior (see, for example, Burgess and Akers 1966; Akers 1977). Many theorists emphasize more material factors, such as accepting conventional goals of success and material rewards but rejecting conventional limitations on the means of attaining such ends. When people find their access to legitimate opportunities blocked by discrimination or class barriers, they are likely to discover illegitimate opportunities (see, for example, Cloward and Ohlin 1960; Cohen 1955). Instead of gaining a Cadillac by business success in conventional terms, one becomes, for example, a narcotics dealer.

Other scholars have objected to these explanations for deviance as oversimplified. On the one hand, while gangs of poor youths do exist, there is a political dimension to emphasizing deviant subcultures. These theories stress threats to the social order from the poor and invite segregation and various types of social control measures, ranging from crackdowns on gang activity to being drafted into the armed forces. The theories tend to overlook crime committed by members of the middle and upper classes who, presumably, are part of the dominant majority culture. Many of their crimes are committed secretly and not as a group activity—one seldom embezzles, for example, as a way to show off one's courage to other corporate officers or one's associates at the country club.

On the other hand, available empirical evidence does not support the existence of delinquent subcultures standing apart from the main body of society. Delinquents and criminals say they do not approve of their own illegal conduct, such subcultures as one

can find do not contain a coherent set of inverse values, and delinquents tend to affirm much of conventional morality (Elliot and Voss 1974; Kornhauser 1978; Regoli and Poole 1978). Some suggest that it may be more profitable to abandon subcultural explanations and turn to theories stressing weakness of social control and increasing opportunity to commit crimes in modern society (see, for example, Cohen and Felson 1979).

Nonetheless, any complete theory of criminal behavior must note that social fields may facilitate if not cause some kinds of violations of the law (see Ekland-Olson 1982). Even if they do not constitute true rival cultures to mainstream society, those who use cocaine often are part of a social field which can help rationalize violating the law. One may be motivated to steal for any number of reasons which may or may not include exposure to a deviant subculture. However, if one who steals is part of a gang of those who also steal, he or she may be provided with a vocabulary with which to derogate the victim and justify the act. Moreover, those who use illegal drugs or crack safes also can pass along information on how to gain access to drugs or offset the latest countermeasures of safe manufacturers. Beginners may learn from professionals techniques of minimizing the chances of arrest, conviction, or a harsh sentence. Group communications may serve to magnify both the amount and success of criminal activity on the part of those who were insiders. In other words, the advantages of considering social fields when theorizing still exist even when the role played by groups fails to provide a complete explanation for behavior.

Many of the social theories we considered see law as playing a part in establishing legitimacy, symbolic satisfactions, or a false consciousness through mystification. These ideas are plausible and undoubtedly contain more than a little truth, but they are unclear about how the process of communication and persuasion is supposed to take place. There is reason to think that any messages broadcast by the legal system are mediated through social fields and networks which may transform and distort them. Moreover, any complete theory must deal with the countermessages which rivals of the state and the public legal system attempt to transmit with varying effect. It is useful to distinguish, and discuss separately, two versions of the impact of law on attitudes which seem to be implicit in these social theories: law and things legal are said to legitimate or mystify the nature of the legal system and liberal society in the eyes of *citizens in general*. Whatever the merits of that assertion, law and things legal may have an impact on the perceptions of *those who seek to enter the legal arena* and must play by its rules.

Many theorists have posited that legality serves to legitimate liberal societies, or some part of their processes, but they are unclear about how this occurs. The public is supposed to have faith because of the relative autonomy of legal officials, formal procedures, and the rule of law. For example, some drew the lesson from the Watergate scandal that "the system works," because the Supreme Court held that President Nixon was bound by the law and could not hide behind a vague "executive privilege."

There are several difficulties with these claims. Schools teach the conventional view of the legal system and mass media communicate a great deal about certain features of it, but people still know little about the legal process in operation and what they know is often distorted (Albrecht and Green 1977; Casey 1976; Cortese 1966; Hearst Corp. 1983; *Michigan Law Review* 1973; National Center for State Courts 1978; Williams and Hall 1972). Perhaps it is enough to sense in some vague and imprecise way that a good legal system is out there. Indeed, there is evidence that those who have the least contact with the American legal system are the most satisfied with it (National Center for State Courts

1978). Nonetheless, vague and distorted pictures of lawyers, judges, police, and administrators would not seem enough to foster a reliable faith or sense of legitimacy. We might suspect that dissonance between the normative claims of American law and an introduction to the realities of plea bargaining, personal injury settlement, and bureaucratic routine would disenchant those who had to confront reality.

Moreover, social fields and networks are not defenseless against messages sent by the legal system. The *Dred Scott* decision, overturning the Missouri Compromise and denying standing to former slaves who had fled to the North, did not change the view of abolitionists about the morality of slavery. The decisions of the Supreme Court of the past few decades dealing with desegregation, school prayers, abortion, and contraception have not legitimated the positions taken by the Court in the eyes of many citizens. Instead, in such instances law has provoked counterreactions and has served as the focus for rallying opposition. Fundamentalist religious leaders and conservative politicians have formed an uneasy alliance to decry the loss of morality symbolized by these decisions. A loose social network has arisen around these issues (Watts 1983). Such groups have targeted elected officials whom they saw as holding the wrong views on one or more of these issues and swung elections against them. Members of the Congress who respond to such views have sought to overturn or undercut many of these Supreme Court decisions with varying success, through withdrawing jurisdiction of the Supreme Court over school prayers, cutting off federal funds to states which provide abortions to welfare recipients, and influencing judicial and administrative appointments. Perhaps in the long run the Supreme Court decisions that prompted all this conflict will become the conventional wisdom of most citizens. However, at least in the short run, instead of enhancing legitimacy they have provoked some measure of conflict and disintegration.

If we recognize that few people in any society ever read legal opinions, legislative committee reports, or statutes in the full original text, we should be prompted to turn to another social field important in the process of promoting legitimacy or provoking outrage—the mass media. Messages about legal action are conveyed to the public by journalists, television reporters, script writers, and novelists. Perhaps some of these people are influenced by law professors and others who can claim expert standing to comment on legal action in light of conventional theories of law. These communicators, however, tend to be at least skeptical if not cynical about the normative claims of legal actors because they see too much of what goes on backstage. Their task, moreover, is to capture public attention and so they are attracted to what is provocative rather than the typical. Accounts of the legal system operating by the book which might reassure readers or viewers seldom are front-page news. On the other hand, for many reasons, news tends to be muckraking rather than revolutionary; bad people rather than the system tend to be blamed.

The chains through which messages about the legal system pass undoubtedly are complex, distorting, and not well understood. Moreover, while it is fairly easy to study what is sent out by the mass media, films, or novels, it is much harder to learn just what different kinds of people receive from such messages. Individuals may reinterpret a report of a distinguished law professor's views about a Supreme Court decision to suit their own world view, and perhaps this is more likely to happen when they are part of a social network with a stake in another view. Some honor civil libertarians but others call them friends of criminals and enemies of the nation. Supreme Court opinions may be seen as

upholding basic values or as idealistic but unrealistic. The rule that a defendant is presumed innocent until proved guilty, for example, is seen by members of many groups as an unwarranted attack on the competence of the police.

Perhaps, over time, subtle messages which are repeated on news broadcasts and entertainment programs affect attitudes despite the conservative efforts of fundamentalist churches, organized interest groups, or the regulars at the tavern. However, we must remember the great skill members of many groups possess to reinterpret or reject ideas that offend them. In short, it is clear that if a social theory tells us that law affects attitudes and no more, the theory is, at best, incomplete. To be meaningful, the theory also must describe in a plausible fashion the process by which those whose attitudes are reinforced or changed learn about legal action and what they make of what they learn.

Similar objections can be raised to Marxist-derived theories of law that talk of false consciousness and mystification. Hunt's statement (1976) is typical:

Legal norms . . . have the role of moulding and inducing acceptance of the power differentials that are encapsulated within them. . . . The concept of citizenship, formal equality of participation in the public affairs of society, is transposed in the field of law through the "rule of law" and associated concepts. Thus the assertion of the legitimacy of law is a celebration of social unity facilitated by the formal universalism of its symbolic content. [pp. 40–41]

The criteria for judging such assertions are a matter of dispute. On the one hand, some Marxist theorists would deny that their writing can be judged by non-Marxist social science. If correct theory tells a scholar that bourgeois law mystifies and helps produce false consciousness, all that is necessary is to find examples. "Data are important in terms of how well they describe the 'actualization of the objective role' played by events and concepts, and they are irrelevant otherwise" (Marenin 1981, p. 10). On the other hand, analyses such as that by Balbus (1977) in the *Law & Society Review*, apparently rest on observation of capitalist legal systems. Therefore, it seems appropriate to ask how much such theories would be altered if the roles played by social fields and networks were considered. As will be seen, such a move both challenges and supports parts of Marxist-derived analyses.

Balbus says that citizenship is a "substitute gratification which compensates for the misery of reality," and the "absence of communal relationships within . . . everyday existence" (p. 580). Without a good deal of qualification, it seems implausible that abstract citizenship is a substitute for community in the minds of many people in capitalist society. Citizenship has meaning only through those partial communities that exist in such nations. One usually votes as part of an undifferentiated mass, and, except in the rare case of an extremely close election, it would not matter if one stayed home and neglected to participate. However, one discusses politics with the regulars at the tavern, the lunch group at the office, neighbors, and the like, and it is here in these partial communities that one's views, vote, and being a citizen gain meaning. At least in the past, some have felt obligations of citizenship called for volunteering to join the armed forces. During World Wars I and II, this won approval from one's social network. One's family members shared in the display of citizenship by putting a banner with a blue star in the window of their home, an act designed to gain approval from an audience of those whose opinions mattered. Finally, we can point out that those for whom reality is the

most miserable are least likely to vote and most likely to view political activity with cynicism.

Theorists of the left often see capitalist society as characterized by what they see as a lack of "genuine" community. However, people acting in social fields and networks often feel some sense of community, and, at times, the legal system provides a focus for that sense. For example, a study of older black and white women who had incomes below the government's definition of poverty found that

Black women made greater use of alternative medical systems, had larger networks of family and friends, participated at greater rates in institutional support systems, and rated themselves higher with respect to health and happiness than did White women. These differences were attributed to the closely cooperative life styles of Black women. These patterns of mutual support were thought to be a highly sophisticated cultural adaptation to historic and economic circumstances. [Curran 1978, p. 39]

The legal system was a focus for cooperative activity within these networks of black women; they had to help each other cope with systems providing government benefits, and, particularly because of their membership in churches, they were organized to do so. We can debate whether this was a *genuine* community, but it is clear that while one should not romanticize their situation, picturing these women as alienated and isolated would be a distortion of their strength. Moreover, it seems unlikely that the lack of a cooperative lifestyle of the older white women studied by Curran is a result of their status as abstract citizens with rights, or their false consciousness about the nature of society and its legal system. At the least, to be convincing Marxist-derived theories must trace the linkages between an ideological picture of legal persons developed by theorists and such matters as the apparent alienation of these older white women.

Another theme related to law as mystification concerns the impact of capitalist ideology on family relationships. The "bourgeois family of liberal capitalism," it has been said, "was privatized and offered a refuge, an emotional haven, from the cold harshness and impersonal competition of the outside reality" (Hearn 1980, p. 131). However, the family in postcapitalist society is losing "its capacity to provide its members with a private space" and is turning into an association which focuses "more on output than on warmth and shared concern." Perhaps theorists such as Balbus have this in mind when they tell us that "the 'community' produced by the legal form contributes *decisively* to the reproduction of the very capitalist mode of production which makes genuine community impossible" (p. 580).

Whatever the problems of the modern family, it is unclear how legal ideology affects the sense of community in family-living arrangements. Furthermore, other social networks—the fellows at the club or tavern, the members of the bowling league, or the women who gather regularly to talk and drink coffee—also may offer some refuge from "the cold harshness and impersonal competition of the outside reality" (see Bissonette 1977; Genovese 1980; Schoenberg 1980). Such social fields and networks often carry some norms of altruism and community, whatever their success in implementing them.

There is little evidence, nor even much of a plausible theory, connecting the attitudes and values of the worker standing with his friends at the bar in a tavern with the logic of the legal system at the doctrinal level. Indeed, there is evidence that people think it

wrong to invoke the law within one's social fields. One keeps one's word, for example, rather than finding loopholes in the language of contracts with family and friends (see Engel 1984). Moreover, any theory of mystification by legal concepts must take into account many workers' sophistication and cynical knowledge about power and privilege in their society (see Stack 1978).

People in social fields regularly help each other cope with legal norms. They help each other comply. However, they may legitimate evasions of the law and teach each other how to evade successfully, often redefining legal norms to their own advantage. Port workers, for example, accept the idea that one should not steal, but they do not see taking damaged cargo as stealing (Hoekema 1975). Networks of employees often take, as of right, reasonable amounts of supplies from their employer, viewing this as just part of their compensation. Breaking what are deemed as foolish laws can become a game: even as loosely structured a group as Japanese commuters share their schemes to cheat the national railways by riding without paying the full fare (Noguchi 1979). In short, "[s]ocial relations in capitalism often deceive in appearance, but their observers are not always deceived because 'they have minds of their own,' minds which sometimes accurately reflect contradictory class interests" (Sumner 1979, p. 265).

Another problem with assertions about the legal system's contributions to legitimacy or mystification is that legality may more effectively shape attitudes and conduct of members of some groups than among others. It has been argued that "it is typically the case that subordinate classes do not believe (share, accept) the dominant ideology which has far more significance for the integration and control of the dominant class itself." This is true because "the apparatuses of transmission of belief are not very efficient in reaching the subordinate classes" (Abercrombie and Turner 1978, pp. 153, 159). Similarly, Ray (1978, p. 155) asserts that "it is not entirely clear that the market and the economic subsystem perform legitimation functions for the *whole* of liberal capitalist society, rather, this is restricted to the bourgeois class, which must convince *itself* that it no longer rules—hence its development of universal ethics and natural law."

Some support for this idea can be found in a study of the Massachusetts Commission Against Discrimination, which found that compromises and settlements involving small amounts of money were much more common than vindications of rights. Working-class complainants tended to be satisfied with what they received because they did not expect to gain much from a legal agency. In contrast, middle-class complainants, who had the highest percentage of favorable outcomes, tended to be the least satisfied because they thought they had rights and expected the system to vindicate them. "For many, a major cost of filing is the discovery that the legal system does not operate the way it is supposed to" (Crowe 1978, p. 234; cf. Baumgartner 1985). This was not news to the poor and working-class complainants; their social networks and experiences carry that message loudly and clearly.

Of course, it is not clear that even all of the most privileged groups in society believe in the rule of law, the autonomy of the legal system, and the like. Those who seek to capture regulatory agencies, influence the course of legislation, and affect appointments to judicial and administrative posts by making campaign contributions, bribes, and similar exercises of influence seem unlikely to be innocent believers in official rhetoric. Perhaps the few at the top and the many at the bottom, then, share cynical knowledge about how things are done.

Having said all this, it is still possible that legal forms do contribute something to legitimacy or mystification. People often act as if they did believe in the power of law. Legal symbols and rhetoric are appropriated selectively by those in social fields on many occasions to rationalize action. Members of these social fields may also attempt to introduce legal ideas as a limitation on the power of those who dominate the field. For example, private police look like the public police—they wear uniforms with badges, carry guns, and use what we think of as police equipment. Given the multiple and overlapping police forces in the United States, it is easy to confuse private with public officers. Private arbitration panels often meet in courtrooms or other public places which have the architecture of authority, and at least some of their discourse uses the language of legal rights. Employees of private universities and business corporations have increasingly claimed that administration and management must give reasons for decisions, and in American culture such justifications tend to have legal or constitutional overtones. Those who want to curb the power of those in charge often speak of due process and free speech; those who hold power often talk of property and contract rights. Private groups often select leaders and take positions by holding elections. One does not have to sit through too many meetings of governing boards of private organizations to gain a healthy respect for the mystificatory power of Robert's Rules of Order in the hands of a master at the game.

Law also can be a cultural resource, selectively drawn upon to aid in the operation of social fields. Santos (1977) studied a squatter settlement in Rio de Janeiro which he called Pasargada. Under Brazilian law, the entire settlement was illegal because it was built without authorization on land belonging to the government. Yet, the settlers of Pasargada held what they saw as property interests in their houses. They established a private government—the Residents' Association—to deal with disputes and to create a structure under which their homes could be leased, bought, and sold. The Residents' Association borrowed and adapted Brazilian legal concepts and procedures to carry out these transactions. Much of the procedure carried out the evidentiary, channeling, and cautionary functions of legal formality (see Fuller 1941). To effect a transfer, the parties came before the *Presidente* of the Residents' Association. He questioned them to determine whether they understood the transaction, much as a notary does in many civil-law systems. A typed contract or lease was produced which was a powerful formality in a community where typewritten documents are not an everyday matter and literacy cannot be assumed. The signed or marked leases and conveyances were filed at the office of the Residents' Association, and filing itself was an important ceremony, giving the transaction legitimacy much as the recording of a legal document might in public legal systems.

Such legal ritual probably lessened conflict by offering symbols of the transfer of property and increasing the awareness of the parties about the nature of their transaction. It also probably served to assert the authority of the Residents' Association and to clothe it with some legitimacy. Squatter law must be appropriate since it is "just like" the law used by the rich in those parts of Brazil where the streets are paved (which the residents of Pasargada called "the law of the asphalt"). It also was hoped that the legal concepts and procedures used would help defend the autonomy of the settlement against the Brazilian government. Transfers purported to deal only with interests in the houses and made no claim to the land on which they stood. The Residents' Association mediated disputes between residents. Santos observes that "[b]y providing Pasargadians with peaceful means

of dispute prevention and settlement Pasargada law neutralizes potential violence, enhances the possibility of orderly life, and thus instills a respect for law and order that may carry out when Pasargadians go into town and interact with official society" (p. 90). This, too, may have protected the settlement. There was always a risk that public authority would send in bulldozers and destroy the settlement, but there was hope that the more self-contained and trouble-free the settlement, the less likely it would be to attract the unwanted attention of governmental authorities.

Santos shows that the legitimating or mystifying power of legal form and rhetoric is a weapon which can be appropriated by both the dominant and the dominated under certain conditions. Of course, groups with wealth can make better use of this weapon and use it in more situations. Moreover, the success of the Residents' Association in Pasargada probably turned on many factors in addition to its adaptation of the forms and vocabulary of Brazilian law. If the land on which the settlement was built was needed for a project which the Brazilian government saw as critically important for the development of the country, we can wonder whether legality would stop the bulldozers.

Whatever the impact of the ideological structure of liberal legal systems on general public opinion, those who use these systems for their own purposes, or who find that they must cope with them, face the necessity of transforming their position into the language of tort, contract, property, due process, free speech, or the like. To what extent, if at all, do such transformations mystify those who want to or must use the legal system?

Groups seeking some degree of social change, or the alteration of the balance of power within a social field or network, seldom are thwarted in seeking favorable readings of basic norms because of the law's emphasis on formal equality, individual rights, and fair procedures. Many of the theorists appear to know little of the reality of modern legal doctrine. Often they credit it with far too much coherence. There are counterprinciples that call for protection of people because of the disadvantaged position of their group. Even where the legal process requires claims to be stated in terms of legal rights, groups can be mobilized around what, in form, is stated as an individual claim. On its face, *Brown v. Board of Education* (the school desegregation case) appeared to be a dispute between Linda Brown and the school system in Topeka, Kansas. It is safe to say that few were misled and failed to see that any decision would speak broadly to the position of blacks in American society.

However, Trubek (1980–81) points out that the law itself is one of the filters that determine what disputes will emerge and what forms conflicts will take. He suggests that the entire behavioral system relating to processing particular types of disputes—including the relevant legal doctrine—"not only transforms the various individual conflicts: in so doing it 'transforms,' so to speak, a raw conflict of interest into a social process with limited possibilities. The disputes that do emerge are those in which basic economic relationships are not challenged: all other possibilities are filtered out" (p. 743). For example, I have mentioned the long-term struggle between retail gasoline dealers and the major oil companies about the nature of their relationship. The arguments of the dealers' lawyers were framed in terms consistent with one strain of classical notions of property and contract. One could imagine claims for much broader protections for the dealers which their lawyers would have been foolish to assert in an American court—for example, the dealers might benefit if a court were to appoint a receiver to supervise the relationships between, say, Mobil Oil and all its dealers; few lawyers would ask for anything so broad for fear of prejudicing their chance of getting anything at all.

One might view this kind of transformation and judgment about what kinds of claims are likely to sell before American judges as mystification. On the other hand, it is possible that no one involved in the gasoline dealers' battles was fooled in the slightest. Everyone may have accurately appraised the amount of power dealers could bring to bear and decided that a slight extension of contract and property ideas was the most that could be hoped for at the moment in question. Either way, Trubek's point holds—American judges and legislators are unlikely to redistribute wealth and power other than incrementally. Few with any experience in the system would expect them to. Indeed, many who have never considered the matter, if asked, might prefer a legal system whose output was incremental to revolutionary change. Those who are, or would be, suspicious of revolutionary change might be wrong, but they are not necessarily mystified.

If we focus on legislation rather than adjudication, we can find an area in which some mystification may take place as Marxist-derived theories suggest. The rhetoric heard in the legislative process is similar to that heard before the courts, but it is not the same. Those claiming to represent farmers, organized labor, small businesses, consumers, the unemployed, and the like typically try to relate the claims of their groups to the interests of the nation as a whole. They claim the need for regulation to alter the balance of power in certain relationships in the society. The lawmaking process usually involves a degree of pluralistic bargaining among certain interests. Seldom will claims be made in the name of the working class in a Marxist sense; seldom will legislation be passed which purports to redistribute wealth more than marginally. More often groups win legislation creating rights for individuals who, for example, have been the victims of discrimination or bad faith.

However, such legislative victories may be more symbolic than real. If rights are to be more than words in a statute book, lawyers usually are needed to represent those who think they have been wronged. Sometimes statutes give complainants a reasonable chance of winning a considerable amount of money, but more often these new rights can be protected only by injunctions that courts hesitate to grant, the damages that can be proved are likely to be low, and establishing a cause of action requires difficult and costly legal research and expert testimony.

It is difficult to mobilize groups to raise funds necessary to bring successful cases to vindicate individual rights. After the statute is passed, sympathetic groups may turn their attention elsewhere or just fade away, believing that the war is won. Private lawyers may donate services, but the supply of those able and willing to do this is low. Given these problems, a reform law may at best create a weak bargaining entitlement, setting the stage for negotiation rather than vindication. It would be fair to say that members of groups that win the passage of statutes creating individual rights without providing an adequate means of vindication have been mystified into thinking they had won a war when they had only won an initial battle. Of course, the failure of a particular statute to affect behavior can be the focus for another legislative battle, but fashions in reform change and it may be difficult to argue for the creation of an administrative agency when deregulation is the cause of the moment or for government-paid legal services when those programs displease powerful interests.

When we consider various social theories and their accounts of the roles played by the legal system, and then add private governments, social fields, and networks, we see that whether law plays the parts assigned is unproved. Many social theorists seem to have accepted the view of the centrality of law championed by legal scholars, but an expanded

perspective shows that in many, or most, instances law and the legal system may be irrelevant or appear briefly in a walk-on part. While, on occasion, law may be in the spotlight center stage, the task is to account for when law and legal actors play major parts and when these roles are played by others.

Of course, it is possible—but difficult to establish—that legal norms and legal practices play an important background role so that social interaction would be very different if they were not present. People act on the basis of many tacit assumptions about the present and future and things legal may be one of the factors providing the reassurance necessary for social interaction. We assume, in most instances, that we are safe walking the streets during the day, that criminals will be arrested, and that contracts will be performed. When we lose this faith, as in time of civil war or a repressive takeover by a military government, our behavior changes. It would be difficult to show the part played by law in our tacit assumptions as compared with customs, experiences, and the like. Yet it seems plausible that it is there. Moreover, legal norms and procedures are a potential resource which always might be mobilized by one group or another, and the chance that this could happen may affect official behavior, perhaps in subtle ways. Police, mayors, governors, regulatory agency personnel, and legislators know that if they affront the beliefs and interests of groups of people, they might mobilize and retaliate by voting the rascals out or by bringing a suit in the courts.

If law fails to play the roles it is assigned in various social theories, there may be costs unless its parts are well played by other associations and groups. Luhmann (1981) sees the filtering done by social fields and networks as potentially harmful.

As a conflict-regulating system that is always belatedly set in motion, i.e. only when called upon, the legal system very seldom takes the initiative. . . . Excessive inhibition of the thematization of law may, therefore, lead to a kind of drying up of the legal system, and so leave the regulation of conflict to other mechanisms—e.g. morality, ignorance, class structure, or the use of force outside the law—whose social structural compatibility may be problematic. [p. 247]

Luhmann, thus, seems to believe that there is a function best performed by the public legal system. If disputes, claims, and the like are the basis for the perception of problems by legal institutions, the filtering and channeling done by social fields and networks are likely to offer a distorted view to lawmakers. Cases before agencies and the courts and bills being lobbied before legislatures are a biased sample of problems in the society (cf. Galanter 1983, p. 70).

If we were to look closely at the roles played by private governments, social fields, and networks, we might see an important problem of legitimacy, undeveloped in the theories we have considered. Hurst (1960, pp. 518–19) tells us that throughout American legal history, “we sought to make all secular power responsible to power outside itself, for ends which it alone did not define.” Unger (1976) sees the recognition of the power of private associations as bringing into question the legitimacy of the liberal state. He asserts that

the increasing recognition of the power these organizations exercise, in a quasi-public manner, over the lives of their members makes it even harder to maintain the distinction between state action and private conduct. Finally, the social law of institutions is a law compounded of state-authored rules and of privately sponsored regulations or practices; its two elements are less and less capable of

being separated. All these movements, which tend to destroy the public character of law, carry forward a process that begins in the failure of liberal society to keep its promise of concentrating all significant power in government. [pp. 201–2]

The parts played in society by private governments, social fields, and networks are far more diverse and complex than the roles envisioned in the social theories discussed. Individuals are subject to a web of norms and sanctions, only some of which are imposed by the state. If, in Hurst's words, "secular power [is not] responsible to power outside itself, for ends which it alone did not define," we can expect those subject to the jurisdiction of such private governments and more structured social fields to challenge their autonomy. Moreover, some response from public government may be needed to preserve its own legitimacy. I will now turn to such questions.

The Autonomy and Accountability of Private Associations

In the United States, relationships between government and various kinds of associations are complex and uncertain. While much of our earlier disquiet about regulation has been overcome, private associations ranging from the family to multinational corporations still have large claims to autonomy. Advocates of greater accountability tend to find the threat to individual liberty, efficiency, or other values coming from powerful private associations as well as the state. Tocqueville (1835) saw equality in the new democracies leading to control by the bureaucratic state. However, he thought that voluntary associations would serve to restrain the power of the state and, indeed, the power of other associations. Durkheim (1950), on the other hand, saw individual liberty as threatened both by private associations and by the state. Liberty required the balancing of both the power of secondary groups which surround the individual on all sides and that of the nation-state so that "collective particularism" is held in check. "And it is out of this conflict of social forces that individual liberties are born" (p. 63).

There is a sprawling normative and descriptive literature about regulation (see Tomasic 1984). It deals with such things as its justification in terms of market failure, capture of regulatory agencies by those supposedly regulated, the new regulation gained by the reforms in the 1960s and 1970s, and the deregulation movement of the 1970s and 1980s. In order to make the discussion in this section more manageable, I will narrow my focus to attempts by individuals or groups *within* a private association to gain action by the legal system to affect the balance of power inside the group. I will take as an example the claims of employees and those who hold franchises against employers and franchisors. The area is important and provides good examples, and much of what is said would apply also to factional struggles in churches, political parties, athletic organizations, and similar associations.

Much of this discussion also will be relevant to the adequacy of structural-functionalist conflict, and Marxist-derived theories considered in the last section. However, in addition I have had an opportunity to consider neo-evolutionary theory in the sociology of law. Teubner (1983, 1984a, 1984b), in a synthesis of several theoretical works, sees legal systems in Western societies moving from what Weber called a formally rational style to a substantively rational one with the rise of the welfare state. However, recent crises may prompt what Teubner calls "reflexive rationality," as the public legal system more and

more seeks to gain substantive goals by working through private associations. However, when we look at concrete examples of the process about which Teubner writes, we will see that reflexive rationality may produce consequences that some would challenge.

First, I will sketch the claims for autonomy and for accountability of private associations and will consider their applications to the employment relationship. Second, I will consider Teubner's synthesis of a number of major evolutionary theories and his description of reflexive rationality. Finally, I will consider challenges to the corporatism implicit in reflexive rationality.

Accountability and Autonomy in the Employment Relationship When we look at the legal response to claims by members of groups against those in control, usually we find plausible theories calling for accountability being matched against norms justifying autonomy from outside authority. This may reflect, to a large degree, the decay of older views which drew a sharp line between public and private spheres of life. Public action was seen as constrained by the rule of law; private interaction within groups was simply a matter of free contract and choice. By the 1980s, if not long before, the purity of such distinctions had been lost. To use Unger's words (1976, p. 193), in postliberal society there is only a "general approximation of state and society, of public and private sphere."

The original theory, which still has a good deal of rhetorical power, saw public governments as holding a monopoly on the legitimate use of force. However, this power to constrain liberty had to be limited. Public officials thus acted only under the rule of law. Citizens were protected from governmental action by a Bill of Rights. Government control rested on elections, and power was constrained by checks and balances, federalism, or both. Private activity, including a right of association, was left free of restraint, subject only to the boundaries set by the law of property, contract, tort, crimes and similar legal categories. Counterbalancing associations offset the power of any particular group. One dissatisfied with a particular club, church, or business organization could go elsewhere, and this threat of exit and competition supplied all the regulation needed. Indeed, an important part of American history involves accounts of groups breaking away from religious organizations and forming new sects to pursue the true faith. This threat of exit constrains leaders to temper their actions.

Of course, the limitations of the rule of law, separation of powers, and federalism on public government and the freedom from state regulation enjoyed by private associations probably always have been less effective than claimed. Government officials probably have acted first and hoped to rationalize what was done later; discretion has long been a major part of our legal system. Private associations have always had to cope with some regulatory elements inherent in contract, property, tort, and criminal law. Nonetheless, one who would rationalize discretion of public officials or regulation of private associations has had the burden of persuasion.

Economic crises and social struggles have prompted the growth of the modern welfare state, which increasingly has attempted to regulate private associations. Instead of a sharp line between public and private purposes, governments promise to take whatever measures are needed to promote the success of the economy, to guarantee equality, and to deal with foreign threats of one kind or another. Instead of applying formal rules through classic procedures, modern governments increasingly rely on those who claim expert

status and exercise discretion in the pursuit of these substantive goals. Also, instead of regulating conduct, government officials often bargain with various interests. Government may attempt to affect social conditions by trying to influence the action of the private sector in many ways, ranging from controlling the supply of money to setting terms for government contracting. At the same time, private associations have grown in power and significance and assume what are seen as public functions (see Nachmias and Greer 1982). Business corporations may wield critical influence over the future of employees, customers, suppliers, and the communities or regions in which they operate. Those dependent on them cannot exit easily. If a stable or expanding economy is seen as a public function, the operations of these large business organizations seem to many to be more than mere private action. Moreover, many corporations develop and supply transportation, communication, and weaponry viewed as essential to the national interest. When bad judgments, accidents, or world economic conditions threaten large organizations engaged in such important functions, it has been seen as a matter for public concern and government action.

Kennedy (1982) sees six stages in the decline of the public/private distinction. First, there are hard cases with large stakes—we manipulate the distinction and analyze it. Second, intermediate terms develop—we recognize that some situations are neither one thing nor another but share the characteristics of each. Third, the distinction collapses—we realize that however one tries to apply it, one ends up in a situation of hopeless contradiction. Property and contract, for example, can be viewed as examples of delegated state power since they are supported by cops and courts. Fourth, rather than abolish the distinction, we see matters along a continuum from polar cases of public and private action. Institutions in the middle seem to need rules which are a mixture of those appropriate to public and private modes. One balances factors that cut one way or another. Fifth, we see that questions about where an instance fits on the continuum involve manipulation of balanced pro/con policy arguments that come in matched pairs. Finally, at times the ends of the continuum may seem closer together than either end does to the middle. Kennedy calls this “loopification.” Parents act more like judges, legislators, and police than officials of very large corporations; yet the family and legal officials would seem to be at opposite poles of the public/private continuum. When this stage is reached, it is hard to take seriously the distinction between what is public and what is private as a justification for treating one situation differently from another.

We can see something of the process Kennedy describes in the attacks on the claim of what, traditionally, were seen as private associations to autonomy from regulation. While some earlier works questioned this autonomy (see, for example, Hale 1920), attention was focused on the issue by Berle and Means (1932), who argued that there had been a separation of ownership from control of the large publicly held business corporation. The majority of shareholders lacked information and ability to mobilize their voting rights in all but extreme situations. Corporate executives, thus, were free to govern in the light of their own interests, subject only to whatever discipline might be found in the various markets in which the corporation dealt. Since corporate democracy was but an empty form and competitive pressures but an uncertain check, public regulation and control were justified.

Then during the early 1950s, a number of writers saw large business corporations as “private governments,” exercising powers similar to those of states unchecked by the

market, the rule of law, or the Bill of Rights (see, for example, Friedmann 1957; Hansloe 1961; Schwartz 1960; Wirtz 1952). Eells (1962, p. 278) observed that "private government is no imaginary construct of academic minds, but is now widely accepted wherever men come to grips with the facts of political life. The corporation of the future is certain to be assessed not only as an element in the economy but also as a contributor—or as a deterrent—to freedom and order." Berle (1952, p. 942) found an emerging principle holding that the "corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself."

While separation of ownership from control and private government theories can be challenged on a number of grounds, both became part of the American political and legal culture. (For a modern version of the argument, see Ewing 1977.) One finds traces of each one in many battles before courts and legislatures about the autonomy or accountability of private associations. As Hanslowe (1961, p. 104) notes, during the 1940s and 1950s, "in labor relations, at least, quasi-governmental powers . . . [were] . . . being circumscribed by . . . quasi-constitutional restraints." These kinds of arguments seem to fall somewhere in the middle of Kennedy's six stages. Private government, for example, is an analogy. General Motors is both like and unlike the state of Wisconsin. As a result, a matched set of predictable arguments fall into place—one calls for GM employees to be protected by guarantees of due process and free speech while the other argument stresses that, unlike a true government, GM's powers over its employees do not extend to the right to imprison or keep them from seeking work elsewhere. Logically, starting from the public/private premise as it has developed, the case is a tie.

By the 1930s, it was difficult to predict when private associations would be seen as autonomous and which form of regulation, if any, would be imposed. Chafee (1930, p. 1021) said that judicial competence to settle disputes within associations rests on a balance of four normative factors which "may be called, for the sake of vividness, the Strangle-hold Policy, the Dismal Swamp Policy, the Hot Potato Policy and the Living Tree Policy. The first favors relief; the last three oppose relief." The strangle-hold policy involves a judgment about the seriousness of the consequences of expulsion or other injury done to a member: "some associations have a strangle-hold upon their members through their control of an occupation or of property which can be ill spared." The dismal swamp policy reflects the difficulty a court would face in learning enough to decide the case. For example, judicial review of "the highest tribunal of the church is really an appeal from a learned body to an unlearned body." Attempts at judicial control of the internal affairs of a powerful association which commands the devoted adherence of its members might cause great resentment and have small chance of success. Courts will hesitate to pick up such a hot potato. Finally, the value of autonomy itself may induce courts to leave associations alone. Chafee argues that

[t]he health of society will usually be promoted if the groups within it which serve the industrial, mental and spiritual needs of citizens are genuinely alive. Like individuals, they will usually do most for the community if they are free to determine their own lives for the present and the future. A due regard for the corresponding interests of others is desirable, but must be somewhat enforced by public opinion. Legal supervision must often be withheld for fear that it may do more harm than good . . . [for example, freedom] is desirable for schools and colleges. . . . The courts, like the legislatures, can hardly profess to be better

qualified to decide how teaching shall be carried on than are the teachers and their administrative associates. [pp. 1027, 1028–29]

Views about this living tree policy may have changed somewhat since Chafee wrote, but the policy still commands respect.

About thirty years later, the editors of the *Harvard Law Review* (1963) recast Chafee's policy considerations as (1) interest in group autonomy, (2) practical limitations on judicial inquiry, (3) harm caused the individual and society by autonomy, (4) alternative methods of control, (5) extent of monopoly power, and (6) determination of whether a governmental grant of rights or powers imposes, by implication, corresponding duties. Of course, whatever its other functions jurisprudential writing that talks of weighing and balancing such factors is only generally descriptive or predictive. There is no scale on which to place these factors one by one and no dial on which to read their weights in grams or pounds. In most cases contrasting but equally plausible cases for autonomy and for accountability could be made. Indeed, after 117 pages of analysis, the *Harvard Law Review* tells us that judicial control of the conduct of private associations is "an area where few legal principles seem to have emerged" (p. 1100). We face all the problems of Kennedy's fourth stage—what he calls "continuumization." (See also, Ellman 1981; Fuller 1969; *Harvard Law Review* 1962; *Yale Law Journal* 1963.)

Klare (1981, p. 465) observed that liberal theory faces a difficult problem in rationalizing regulation of a supposedly private economy. "The core of the problem is to find a justification for public regulation which does not in logic lead to the notion that *all* economic decisions of societal consequence (e.g., all investment decisions by the 'top 500' corporations) should be subject to public control." As we shall see, legal decision-makers often are concerned about this slippery slope.

We can see many of the difficulties with the distinction between public and private by examining the legal treatment of the employment relationship and its close relative, the franchise. These relationships are social fields and sometimes structured private governments. Throughout the twentieth century, employees have sought to alter the balance of power between them and their employers, and they have enjoyed some success. In this section I will first paint, with very broad strokes, a rough history of the legal response to the claims for intervention in employment relationships in the United States in this century. Second, I will look at some of the factors affecting the actual balance of power in that relationship, including all of the legal activity. The discussion suggests an important question yet to be addressed adequately in the social study of law: why and when do people turn to the formal public legal system rather than some form of private government? I will also set the stage for considering evolutionary theories concerning the parts played by legal systems as the role of the state has changed in capitalist societies.

The starting point for considering legal reaction to the employment relationship in this century is the classic position that the matter is simply one of free contract. Regulation is not needed because if a job is, for example, more dangerous, employees will be paid more to take the risks. In theory, those employees who held contracts for specific terms held rights and were subject to duties determined by voluntary agreement. However, courts almost never would grant specific performance of an employment contract and force people into a distasteful close personal relationship. In most instances, an aggrieved party was left to seek damages. If an employer breached the contract, an employee usually would have to be paid the balance of the salary that would have been earned less any

income the employee received from a substitute job taken after being fired. If an employee breached by leaving the job, the employer's damages usually were worth so little that a suit would not be brought. As might be expected, if an employee left taking trade secrets or valuable skills to use in direct competition with the employer, courts might enjoin this attack on property.

However, at the turn of the century as today, most employees did not hold contracts for fixed terms but worked under an employment-at-will. In theory, equality is preserved. The employer is free to discharge the employee, and the employee is free to leave for good, bad, or no reason. However, in times of labor surplus, the employee is at a disadvantage. For example, in *Comerford v. International Harvester* (1938), the Supreme Court of Alabama held that a worker who had alleged that he was fired after his wife refused the sexual advances of his boss had failed to state a cause of action. It explained that the employer "could have well decided that it would be in the interest of good management not to have both plaintiff and the guilty assistant sales manager working together under the circumstances. It could have concluded that the services of the sales manager were preferable and retained him without in the least ratifying or condoning his conduct toward the plaintiff." In short, employees-at-will must please the boss or look for work elsewhere.

In the early decades of the century, reformers sought to gain statutes regulating certain aspects of the employment relationship. Legislation was passed in a number of states attempting to govern wages, hours, and working conditions. Of course, this led to the great constitutional battles concerning liberty of contract and substantive due process. Not until the 1930s was it clear that such legislation was constitutional.

The legal response to labor unions and strikes was hostile. Such activity could be attacked as tortious or as criminal conspiracy. Police and sheriffs used force to remove strikers from their employer's property, and union organizers were attacked by law enforcement officers with both legal and illegal means. Moreover, courts would enjoin union activity and strikes and enforce promises by employees not to join unions—"yellow dog contracts."

As part of the reforms of the New Deal, the American legal system took a very different stance. Collective bargaining was symbolically legitimated in terms of union democracy, a collective contract, and private adjudication through arbitration. The government supported and attempted to influence a private legal system. Employees in a bargaining unit could vote to determine whether they wanted to be represented by a union, and, if so, by which one. Once a union was certified by the National Labor Relations Board as the bargaining representative, the employer had a duty to bargain in good faith. The result of this process would be a contract governing wages and conditions of employment for a fixed term, which had to be ratified by the individual workers. The contract typically is interpreted and applied to specific problems through a grievance procedure. There are a number of steps, usually beginning with a complaint to a foreman and ending with arbitration. The courts, particularly since World War II, have supported arbitration in a number of ways and have sharply limited challenges to an arbitrator's power. Unions, in turn, have been subjected increasingly to a duty of fair representation in the grievance procedure. On the other hand, during the life of a collective bargain, employees lose the right to strike and wildcat strikes can be enjoined. All parties, as well as the public, are deemed to have an interest in continuing production. Displeasure with the grievance

process can be expressed legitimately only by seeking a new arbitrator for future disputes, by collective bargaining when the current contract expires, or by voting for new union officers or a new union.

Over half of the American labor force continues to work under only an employment-at-will, and there have been a number of developments over the last thirty years indicating an increasing willingness to cut away at the autonomy of the employment relationship. For example, franchisees have battled franchisors before courts, legislatures, and administrative agencies. Their successes influenced attempts of employees-at-will to gain rights.

Before the changes in the law that occurred from the 1950s through the 1970s, those holding franchises to sell nationally advertised products and services were in form independent business people but in substance they resembled employees. Franchisors create a nationally known product and a trademark. They plan how retailing is to be conducted and often select the location of each place of business. The franchisee contributes capital and management to the particular outlet and will share in the profit or loss generated there. However, a franchise was a highly dependent relationship. The franchisor could cancel at any time without having to show justification. If a franchisee had invested in the business and had built up a local reputation tied to the franchisor's trademark, the franchisee had a great deal to lose. Thus, there were real incentives to please the franchisor's supervisors in charge of the particular location. Franchisees often complained of a contradiction between the symbols used by the franchisors and the reality of the relationship—franchisees were supposed to be independent business people, but the form contracts drafted by Wall Street lawyers gave the franchisees few, if any, rights and reserved all power to a not always benevolent authoritarian ruler. While franchisees often look like small capitalists, before statutes offered some protection, their franchises could be terminated without cause. While franchisees may appear to be "running their own business," they actually occupy a position hard to distinguish from that of an employee-at-will. Franchisees, however, often can afford to organize and lobby for legislation while employees-at-will have been limited to individual appeals for help from the courts.

While there were some victories by franchisees before the courts, generally their decisions favored the large corporations that created the relationships. With some exceptions, the courts protected a property interest in the product or service and the trademark (see Jordan 1978). It was just a matter of free contract. Franchisees were held to have taken the risk when they accepted the standard form contract as the blueprint for the relationship.

Then automobile dealers and retail gasoline dealers gained statutes, both at the state and federal levels (see *Minnesota Law Review* 1975). These statutes were thought to affect the balance of power within the private governments of franchising. The symbols found in this legislation tend to involve due process, the use of a franchisor's power in good faith, or the existence of reasonable cause for its use after an opportunity to cure defaults by the dealer. However, the rights gained by the automobile and gasoline dealers were limited and subject to performance of duties. It seems clear that the legislators accepted the case offered by the lobbyists for the dealers but were concerned, as well, with what they saw as the franchisors' legitimate interests and the rights of the public. The statutes and their legislative histories exhibit great concern that there not be too great an invasion of private decision-making.

Another example of our willingness to whittle down the autonomy of the employment relationship can be found in the results of the civil rights struggles during the 1950s and 1960s. Legal protections against discrimination based on race, sex, and age are now widespread. Such laws may have the greatest impact on employees-at-will who lack union or contract protection against unfair treatment by their employers. Cases such as the *Comerford* decision, involving an employee fired because his wife rejected the sexual advances of his supervisor, likely are no longer the law.

During the 1970s, the employment-at-will doctrine was subject to challenge in many states, with very mixed results. Many states continued to uphold the older view. The Supreme Court of Alabama, for example, refused to find a cause of action when an employee of a hospital alleged she had been fired because she refused to falsify medical records as part of a fraudulent scheme. The court remarked that to rule otherwise would "abrogate the inherent right of contract between employer and employee." Any change had to be left to the legislature.

However, other state courts created causes of action for employees-at-will (see *Harvard Law Review* 1980). Cases have involved discharges for such reasons as refusing to respond to sexual advances, being absent from work to serve on a jury, blowing the whistle on illegal activity within a corporation, and making insurance claims which would affect the rates paid by the employer. The theories used to justify intervening in the employment relationship have varied widely, and, typically, the nature of the cause of action is left extremely uncertain. Some courts found an implied obligation of good faith inherent in any contract, but the requirements of that duty were left to case-by-case definition. Others appraised the reason an employee was fired to see if it violated public policy. The California courts recognize a tort cause of action for wrongful discharge that carries with it the possibility of punitive damages.

However, many courts which recognized some right of action also seemed concerned about making it too hard to discharge incompetent workers and prompting nuisance settlements when there was any doubt about the propriety of a termination. In *Pierce v. Ortho Pharmaceutical Corp.*, the Supreme Court of New Jersey required a "clear mandate of public policy" to be violated in the discharge before relief would be given. Such policy could be found in "legislation; administrative rules, regulations or decision; and judicial decisions," and in "certain instances, a professional code of ethics." An employee's own ethical objections to an employer's practices were not enough to justify a refusal to work on a project, and so firing the employee did not violate public policy. Employment still remains more private than public; employers still have a claim to autonomy, and accountability, so far, is reserved for cases involving atrocity stories (see Lopatka 1984).

Reflexive Rationality: The Legal System Working Through Private Associations to Achieve Substantive Goals We have seen that the relationship between the public legal system and private associations is uncertain and there is conflict among normative claims concerning autonomy and accountability. Teubner (1983, 1984a, 1984b) sees legal thought evolving through a number of stages to one where dispute resolution and social integration will be decentralized and handled within various private associations. Law will play a role at the margin, influencing outcomes by demanding procedures and new forms of participation rather than prescribing substantive results. We will consider his evolutionary theory in light of our discussion of the employment and

franchise relationships and attempts to influence the balance of power within them. Finally, we will consider Klare's challenge (1981, 1982) that such reflexive approaches only mask the exercise of power and stand in the way of further development of real decentralization of power and control to the level of individuals and small groups.

Teubner looks at neo-evolutionary theories about the place of law in society fashioned by Nonet and Selznick (1978), Luhmann (1982), and Habermas (1979) and offers a synthesis which predicts the direction development of legal thought is likely to take. All of these writers argue that while law is affected by social change, there are limitations on its adaptability. External needs and demands are selectively filtered into the legal system and adapted in light of the logic of normative development. This process, however, can lead to crisis. Legal structures may not provide the conceptual resources nor the effective regulation needed for maintenance of the overall social system. Moreover, legal action may be seen as illegitimate if legal norms are out of phase with social ones. There was such a crisis when the legal approach appropriate to early capitalism confronted its later development. We may face another today as the legal approach appropriate to the welfare state is under attack in many Western nations.

In the nineteenth and early twentieth centuries, capitalism was facilitated by what Max Weber (1954) called *formal rationality*. Internally, law was rationalized by rule-oriented reasoning, which was manipulated by professionals who shared a legal culture. The justification for this style of law rested on its contributions to individualism and autonomy from government control. Externally, this style of law facilitated private ordering by guaranteeing a framework within which substantive judgments could be made by individuals. In this manner, it contributed to mobilizing and allocating resources, and it appeared neutral and autonomous from political and economic power. With the rise of the regulatory welfare state in the mid-twentieth century, Western legal thought evolved to a style which, in Weberian terms, was *substantively rational*. Law lost most of its formal characteristics. Internally, law was then rationalized in terms of achieving substantive ends—law was an instrument and not an end in itself. It was justified in terms of the perceived need for collective regulation of social life because of the failures of the market. Externally, this style of law is the main instrument by which the state affects market-determined patterns of behavior. It is seen as legitimate when it works to provide full employment, end discrimination, assure consumers that they will get a certain level of quality, and the like. Formal rationality was primarily a judicial style; substantive rationality was a tool of legislatures and administrative agencies, although some courts followed legal realism in this direction.

Increasingly in the 1970s and 1980s, substantive rationality is caught in the crisis of the regulatory welfare state. (Cf. Tomasic 1984.) On the one hand, social processes and economic arrangements seem too complex to be governed by the kinds of regulatory arrangements that can be fashioned within our traditions. On the other hand, the regulatory welfare state has been losing legitimacy. Insofar as it was justified by its claims to gain substantively valued ends, to a great degree it just has not worked. For example, despite the claim that the economic system would be managed, inflation has cut real income and unemployment has become a significant problem in many Western nations. Despite promises to desegregate American society, race, class, sex, and ethnicity still affect one's life chances significantly apart from talent and effort. The substantive style of legal and political rhetoric loses its power to convince those who listen to it, particularly

in light of the claims of traditional formal rationality. Substantive rationality does not seem to be "law"; rather, the ends sought and the methods used can be labeled as the preferences of those who have captured power. In short, formal rationality can be turned against substantive rationality to delegitimize it.

One response to this crisis is to call for a return to formal rationality, deregulation, and governmental retreat. The public sector will withdraw and the private sphere will produce efficiency and freedom once again. There is reason to doubt whether such a strategy could succeed. Too many are interested in at least some of the benefits of the welfare state to allow a recreation of the governmental system of 1900—the cry often seems to be, "cut the budget for your programs but not mine." Moreover, even if such a recreation of what we think was the past could work, the transition from governmental systems of, say, the 1960s to a passive and neutral state likely would produce socially unacceptable burdens.

Teubner suggests, rather, that the next stage of legal evolution will be from substantive rationality to what he calls *reflexive rationality*. Here, the legal system would regulate self-regulation. Law would seek to facilitate rather than endanger self-regulatory processes, organizations, and the distribution of rights. Teubner (1984) notes that the model of social reality found in substantive rationality is

rather primitive in comparison with the complicated self-referential structure of the various social subsystems. . . . Taking self-reference seriously means that we have to give up conceptions of direct regulatory action. Instead, we have to speak of an external stimulation of internal self-regulating processes which, in principle, cannot be controlled from the outside. [p. 298]

Law would not take responsibility for outcomes, seeing such an effort as often beyond its capabilities. The justification for this style of law would be success in coordinating forms of social cooperation. It would not be a return to formal rationality, merely adapting to or supporting what were seen as "natural" social orders. It would attempt to guide human interaction by redefining and redistributing property rights. Externally, reflexive law would structure and reform semi-autonomous social systems, by shaping both their procedures of internal discourse and their methods of relating to other social systems. The major goal would be neither power-equalization nor participatory democracy. It would be the design of organizational structures which made institutions such as corporations, semi-public associations, mass media, and educational institutions sensitive to the outside effects of their attempts to maximize their own goals.

He offers examples to lend some empirical support to his theory. "Labor law . . . is, with respect to collective bargaining, characterized to some degree by a more abstract control technique in which we can recognize a 'reflexive' potential." Teubner recognizes that a strategy of decentralization will fail if asymmetries of power and information successfully resist attempts at equalization through law. He suggests that the legal system can operate reflexively by imposing standards of good faith and public policy in order to prompt processes of social self-regulation in semi-autonomous social systems. Also private associations could be commanded to develop constitutions which require them to operate in harmony with the requirements of other social institutions. He concedes that the adequacy of such approaches is unclear. However, reflexive rationality is an attempt to gain many of the benefits of both formal and substantive rationality with fewer of the

costs of each. Whatever its normative status, one can find examples of this approach in modern law.

Teubner is unclear about how he thinks legal thought influences activity in other subsystems. Other subsystems may incorporate conceptions of legal rights and duties, transformed to meet their requirements, into their expectations and procedures. Legal thought may make issues salient and may affect background assumptions about what is natural or proper. Those acting within other subsystems may respond to the threat of the application of power to implement legal thought. However, there are many kinds of legal power. At one extreme, legal thought can be crystallized in a judgment which various state officials may enforce. People can be put in jail, property can be seized, licenses can be granted or revoked, and these orders may be enforced by agents of the state armed with weapons. At the other extreme, even the suspicion that another might commence legal action may affect behavior. Tacit and explicit threats to sue or seek new legislation or regulation may force the one threatened to examine legal arguments, the costs of defending a position in the process, and the impact on reputation of being challenged. The one threatened may decide to surrender, fight, or attempt to negotiate a settlement. Some legal agencies, such as higher appellate courts, often are relatively autonomous from direct applications of political and economic power. (However, one must recall the great contrast in views between judges appointed to the United States courts of appeal by Presidents Carter and Reagan.) Other legal agencies, such as administrative agencies and legislative committees, are influenced in varying degree by legal, moral, and political ideas as well as power and privilege. This, too, affects decisions about how to respond to actual or potential assertions of legal power.

We can only speculate about how Teubner would fit a description of the way legality is delivered into his theory. As we will see, it is easier to make the case for possible influence on self-regulation than for social integration. Many of the attempts to regulate employment and franchise relationships might be examples of what we could call indirect reflexive rationality. Even the chance that formal or substantive rationality might be exercised within the legal system may affect procedures and the balance of power within private associations. Whether such changes, in fact, serve to integrate the functioning of these associations with that of other social structures is hard to establish, but the possibility is present. I will look at the impact of some of the legislation and other legal activity dealing with, first, franchises, and, second, employment-at-will. Finally, I will turn to collective-bargaining law and the possibility that decentralized activity may prompt social integration at the price of the interests of individual workers.

The threat of lawmaking and negative public relations affected self-regulation in the area of automobile dealer franchises in the United States. The publicity given the hearings before a committee of the United States Senate and the challenging questioning of the top officials of the automobile manufacturers provoked a response that was more beneficial to the dealers than the statute that finally was passed (Macaulay 1966). After being embarrassed by testimony about the past practices of General Motors, its president sought to take the public relations initiative. During the hearings he announced a revised franchise contract which gave General Motors dealers a number of valuable rights. Moreover, dealers' representatives would meet regularly with the top officials of the company in a setting in which they could raise questions, offer suggestions, and learn of

the reasons for future plans. Furthermore, decisions to terminate a dealer could be reviewed through a process ending with a decision by a retired Justice of the Supreme Court. Other manufacturers followed suit, defining rights and duties in some detail, and creating different types of systems of review. Ford's revised contract with its dealers even looked like an elaborate statute, with definitional sections and a detailed index.

In several states, the dealers' association or the administrative agency regulating manufacturer-dealer relationships began mediating disputes. One important part of such mediation was bringing new representatives of the manufacturer into the transaction. Instead of a fight between a dealer and a zone or area supervisor who is judged by the rate of sales in the territory, dispute processing now involved the dealer, the zone or area supervisor, a representative of the manufacturer from the home office, and someone from the state agency or trade association. Instead of acting as the final authority, the zone or area supervisor's decision and past actions were now subject to review. It seems likely that the possibility of such review would have a deterrent effect. Before supervisors acted, now there would be a real incentive to get their facts straight and to build a file justifying terminating the dealer or taking other action. Moreover, bias, nepotism, and similar factors that are unrelated to the goals of the manufacturer but often play a role in dependent relationships also were likely to be deterred.

Of course, a number of cases were brought before the courts under the federal and state statutes by dealers against manufacturers. The dealers rarely won. Yet the flow of litigation itself may have had some impact on large bureaucratic organizations such as the automobile manufacturers. Lawyers and executives much more senior than those normally involved in day-to-day contact with dealers had reason to establish policies and see that they were implemented so that the manufacturers could defend themselves in litigation. Again, this was likely to restrain the discretion of area or zone supervisors who were directly responsible for decisions concerning dealers. In order to structure practice so that an automobile manufacturer was ready to cope with a flow of litigation involving its relationship with dealers, it would want evidence that the dealer had had the opportunity to retail the best-selling models and that the dealer had failed to do as well as other similarly situated dealers. Such record-keeping likely added to the objectivity of judgments about terminating dealerships.

All of these private systems have far more meaning for most dealers than lawsuits for damages under the [federal] Good Faith Act or proceedings under [state] administrative-licensing statutes to revoke licenses of factory representatives. The major significance of these formal legal proceedings is that they support the private other-than-legal ways of dealing with problems. [Macaulay 1966, pp. 204-5]

The various civil rights statutes and the cases creating some remedies for employees-at-will may have a similar impact. There is some risk of legal challenge if an employer passes over for promotion or fires a member of a racial minority, a woman, a handicapped person, or anyone over forty. Drucker (1980) comments that "[i]t's getting harder to dismiss any employee except for 'cause.'" He continues:

Standards and review will, paradoxically, be forced on employers in the United States by the abandonment of fixed-age retirement. For companies to be able to dismiss even the most senile and decrepit oldster, they will have to develop

impersonal standards of performance and systematic personnel procedures for employees of all ages. [p. 18]

Such procedures, of course, will limit the powers of supervisors and constitutionalize more and more employment relationships. As Selznick (1968, 1969) has argued, once reasons must be given to justify action, those reasons are open to examination and challenge. At least in close cases, many supervisors are likely to avoid the burden of persuasion and give an employee a second chance to meet defined standards of performance.

The relatively few cases involving employment-at-will in which employees have gained some measure of victory have prompted a great deal of writing in business publications such as *Fortune*, the *Harvard Business Review*, and the *Wall Street Journal*, as well as the law reviews. A number of major corporations have created some type of internal review system governing discipline, failure to promote, and discharge of such employees. The cases and the writing may have made the matter salient to those in charge of personnel. Seminars and training sessions about coping with the new employee-at-will cases have been sold to personnel managers and corporate lawyers. Many consulting firms offer to create informal dispute resolution processes to deal with the rights and duties of such employees. Part of the reason for the interest in such programs may have been an attempt to show courts that new rights need not be recognized; part may have been an attempt to offset claims of unfairness in case firms were sued by an employee. The informal dispute resolution procedure adopted may be more or less elaborate, but most call for review by people without a personal stake in the case. Whatever the difficulties facing an employee claiming to have been treated unfairly before such an internal body, the chance that a supervisor's decisions might be reviewed by those who could affect the supervisor's career again could serve some deterrent function. Supervisors ought to be prompted to create files on employees which could withstand review. Of course, crafty supervisors could manipulate such files, and those who conducted the review might tend to back up supervisors automatically and distrust employees. Nonetheless, the need to be able to make a case should serve as some limitation on arbitrary power.

These may be examples of reflexive rationality. Certainly, legal action affected procedures of internal discourse, and we could say that property rights had been redefined and redistributed in the franchise and employment cases. However, Teubner stresses that reflexive rationality is neither power-equalization nor participatory democracy. In addition, this kind of rationality must affect the ways semi-autonomous social systems relate to other social systems. On the one hand, it may be that the cumulative effect of all the increases in the rights of employees and franchisees will be to raise costs and make it harder to discipline and discharge the lazy and incompetent. As a result of this factor and others, American products could cost more and become more shoddy. In turn, cheaper and higher quality foreign products could enter American markets, ultimately prompting unemployment and economic crisis. On the other hand, perhaps fair procedures, a measure of job security, and the accountability of supervisors diminish the price paid for the effects of arbitrary action by supervisors. Moreover, the systems described may aid supervisors to better target and deal with the truly incompetent or inefficient since responsibility and performance ought to be better identified and evaluated. Changes in a social institution such as employment probably will affect other institutions such as the family or the economy as a whole.

Teubner sees "reflexive potential" in the "abstract control technique" used in labor law. Here, public government fosters a private legislative and adjudicatory system for the social end of promoting labor peace while redistributing wealth and affording workers some influence over working conditions. Klare (1981, 1982a, 1982b) criticizes what he calls liberal collective-bargaining theory by showing that its inner logic "deflects and demoralizes popular participation and, through cooptation of popular struggle, ultimately reinforces the institutional infrastructure of capitalism" (1981, p. 482). Klare's argument enables us to consider Teubner's reflexive rationality in more detail.

Klare argues that liberal collective-bargaining law theory ultimately rests on a delegation of power to make socially important decisions to corporations and large, bureaucratically run labor unions. This delegation results in management decision-making about what is critically important and gives it the power of command in the workplace. Essentially, of course, this is the private government argument. However, Klare stresses that liberal theory actively promotes workers' rights in certain limited and carefully defined contexts. Our collective-bargaining law has engendered some democratic participation of employees in workplace governance. Unions do protect employees from some unilateral and arbitrary dictates of management. The grievance procedure is the most important source of whatever due process Americans have on the job. Unions can be a context within which workers form and express aspirations and experience the dignity that comes with having some influence on decisions governing one's life. Nonetheless, Klare argues that the accepted theory of collective bargaining defines for workers, for union leaders, and for the public what is possible and desirable in the workplace. It stands in the way of progress toward freedom there and toward gaining for workers a dominant voice respecting the organization and purposes of work and the disposition of the products of labor.

Liberal collective-bargaining theory uses a legislative and private government metaphor to serve a number of key rhetorical purposes. Workers vote for union representatives who negotiate a collective bargain in light of the power to strike. The bargain will concern wages and conditions of employment. However, management will not surrender control over such things as whether to open new plants or close old ones, or whether to adopt new basic manufacturing techniques. Management, for example, designs a new model automobile, plans the organization of the factory and the division of labor among people and machines, and then employs unionized workers who are governed by a bureaucratic chain of command within which decisions of importance often are made far removed from anyone at the local level. Collective bargaining can influence, but not control, this process.

Once a collective bargain, usually published as a small book written in legal language, is ratified by the membership, workers then lose their right to strike during the life of the contract. Workers, management, and the public are deemed to share an interest in continuing production or providing services. In place of a strike, during the life of the contract the exclusive remedy for disputes is the grievance process which leads, ultimately, to arbitration. But unions also become large bureaucracies removed from their membership. They are held responsible for the compliance of their members with the contract. Union officials develop their own interests which are not always congruent with those of the workers at a particular plant or in smaller work groups. Their role becomes political, involving manipulation of both managers and workers. Almost inevitably, some groups of workers will be favored over others.

Liberal collective-bargaining theory presents grievance arbitration as a technical and apolitical matter of contract interpretation. Collective bargains are seen as contracts which, as other contracts, primarily concern the parties. The role of public law is limited to enforcing a bargain, and since the agreement provided an institutionalized, private internal dispute resolution process, arbitration will be enforced. This helps vindicate a limited role of government in supporting the grievance arbitration process while still continuing to recognize a private character of industrial decision-making. The end result is that procedure is separated from substance so that the quality of working life and fairness of compensation turn on bargaining power rather than norms of substantive justice. The workers have only the form of industrial due process rather than democratic self-governance. They must surrender control of their disputes to union officials and ultimately to labor lawyers who transform them into grievances phrased as interpretations of the collective bargain. The process itself involves a multilayered series of stages, hearings, and legal forms which ensure that decisions are delayed. Arbitration may resolve the dispute as so transformed but leave the real problem untouched. Decision-makers, though deemed expert, may understand little of life in a particular plant or the experience of workers in general. Labor lawyers and law professors who serve as arbitrators seldom have experience of life in the workplace or the impact of layoffs and unemployment.

Moreover, workers often face disincentives at many plants to bringing a grievance and pursuing it. Whyte (1956, p. 13) reports that "[w]orkers don't like to be considered 'trouble-makers.' It isn't a case of the worker thinking, if I pass on this grievance, I will be fired; nothing as crude as that, but rather an uneasy feeling that if I put this in the grievance procedure, management will not forget and maybe somewhere along the line I will not get the breaks that I am entitled to." At one time, union officials also filtered out grievances that they thought unwarranted or tactically unwise to push in light of positions to be taken at the next collective-bargaining negotiating session. While the expanding definition of the duty of fair representation may inhibit the more open forms of gatekeeping, union officials cannot be expected to support fully what they see as unwarranted or unwise claims (see Weir 1976).

When workers see a major portion of their lives under the control of management and union officials and see collective-bargaining and grievance procedures as largely meaningless rituals, they may exercise what power they still retain (see Farrell 1983). When economic conditions are such that jobs are not scarce prizes, often they can slow down the pace of the work; do passable but not high-quality work; engage in horseplay and foolishness to confront boredom; take, sometimes as of right, goods and materials from the employer; or engage in an illegal wildcat strike (see Atleson 1973). They can also turn to factional fights within their unions. Such practices can damage the reputation of their company's products, subjecting the firm to competitive pressure. On the one hand, this may provoke new and better forms of work organization, but it may also provoke company demands for concessions from unions or spur decisions to use more industrial robots and high technology to eliminate the need for many workers.

Klare and Teubner differ in their appraisal of reflexive rationality. To a great extent, they are seeking different ends. Klare (1981, p. 456) sees the philosophy of collective-bargaining law as "an important effort to conceptualize, justify and legitimate the modern, regulatory state in the period of advanced industrial capitalism." Unions and large

corporations are seen as engaging in *private lawmaking*, "although their *de facto* power rivals or even supersedes that of public agencies and although their actions are of societal consequence." Welfare-state social democracy, acting in support of collective bargaining, loses sight of the ideal that "the highest aspiration of democratic culture should be to generate and nurture in all people the capacity for individual and collective self-governance and self-realization of their potentials" (1982a, p. 83).

Teubner, on the other hand, does not see the main goal of reflexive rationality as "power-equalization nor an increase of individual participation in the emphatic sense of 'participatory democracy'" (p. 440). He tells us that, rather, "law must act at the subsystem-specific level to install, correct, and redefine democratic self-regulatory mechanisms. Law's role is to decide about decisions, regulate regulations, and establish structural premises for future decisions in terms of organization, procedure, and competencies" (p. 437). The goal is "to create the structural premises for a decentralized integration of society by supporting integrative mechanisms within autonomous social subsystems" (p. 417). Integration requires that corporations, semi-public associations, mass media, and educational institutions be sensitive to the outside effects of their attempts to maximize internal rationality (cf. Cohen 1983). Teubner would like to have both social integration by decentralized means and power equalization in self-regulatory processes. However, he recognizes the danger that reflexive rationality could be "perverted easily into a sheer moralistic appeal" (p. 439).

Whatever our views about social integration and increasing individual control of one's own life, there is a tension between self-regulation and social integration. This suggests that while the law may be evolving toward some version of reflexive rationality, the process may not solve all problems and avoid crises. It may be that the legal system is doomed to make a succession of vain efforts to offset the contradictions of late capitalism and late socialism as it is practiced in the Soviet Union and eastern Europe today (see Bowers 1982; Sabel and Stark 1982; Simis 1982).

Moreover, we can note that both Teubner and Klare seem curiously apolitical. Klare writes as if those who worked to gain the rights for workers to organize and collectively bargain were free to write any program they pleased. Teubner writes about evolution from formal to substantive to reflexive rationality. Evolution in a biological sense implies that things just happen, perhaps by a cumulative series of accidents and a process of natural selection. In social science, evolution seems to connote a systematic and almost inevitable progression following an inner logic. Taken either way, there is some plausibility to the idea of evolution from one legal style to another. However, we may be disquieted by the absence from the picture of those who attempt to plan changes or individuals and groups struggling for advantage and power. (Cf. Ray's criticism [1983] of Luhmann's theory, a theory that serves as part of the foundation for Teubner's position.) In Joerges' words (1983, p. 29), "the Achilles' heel of reflexive rationality . . . is that a requirement [that affected groups] . . . renegotiate does not change the balance of power which determines the outcome of the negotiations." (Cf. Hearn 1984.)

Insofar as we accept the idea of an evolutionary tide as the product of natural forces, however, there is no reason to assume that evolution will stop with reflexive rationality. This is particularly true as long as we continue to have difficulty distinguishing public from private action. Reflexive rationality would seem only to postpone the day of reckoning for a distinction that Kennedy (1982) tells us is hard to take seriously.

Teubner's progression assumes a legal system with sufficient autonomy to control other social systems so that they will be integrated into a total collective unit. However, if an empirical picture of modern societies shows interchanges between and interpenetration among legal and other systems, major questions remain unanswered. It is easy to imagine legal agencies delegating self-regulatory power to various social units; it is harder to see how reflexive law would enable legal officials to coordinate and resolve conflicting claims in light of the powers of private governments and social fields and networks to influence legal outcomes and evade commands.

If Klare clears away the mystifications of liberal collective-bargaining theory, he seems to assume that the way will be open for "democratic self-management of the workplace by workers; [for] . . . giving a dominant voice respecting the organization and purposes of work and the disposition of the products of labor to those who perform work . . ." (1981, p. 451). However, the abandonment of "industrial democracy" might lead to a kind of corporatism or state socialism where workers had less power rather than more. The experience of those who have attacked liberal institutions in the name of lifting false consciousness is not reassuring.

On the other hand, due process, rights, and bureaucratic structures often break down into bargaining in the shadow of the law. Henry (1982) reports that a number of legal measures in Great Britain during the 1970s prompted management to formalize rules and procedures to deal with the disciplining of individual workers for acts such as theft of company property. In a sense, this was another example of reflexive rationality. However, as Klare might have predicted, Henry reported that the procedures functioned to give management a legitimate method of dismissing workers without being subject to question. Henry found, however, that many employers had moved from formal internal procedures to reliance on automatic employee self-discipline, often reinforced by a trade union. This

was especially apparent where work was structured into small teams or gangs, working for pooled bonuses. Under such circumstances, said one employer, "employees wish to be seen contributing to their working groups and are reluctant to disrupt the normal pattern" since, as another pointed out, "equal effort is required by gang members." Here there can be "pressure from other workers on slackers" or "sanctions on people whom the team don't feel are pulling their weight." This pressure can be informal, "from colleagues to the offending employee" or more formally by "shop stewards who make points cautioning members who break company rules" and whom they "get to toe the line" by either having a "quiet word" or in extreme cases, "advising local district officers of the union." [p. 374]

Henry sees the possibility that, as suggested by Abel (1981) and Santos (1980), "participatory disciplinary technology becomes the ultimate form of capitalist control" (cf. Scruton and South 1984). However, participation of this type may also bring with it some limited autonomy and self-confidence. This could bring about the "penultimate stage of the process whereby the existing relations of production are undermined and replaced." Perhaps this is the road an evolution to reflexive rationality will take, and perhaps it will prompt the next evolution (cf. Derber and Schwartz 1983; Feldberg and Glenn 1983).

I doubt that those capitalists who now benefit by the distinction between public and

private spheres and the delegation of power justified by it will be content to sit and watch the "natural" evolution to worker control. Indeed, Blankenburg (1984) points out that instead of an evolution from stage to stage in the style of legal thought, all forms of rationality may exist at once. Substantive rationality did not end the claims of formal rationality, and reflexive rationality is unlikely to erase formal or substantive rationality from the minds of those concerned with legal thought. Distinguished jurists often use inconsistent styles of legal thought. They serve as ideological ploys rationalizing shifting positions about autonomy and accountability of private social control. They reflect the power of those who control associations and those affected by them.

CONCLUSION

As we have seen, viewing society as involving relationships between only the state and individuals presents major difficulties for the social study of law. Theories about the state or society tend to overlook the remarkable ability of individuals to cope with attempted regulation by evasion, manipulation, conscious ignorance of the law, and bargaining in the light of more or less plausible legal arguments. Yet a picture of law confronting or confronted by isolated individuals also is too simple to capture enough of reality for many purposes. We live in a world of legal pluralism. Private governments, social fields, and networks administer their own rules and apply their own sanctions to those who come under their jurisdiction. Sometimes individuals are insulated from public governmental activity by social fields; sometimes public government officials are members of social fields which cut across formal boundaries of the public and the private.

These complicated interrelationships are important for the social study of law. An article in the *New York Times* (1982), for example, reported that those who supply and those who use cocaine constitute an integrated social field. In return for access to the drug, lawyers provide information on changes in the narcotics law, and on the doctrine of search and seizure, and keep track of arrest warrants. From these lawyers, dealers have learned to use occupied buildings because police need a warrant before they can enter. Often the process of obtaining a warrant will prompt a warning so that drug operations can be moved. Plumbers who use cocaine convert the pipes in a building so that drugs can be sent in tubes to other rooms quickly. Telephone repair people and others with experience in electronics make their contribution by installing sophisticated equipment so that conversations in other rooms can be monitored. Electricians install doors that can be opened only by remote control. Scanners are used to listen to police radio calls, and communications equipment helps alert people on upper floors that unwelcome visitors are entering the building. Of course, police officers, too, can become users of cocaine, and they are in a position to make valuable contributions to the maintenance of the network.

Clearly, this report suggests some of the limits on effectiveness of drug laws. However, it also suggests some of the difficulties with theories that see people as so socialized to comply with law that it is part of their personality. We can question whether the story describes a true deviant subculture or just a social network in which commonly held values other than complying with the law are stressed. Americans are socialized to gratify their desires. They learn to win at games, and clever shading of the rules is a matter for amusement rather than horror. Law enforcement officials commented that many in the middle class no longer thought of cocaine use as against the law.

Many involved in the cocaine trade learn and use entrepreneurial skills which they, because of class or race, could not learn or use in legal occupations. A large part of underemphasized American history involves ill-gotten gains serving as the base for the next generation of a family or a group moving into mainstream society. We can view participation as a form of rebellion and taking control of one's life, or we can see it as exploiting the weaknesses of one's fellows for personal gain. Undoubtedly, the illegality of the cocaine trade has prompted the creation of deviant norms within the group of users and suppliers as well as the use of swift and severe sanctions for even suspected deviation. I wonder whether Teubner would want to find "elements of reflexive rationality" in this decentralized system of private lawmaking. Do networks distributing illegal drugs contribute to social integration or disintegration? All in all, the example is a good one with which to test the kinds of theories about law and society which have been discussed in this paper.

The relationships between the state, individuals, and various human associations ranging from the family to multinational corporations are as poorly described in the law-and-society literature as they are difficult to evaluate. It is often assumed that there has been a great loss of community in modern industrial societies. Novelists and playwrights dramatize these themes. In this view, people are but cogs in an industrial machine who live rootlessly in interchangeable neighborhoods, unencumbered by real ties to family, friends, those who share their job skills or their tastes in recreation, or those who share religious observances. This picture undoubtedly shows some of the reality of modern life, but it is an overstatement, more applicable to some people than others.

Even at the bottom of the economic and status ladder, one often finds strong family ties, a religious-based system of coping with problems, and associations functioning to provide recreation and self-defense. Irving (1977, p. 879), after studying people in urban settings in England and the United States, concluded that social networks "remained close-knit in a surprising variety of urban situations, and they continue, even in this mobile age, to remain substantially rooted in the residential locality." Galanter (1979) reminds us that the

survival and proliferation of indigenous law in the contemporary United States remains concealed from those who are looking for an inclusive and self-contained *gemeinschaft*, unsullied by formal organization, which enfolds individuals and integrates their whole life experience. What we find instead is a multitude of associations and networks, overlapping and interpenetrating, more fragmentary and less inclusive. . . .

Such partial communities, linked by informal communications and sometimes by formal communications devices as well, provide much of the texture of our lives in family and kinship, at work and in business dealings, in neighborhood, sports, religion, and politics. There are varying degrees of self-conscious regulation and varying degrees of congruity with the official law. This is a realm of interdependence, regulated by tacit norms of reciprocity and sometimes by more explicit codes. The range of shared meanings is limited but the cost of exit is substantial. If we have lost the experience of an all-encompassing, inclusive community, it is not to a world of arm's length dealings with strangers, but in large measure to a world of loosely joined and partly overlapping partial or fragmentary communities. In this sense our exposure to indigenous law has increased at the same time that official regulation has multiplied. [pp. 16-17]

Ferguson (1983, p. 51) says that "[t]he standard anarchist recommendations for post-revolutionary society—workers' collectives, producers' and consumers' cooperatives, neighborhood councils—are all attempts to provide . . . [an open public] . . . space, where the ideas and goals of diverse individuals could come together and form the direction for collective action." She continues to say that "[i]n an open public situation, with full participation by all members, power need not be seen as the ability of some to make others do that which they would not otherwise have done. Instead, power could become the capacity to shape the collective situation—a positive force enabling individuals to do together that which they cannot do separately." However, Ferguson recognizes that anarchism cannot eliminate all coercion and all law. The pressure of one's peers is not the most innocent kind of coercion. In contrast to Kennedy, she concludes that "[t]he members of the collective must continually establish and reestablish the boundary between public and private acts, and not try to either erase the boundary or fix it once and for all."

Those who have been frustrated by the mindless operation of bureaucratic formal rationality can see much to admire in the anarchist vision. Yet there are two matched classic objections. Frug (1980, p. 1070) tells us that "[w]hat makes the concept of popular participation so unrealistic to us is not only its frightening unfamiliarity, but also our conviction that all decision-making requires specialization, expertise, and a chain of command." We can imagine a chaotic attempt to design a new automobile or stereo receiver and produce it by popular participation or an attempt of a major symphony orchestra to produce a work of the stature of a Beethoven concerto by a collective participatory process. Efficiency, our civil religion, seems to demand supporting hierarchies by deeming an area to be private, by leaving matters to the logic of property and contract. Yet the benefits of a division of labor do not establish that present chains of command are natural or inevitable. Ferguson mentions the second concern. All collective action is a threat to the individual who does not agree, who promotes an alternative view, or who just wants to be left alone. One speaking with the authority of the collective may act against such individuals for the good of the group or for the official's own self-interest. Given all the difficulties in asserting rights successfully—the cost barriers to litigation, the contradictory nature of our theories of rights, and the power of those with whom one has long-term relationships to retaliate later—rights are a feeble defense against power. Yet until we think of a way to achieve what now looks to be a utopia where all power is neatly equalized and balanced, rights may be all we have. As Kennedy (1981, p. 506) observed, "[e]mbedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom." These normative contradictions help explain the problematic relationships between the larger public government, private governments, social fields, and networks.

An appreciation of the role of private governments, social fields, and networks, as we have seen, is critical for the development of many of the classic topics of the social study of law. The relationship of public and private normative orderings tells us much about the place of law in society and the fate of attempted reforms. Lurking in all of these concerns are great questions about freedom and control of individuals and their associations, the autonomy of centers of power and their integration into a functioning society, and

problems of the interrelationships and interpenetration of public governments and private associations. Our present understanding of more and less institutionalized social fields and their connections with the larger legal system is, to say the least, underdeveloped and in need of attention. Articles surveying fields often end by calling for either more research or more theory. Here, I can safely do both. In addition, we ought not forget what we already know. Private government performs many of the functions commonly associated with public government, and it is likely that the more decentralized the structures for carrying out a social function, the greater the problems of coordination and integration. At the same time, the public/private distinction is suspect. While it may be useful or vital to carve out areas of activity and put them beyond public control, reifying public and private governments and seeing them as distinct entities only obscures reality. In Zimring's words (1981):

It is sometimes possible both to know something important and to ignore that knowledge. To do this is to generate the phenomenon of the well-known secret, an obvious fact we ignore. When Edgar Allan Poe suggested that the best location to hide something is the most obvious place, he was teaching applied law and social science. [p. 867]

Cases Cited

- Brown v. Board of Education, 347 U.S. 483 (1954).
 Comerford v. International Harvester, 235 Ala. 376, 178 So. 894 (1938).
 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
 Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

Bibliography

- Abel, Richard L.
 1981 "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice." *International Journal of the Sociology of Law* 9:245-67.
- Abercrombie, Nicholas, and Turner, Bryan S.
 1978 "The Dominant Ideology Thesis." *British Journal of Sociology* 29:149-67.
- Abney, Glenn, and Lauth, Thomas P.
 1982 "Councilmanic Intervention in Municipal Administration." *Administration and Society* 13:435-56.
- Abramson, Joan
 1977 "Measuring Success or, Whatever Happened to Affirmative Action?" *Civil Rights Digest* 9:15-27.

- Adler, Patricia A., and Adler, Peter
1983 "Relationships Between Dealers: the Social Organization of Illicit Drug Transactions." *Sociology and Social Research* 67:260-78.
- Akers, Ronald L.
1977 *Deviant Behavior: A Social Learning Approach*. Belmont, Calif.: Wadsworth.
- Albrecht, Stan L., and Green, Miles
1977 "Cognitive Barriers to Equal Justice Before the Law." *Journal of Research in Crime and Delinquency* 14:206-21.
- Arnove, Robert F.
1970 "The Ford Foundation and 'Competence Building' Overseas: Assumptions, Approaches, and Outcomes." *Studies in Comparative International Development* 12:100-126.
- Atleson, James B.
1973 "Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience." *Ohio State Law Journal* 34:751-816.
- Balbus, Isaac D.
1977 "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law." *Law & Society Review* 11:546-88.
- Barber, Bernard
1978 "Control and Responsibility in the Powerful Professions." *Political Science Quarterly* 93:599-615.
- Baumgartner, M. P.
1985 "Law and the Middle Class: Evidence from a Suburban Town." *Law and Human Behavior* 9:3-24.
- Baxter, Leslie A.
1984 "An Investigation of Compliance-Gaining as Politeness." *Human Communication Research* 10:427-56.
- Berle, Adolph A., and Means, Gardner C.
1932 *The Modern Corporation and Private Property*. New York: Macmillan.
- Berle, Adolph A., Jr.
1952 "Constitutional Limitations on Corporate Activity: Protection of Personal Rights from Invasion Through Economic Power." *University of Pennsylvania Law Review* 100:933-55.
- Bernard, Jesse
1964 *Academic Women*. State College: Pennsylvania State University Press.
- Biersteker, Thomas J.
1980 "The Illusion of State Power: Transnational Corporations and the Neutralization of Host-Country Legislation." *Journal of Peace Research* 17:207-21.
- Bilder, Richard B.
1970 "East-West Trade Boycotts: A Study in Private, Labor Union, State, and Local Interference with Foreign Policy." *University of Pennsylvania Law Review* 118:841-938.
- Bissonette, R.
1977 "The Bartender as a Mental Health Service Gatekeeper: A Role Analysis." *Community Mental Health Journal* 13:92-99.
- Black, Donald
1976 *The Behavior of Law*. New York: Academic Press.
1983 "Crime as Social Control." *American Sociological Review* 48:34-45.
- Blankenburg, Erhard
1984 "The Poverty of Evolutionism: A Critique of Teubner's Case for 'Reflexive Law.'" *Law & Society Review* 18:273-89.

- Block, Alan A., and Thomas, Philip A.
1984 "Beyond the Courtroom Door." *Australian Journal of Law and Society* 2:110-28.
- Bowers, Stephen R.
1982 "Law and Lawlessness in a Socialist Society: The Potential Impact of Crime in East Germany." *World Affairs* 145:152-76.
- Braithwaite, John
1982 "Enforced Self-Regulation: A New Strategy for Corporate Crime Control." *Michigan Law Review* 80:1466-1502.
- Bredemeier, Harry C.
1962 "Law as an Integrative Mechanism." In *Law and Sociology*, edited by William Evan. New York: Free Press.
- Burgess, Robert L., and Akers, Ronald L.
1966 "A Differential Association-Reinforcement Theory of Criminal Behavior." *Social Problems* 14:128-47.
- Burton, Frank
1976 "The Irish Republican Army and Its Community: A Struggle for Legitimacy." In *The Sociology of Law*, edited by Pat Carlen. Keele: University of Keele.
- Cain, Maureen
1983 "Introduction: Towards an Understanding of the International State." *International Journal of the Sociology of Law* 11:1-10.
- Caplow, Theodore
1982 "Christmas Gifts and Kin Networks." *American Sociological Review* 47:383-92.
- Carter, Lief H.
1974 *The Limits of Order*. Lexington, Mass.: Lexington Books.
- Casey, Gregory
1976 "Popular Perceptions of Supreme Court Rulings." *American Politics Quarterly* 4:3-45.
- Chafee, Zechariah, Jr.
1930 "The Internal Affairs of Associations Not for Profit." *Harvard Law Review* 43:993-1029.
- Chambliss, William J.
1973 "Functional and Conflict Theories of Crime." *MSS Modular Publications* 17:1-23.
1979 "Contradictions and Conflicts in Law Creation." In *Research in Law and Sociology*, vol. 2, edited by Rita J. Simon and Steven Spitzer. Greenwich, Conn.: JAI Press.
- Chambliss, William J., and Seidman, Robert
1971 *Law, Order and Power*. Reading, Mass.: Addison-Wesley.
- Cloward, Richard A., and Ohlin, Lloyd E.
1960 *Delinquency and Opportunity*. Glencoe, Ill.: Free Press.
- Coffee, John C., Jr.
1981 "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment." *Michigan Law Review* 79:386-459.
- Cohen, Albert K.
1955 *Delinquent Boys*. Glencoe, Ill.: Free Press.
- Cohen, Lawrence E., and Felson, M.
1979 "Social Change and Crime Rate Trends: A Routine Activity Approach." *American Sociological Review* 44:588-608.
- Cohen, Steven R.
1983 "From Industrial Democracy to Professional Adjustment." *Theory and Society* 12:47-67.
- Cole, Richard B.
1978 "The Second Criminal Justice System." *S.A.M. [Society of Advanced Management] Management Journal* 43:17-23.

- Cortese, Charles F.
1966 "A Study in Knowledge and Attitudes Toward the Law: The Legal Knowledge Inventory." *Rocky Mountain Social Science Journal* 3:192-204.
- Cressey, Donald R.
1973 "Advanced Notice and Government by Law Within Criminal Confederations." *International Journal of Criminology and Penology* 1:55-67.
- Crowe, Patricia Ward
1978 "Complainant Reactions to the Massachusetts Commission Against Discrimination." *Law & Society Review* 12:217-35.
- Curran, Barbara W.
1978 "Getting By with a Little Help from My Friends: Informal Networks Among Older Black and White Urban Women Below the Poverty Line." *Dissertation Abstracts International* 39(4-A).
- Derber, Charles, and Schwartz, William
1983 "Toward a Theory of Worker Participation." *Sociological Inquiry* 53:61-78.
- Deysine, Anne
1980 "Political Corruption: A Review of the Literature." *European Journal of Political Research* 8:447-62.
- Di Franceisco, Wayne, and Gitelman, Zvi
1984 "Soviet Political Culture and 'Covert Participation' in Policy Implementation." *American Political Science Review* 78:603-20.
- Drucker, Peter F.
1980 "The Job as Property Right." *Wall Street Journal* September 25, 1979, p. 20.
- Durkheim, Emile
1958 *Professional Ethics and Civic Morals*. Glencoe, Ill.: Free Press.
- Dye, Thomas R.
1978 "Oligarchic Tendencies in National Policy-Making: the Role of the Private Policy-Planning Organizations." *Journal of Politics* 40:309-31.
- Eells, Richard
1962 *The Government of Corporations*. Glencoe, Ill.: Free Press.
- Ehrlich, Eugen
1936 *Fundamental Principles of the Sociology of Law*. Translated by Walter L. Moll with an introduction by Roscoe Pound. Cambridge, Mass.: Harvard University Press.
- Eisenstadt, S. N., and Roniger, Louis
1980 "Patron-Client Relations as a Model of Structuring Social Exchange." *Comparative Studies in Society and History* 22:42-77.
- Ekland-Olson, Sheldon
1982 "Deviance, Social Control and Social Networks." In *Research in Law, Deviance and Social Control*, vol. 4, edited by Steven Spitzer and Rita J. Simon. Greenwich, Conn.: JAI Press.
- Ellickson, Robert C.
1982 "Cities and Homeowners Associations." *University of Pennsylvania Law Review* 130:1519-80.
- Elliot, Delbert S., and Voss, Harwin L.
1974 *Delinquency and Dropout*. Lexington, Mass.: Lexington Books.
- Ellman, Ira Mark
1981 "Driven from the Tribunal: Judicial Resolution of Internal Church Disputes." *California Law Review* 69:1378-1444.
- Engel, David M.
1984 "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community." *Law & Society Review* 18:549-79.

- Evan, William
1976 *Organizational Theory: Structures, Systems, and Environments*. New York: Wiley.
- Ewing, David W.
1977 *Freedom Inside the Corporation: Bringing Civil Liberties to the Workplace*. New York: Dutton.
- Farrell, Dan
1983 "Exit, Voice, Loyalty, and Neglect as Responses to Job Dissatisfaction: A Multidimensional Scaling Study." *Academy of Management Journal* 26:596-607.
- Feldberg, Roslyn L., and Glenn, Evelyn Nakano
1983 "Incipient Workplace Democracy among United States Clerical Workers." *Economic and Industrial Democracy* 4:47-67.
- Felstiner, William L. F., and Williams, Lynne A.
1978 "Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations." *Law and Human Behavior* 2:223-44.
1979 *Community Mediation in Dorchester, Massachusetts: Alternatives to Adjudication. An International Study*. Los Angeles: Program for Dispute Systems Research, University of Southern California.
- Femia, Joseph V.
1983 "Review Article: Gramsci's Patrimony." *British Journal of Political Science* 13:327-64.
- Ferguson, Kathy E.
1983 "Toward a New Anarchism." *Contemporary Crises* 7:39-57.
- Fisse, Brent
1981 "Community Service as a Sanction Against Corporations." *Wisconsin Law Review* 1981: 970-1017.
- Fisse, Brent, and Braithwaite, John
1984 "Sanctions Against Corporations: Dissolving the Monopoly of Fines." In *Business Regulation in Australia*, edited by Roman Tomasic. North Ryde, N.S.W.: CCH Australia Limited.
- FitzGerald, Jeffrey M.; Hickman, David C.; and Dickins, Richard L.
1980 "A Preliminary Discussion of the Definitional Phase of the Dispute Process." Paper presented at the Law and Society Association Conference, Madison, Wisconsin, June.
- Fitzpatrick, Peter
1984 "Law and Societies." *Osgoode Hall Law Journal* 22:115-38.
- Fleming, R. W.
1961 "Some Problems of Due Process and Fair Procedure in Labor Arbitration." *Stanford Law Review* 13:235-51.
1962 "Some Problems of Evidence Before the Labor Arbitrator." *Michigan Law Review* 60:133-68.
- Ford, Frederick R.
1983 "Rules: The Invisible Family." *Family Process* 22:135-45.
- Friedmann, Wolfgang G.
1957 "Corporate Power, Government by Private Groups, and the Law." *Columbia Law Review* 57:155-86.
- Frug, Gerald
1980 "The City as a Legal Concept." *Harvard Law Review* 93:1057-1154.
- Fuller, Lon L.
1941 "Consideration and Form." *Columbia Law Review* 41:799-824.
1969 "Two Principles of Human Association." In *Voluntary Associations*, edited by J. Roland Pennock and John W. Chapman. New York: Atherton Press.

- Galanter, Marc
 1974 "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9:95-160.
 1979 "Beyond Legal Representation: Dispute Processing, Non-judicial Alternatives and the 'Third Wave' in the Access-to-Justice Movement." Paper presented at the Colloquium on Access to Justice After the Publication of the Florence Project Series: Prospects for Future Action, Florence, Italy, October 15-18.
 1981 "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law." *Journal of Legal Pluralism* 19:1-47.
 1983 "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society." *UCLA Law Review* 31:4-71.
- Genovese, Rosalie G.
 1980 "A Women's Self-Help Network as a Response to Service Needs in the Suburbs." *Signs: Journal of Women in Culture and Society* 5:S248-56.
- Ghezzi, Susan Guarino
 1983 "A Private Network of Social Control: Insurance Investigation Units." *Social Problems* 30:521-31.
- Glazer, Nathan
 1975 *Affirmative Discrimination: Ethnic Inequality and Public Policy*. New York: Basic Books.
- Gottlieb, Gidon
 1983 "Relationalism: Legal Theory for a Relational Society." *University of Chicago Law Review* 50:567-612.
- Grace, Clive, and Wilkinson, Philip
 1978 *Sociological Inquiry and Legal Phenomena*. London: Collier Macmillan.
- Greenberg, David F.
 1976 "On One-Dimensional Marxist Criminology." *Theory and Society* 3:611-21.
- Greenberg, David F., and Anderson, Nancy
 1981 "Recent Marxisant Books on Law: A Review Essay." *Contemporary Crises* 5:293-322.
- Griffiths, John
 1984 "Village Justice in the Netherlands." *Journal of Legal Pluralism* 22:17-42.
- Habermas, Jurgen
 1979 *Communication and the Evolution of Society*. Boston: Beacon Press.
- Hagen, John; Silva, Edward T.; and Simpson, John H.
 1977 "Conflict and Consensus in the Designation of Deviance." *Social Forces* 56:320-40.
- Hale, Robert L.
 1920 "Law Making by Unofficial Minorities." *Columbia Law Review* 20:451-56.
- Hammer, Muriel
 1980 "Social Access and the Clustering of Personal Connections." *Social Networks* 2:305-25.
- Hannigan, John A.
 1982 "Unfriendly Skies: The Decline of the World Aviation Cartel." *Pacific Sociological Review* 25:107-36.
- Hans, Valerie P., and Slater, Dan
 1983 "John Hinckley, Jr. and the Insanity Defense: The Public's Verdict." *Public Opinion Quarterly* 47:202-12.
- Hanslowe, Kurt L.
 1961 "Regulation by Visible Public and Invisible Private Government." *Texas Law Review* 40:88-135.

- Harding, Vincent
 1975 "The Black Wedge in America: Struggle, Crisis and Hope, 1955-1975." *Black Scholar* 7:28-30, 35-46.
- Harvard Law Review
 1949 "Private Lawmaking by Trade Associations." *Harvard Law Review* 62:1346-70.
 1962 "Judicial Intervention in Disputes over the Use of Church Property." *Harvard Law Review* 75:1142-86.
 1963 "Judicial Control of Actions of Private Associations." *Harvard Law Review* 76:983-1100.
 1980 "Protecting at Will Employees Against Wrongful Discharge." *Harvard Law Review* 93:1818-44.
- Havighurst, Harold C.
 1961 *The Nature of Private Contract*. Evanston, Ill.: Northwestern University Press.
- Hearn, Frances
 1980 "Adaptive Narcissism and the Crisis of Legitimacy." *Contemporary Crises* 4:117-40.
- Hearn, Frank
 1984 "State Autonomy and Corporatism." *Contemporary Crises* 8:125-45.
- Hearst Corporation
 1983 *The American Public, the Media and the Judicial System: A National Survey on Public Awareness and Personal Experience*. New York: Hearst Corporation.
- Henry, Stuart
 1981 "Decentralized Justice: Private v. Democratic Informality." In *Informal Institutions: Alternative Networks in the Corporate State*, edited by Stuart Henry. New York: St. Martin's Press.
 1982 "Factory Law: The Changing Disciplinary Technology of Industrial Social Control." *International Journal of the Sociology of Law* 10:365-83.
- Hoekema, Andre
 1975 "Confidence in Justice and Law Among Port Workers." *Sociologia Neerlandica* 11:128-43.
- Hopkins, Raymond F.
 1978 "Global Management Networks: The Internationalization of Domestic Bureaucracies." *International Social Science Journal* 30:31-46.
- Hornig, Lilli S.
 1980 "Untenured and Tenuous: The Status of Women Faculty." *Annals, AAPSS* 448:115-25.
- Hunt, Alan
 1976 "Perspectives in the Sociology of Law." In *The Sociology of Law*, edited by Pat Carlen. Keele: University of Keele.
- Hurst, James Willard
 1960 "The Law in United States History." *Proceedings of the American Philosophical Society* 104:518-26.
- Irving, Henry W.
 1977 "Social Networks in the Modern City." *Social Forces* 55:867-80.
- Jaffee, Louis L.
 1937 "Law Making by Private Groups." *Harvard Law Review* 51:201-53.
- Jessop, Bob
 1980 "On Recent Marxist Theories of Law, the State, and Juridico-Political Ideology." *International Journal of the Sociology of Law* 8:339-68.
- Joerges, Christian
 1983 "Regulatory Law, Private Government and Self-Regulation: A Comment on Stewart Macaulay." Paper presented at the Conference on Reflexive Law and the Regulatory Crisis, Madison, Wisconsin, July 18-21.

- Johnstone, Quintin, and Hopson, Dan, Jr.
1967 *Lawyers and Their Work*. Indianapolis, Ind.: Bobbs-Merrill.
- Jordan, Ellen R.
1978 "Unconscionability at the Gas Station." *Minnesota Law Review* 62:813-56.
- Kakalik, James S., and Wildhorn, Sorrel
1977 *The Private Police: Security and Danger*. New York: Crane, Russak.
- Kennedy, Duncan
1981 "Critical Labor Law Theory: A Comment." *Industrial Relations Law Journal* 4:503-6.
1982 "The Status of the Decline of the Public/Private Distinction." *University of Pennsylvania Law Review* 130:1349-57.
- Kerbo, Harold R., and Della Fave, L. Richard
1983 "Corporate Linkage and Control of the Corporate Economy: New Evidence and a Reinterpretation." *Sociological Quarterly* 24:201-18.
- Klare, Karl E.
1981 "Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law." *Industrial Relations Law Journal* 4:450-82.
1982a "Critical Theory and Labor Relations Law." In *The Politics of Law: A Progressive Critique*, edited by David Kairys. New York: Pantheon Books.
1982b "The Public/Private Distinction in Labor Law." *University of Pennsylvania Law Review* 130:1358-1422.
- Koch, Koen
1980 "The New Marxist Theory of the State or the Rediscovery of the Limitations of a Structural-Functionalist Paradigm." *Netherlands Journal of Sociology* 16:1-19.
- Kornhauser, Ruth R.
1978 *Social Sources of Delinquency*. Chicago: University of Chicago Press.
- Kowalewski, David, and Leitko, Thomas A.
1983 "Transnational Corporations and Intergovernmental Organizations: The Trilateral Commission Case." *Journal of Political and Military Sociology* 11:93-107.
- Ladinsky, Jack, and Susmilch, Charles
1983 "Community Factors in the Brokerage of Consumer Product and Service Problems." Working paper no. 14, Disputes Processing Research Program, University of Wisconsin Law School.
- Lamo De Espinosa, Emilio
1980 "Social and Legal Order in Sociological Functionalism." *Contemporary Crises* 4:43-76.
- Leblebici, Huseyin, and Salancik, Gerald R.
1982 "Stability in Interorganizational Exchanges: Rulemaking Processes of the Chicago Board of Trade." *Administrative Science Quarterly* 27:227-42.
- Lee, Trevor R.
1980 "The Resilience of Social Networks to Changes in Mobility and Propinquity." *Social Networks* 2:423-35.
- Lester, Richard A.
1974 *Antibias Regulations of Universities: Faculty Problems and Their Solutions*. New York: McGraw-Hill.
- Lindblom, Charles
1977 *Politics and Markets*. New York: Basic Books.
- Lindgren, Janet S.
1983 "Beyond Cases: Reconsidering Judicial Review." *Wisconsin Law Review* 1983:583-638.

- Lineberry, Robert L., and Watson, Sharon M.
1980 "Neighborhoods, Politics, and Public Services: The Case of Chicago." *Urban Interest* 2:11-18.
- Lipset, Seymour Martin
1982 "The Academic Mind at the Top: The Political Behavior and Values of Faculty Elites." *Public Opinion Quarterly* 46:143-68.
- Liss, Lora J.
1977 "Affirmative Action Officers: Are They Change Agents?" *Educational Record* 58:418-28.
- Livingstone, Neil C.
1981 "Fighting Terrorism: The Private Sector." *Conflict* 3:177-219.
- Lopatka, Kenneth T.
1984 "The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s." *Business Lawyer* 40:1-32.
- Lowenthal, Abraham F.
1978 "Latin America: A Not-So-Special Relationship." *Foreign Policy* 32:107-26.
- Luhmann, Niklas
1981 "Communication About Law." In *Advances in Social Theory and Methodology*, edited by K. Knorr-Cetina and A. V. Cicourel. Boston: Routledge & Kegan Paul.
1982 *The Differentiation of Society*. New York: Columbia University Press.
- Macaulay, Jacqueline
1980 "The Failure of Affirmative Action: A Case Study." In *Rocking the Boat: Academic Women and the Academic Process*, edited by G. DeSole and L. Hoffman. New York: Modern Language Association.
- Macaulay, Jacqueline, and Macaulay, Stewart
1978 "Adoption for Black Children: A Case Study of Expert Discretion." In *Research in Law and Sociology*, vol. 1, edited by Rita J. Simon. Greenwich, Conn.: JAI Press.
- Macaulay, Stewart
1963 "Non-Contractual Relations in Business: A Preliminary Study." *American Sociological Review* 28:55-67.
1966 *Law and the Balance of Power*. New York: Russell Sage Foundation.
1979 "Lawyers and Consumer Protection Laws." *Law & Society Review* 14:115-71.
1985 "Lawyer Advertising: 'Yes, but . . .'" Forthcoming. (Louvain, Belgium: European Workshop on Consumer Law.)
- McKenna, Wendy B., and Denmark, Florence L.
1975 "Women and the University." *International Journal of Group Tensions* 5:226-34.
- Marenin, Otwin
1981 "Essence and Empiricism in African Politics." *Journal of Modern African Studies* 19:1-30.
- Marighela, Carlos
1971 *For the Liberation of Brazil*. New York: Penguin Books.
- Mayhew, Leon H.
1968 *Law & Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination*. Cambridge, Mass.: Harvard University Press.
- Mechanic, David
1962 "Sources of Power of Lower Participants in Complex Organizations." *Administrative Science Quarterly* 7:349-64.
- Merton, Robert K.
1957a "Social Structure and Anomie." In *Social Theory and Social Structure*. Rev. ed. Glencoe, Ill.: Free Press.
1957b "Continuities in the Theory of Social Structure and Anomie." In *Social Theory and Social Structure*. Rev. ed. Glencoe, Ill.: Free Press.

- Michigan Law Review
1973 "Legal Knowledge of Michigan Citizens." *Michigan Law Review* 71:1463-86.
- Mileski, Maureen
1971 "Courtroom Encounters: An Observational Study of a Lower Criminal Court." *Law & Society Review* 5:473-538.
- Miller, Arthur S.
1960 "The Corporation as a Private Government in the World Community." *Virginia Law Review* 46:1539-72.
- Mills, C. Wright
1956 *The Power Elite*. Oxford: Oxford University Press.
- Mills, Edgar W., Jr.
1983 "Sociological Ambivalence and Social Order: The Constructive Uses of Normative Dissonance." *Sociology and Social Research* 67:279-87.
- Milward, H. Brinton, and Francisco, Ronald A.
1983 "Subsystem Politics and Corporatism in the United States." *Policy and Politics* 11:273-93.
- Minnesota Law Review
1975 "Regulation of Franchising." *Minnesota Law Review* 59:1027-63.
- Mishra, Ramesh
1982 "System Integration, Social Action and Change: Some Problems in Sociological Analysis." *Sociological Review* 30:5-22.
- Moore, Sally Falk
1978 *Law as Process: An Anthropological Approach*. London, Henley, and Boston: Routledge & Kegan Paul.
- Nachmias, David, and Greer, Ann Lennarson
1982 "Governance Dilemmas in an Age of Ambiguous Authority." *Policy Sciences* 14:105-16.
- Nader, Laura
1984 "The Recurrent Dialectic Between Legality and Its Alternatives: The Limitations of Binary Thinking." *Pennsylvania Law Review* 132:621-45.
- National Center for State Courts
1978 *State Courts: A Blueprint for the Future*. Williamsburg, Va.: National Center for State Courts.
- Nauta, A. P. N.
1974 "Social Control and Norm Restrictiveness: Some Results of an Inquiry into Neighbor Relationships." *Sociologia Neerlandica* 10:233-43.
- Nelson, Barbara J.
1980 "Help-Seeking from Public Authorities: Who Arrives at the Agency Door?" *Policy Sciences* 12:175-92.
- New York Times
1982 "Cocaine Use by Middle Class Called Widely Accepted in the New York Area." *New York Times*, December 13, p. 15.
1984 "A Diamond Maverick's Clash with the Club on 47th Street." *New York Times*, November 13, §iv, p. 5.
1985 "White Collar Crime: Booming Again." *New York Times*, June 9, §3, pp. 1, 6.
- Noguchi, Paul H.
1979 "Law, Custom, and Morality in Japan: The Culture of Cheating on the Japanese National Railways." *Anthropological Quarterly* 52:165-77.
- Nonet, Philippe, and Selznick, Philip
1978 *Law and Society in Transition: Toward Responsive Law*. New York: Harper.

- O'Toole, George
1978 *The Private Sector: Rent-a-Cops, Private Spies and the Police-Industrial Complex*. New York: Norton.
- Page, Barbara
1978 "The Assault on Affirmative Action." *Politics & Education* 1:31-38.
- Parsons, Talcott
1962 "Law and Social Control." In *Law and Sociology*, edited by William Evan. New York: Free Press.
- Posner, Richard A.
1979 "The Bakke Case and the Future of 'Affirmative Action.'" *California Law Review* 67:171-89.
- Pound, Roscoe
1917 "The Limits of Effective Legal Action." *American Bar Association Journal* 3:55-70.
- Prager, Jeffrey
1982 "Equal Opportunity and Affirmative Action: The Rise of New Understandings." In *Research in Law, Deviance and Social Control*, vol. 4, edited by Steven Spitzer and Rita J. Simon. Greenwich, Conn.: JAI Press.
- Pritchard, David
1985 "Homicide and Consensual Justice: The Agenda-Setting Effect of Crime News on Prosecutors." Unpublished manuscript.
- Prottas, Jeffrey Manditch
1978 "The Power of the Street-Level Bureaucrat in Public Service Bureaucracies." *Urban Affairs Quarterly* 13:285-311.
- Quinney, Richard
1975 "Crime Control in Capitalist Society: A Critical Philosophy." In *Critical Criminology*, edited by Ian Taylor, Paul Walton, and Jock Young. London: Routledge & Kegan Paul.
- Ray, Lawrence J.
1978 "Habermas, Legitimation, and the State." *Journal for the Theory of Social Behaviour* 8:149-63.
1983 "Review Essay: Systematic Functionalism Revisited." *Journal for the Theory of Social Behaviour* 13:231-41.
- Regoli, Robert M., and Poole, Eric D.
1978 "The Commitment of Delinquents to Their Misdeeds: A Re-Examination." *Journal of Criminal Justice* 3:3-28.
- Reuter, Peter
1984 "Social Control in Illegal Markets." In *Toward a General Theory of Social Control*, edited by Donald Black. New York: Academic Press.
- Robbins, James J., and Heckscher, Gunnar
1941 "The Constitutional Theory of Autonomous Groups." *Journal of Politics* 3:3-28.
- Ross, H. Laurence
1970 *Settled Out of Court: The Social Process of Insurance Claims Adjustments*. Chicago: Aldine.
- Sabel, Charles F., and Stark, David
1982 "Planning, Politics, and Shop-Floor Power: Hidden Forms of Bargaining in Soviet-Imposed State-Socialist Societies." *Politics & Society* 11:439-75.
- Santos, Bonaventura de Sousa
1977 "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada." *Law & Society Review* 12:5-105.
1980 "Law and Community: The Changing Nature of State Power in Late Capitalism." *International Journal of the Sociology of Law* 8:379-97.

- Schall, Maryan S.
1983 "A Communication-Rules Approach to Organizational Culture." *Administrative Science Quarterly* 28:557-81.
- Schmidhauser, John R.
1979 *Judges and Justices: The Federal Appellate Judiciary*. Boston: Little, Brown.
- Schoenberg, Sandra Perlman
1980 "Some Trends in Community Participation of Women in Their Neighborhoods." *Signs: Journal of Women in Culture and Society* 5:S261-68.
- Schwartz, Louis B.
1960 "Institutional Size and Individual Liberty: Authoritarian Aspects of Big Business." *Northwestern University Law Review* 55:4-53.
- Schwartz, Warren F.; Baxter, Keith; and Ryan, David
1984 "The Duel: Can These Gentlemen Be Acting Efficiently?" *Journal of Legal Studies* 13:321-55.
- Scruton, Phil, and South, Nigel
1984 "The Ideological Construction of the Hidden Economy: Private Justice and Work-Related Crime." *Contemporary Crises* 8:1-18.
- Selznick, Philip
1968 "The Sociology of Law." In *International Encyclopedia of Social Sciences*, vol. 9, edited by David L. Sills. New York: Macmillan and Free Press.
1969 *Law, Society, and Industrial Justice*. New York: Russell Sage Foundation.
- Sharp, Elaine B.
1980 "Citizen Perceptions of Channels for Urban Service Advocacy." *Public Opinion Quarterly* 44:362-76.
- Shearing, Clifford D., and Stenning, Philip C.
1983 "Private Security: Implications for Social Control." *Social Problems* 30:493-506.
- Sills, David L.
1968 "Voluntary Associations: Sociological Aspects." In *International Encyclopedia of the Social Sciences*, vol. 16, edited by David L. Sills. New York: Macmillan.
- Simis, Konstantin
1982 *USSR: The Corrupt Society—The Secret World of Soviet Capitalism*. New York: Simon and Schuster.
- Snyder, Frederick E.
1978 "Crime and Community Mediation—The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program." *Wisconsin Law Review* 1978:737-91.
- Sowell, Thomas
1976 "'Affirmative Action' Reconsidered." *Public Interest* 42:47-65.
- Spitzer, Steven
1984 "The Embeddedness of Law: Reflections on Lukes and Scull's *Durkheim and the Law*." *ABF Research Journal* 1984:859-68.
- Spitzer, Steven, and Scull, Andrew T.
1977 "Privatization and Capitalist Development: The Case of the Private Police." *Social Problems* 25:18-29.
- Stack, Steven
1978 "Ideological Beliefs on the American Distribution of Opportunity, Power, and Rewards." *Sociological Focus* 11:221-33.
- Stenning, Philip, and Shearing, Clifford
1979 "Private Security and Private Justice." *British Journal of Law and Society* 6:261-71.
- Sumner, Colin
1979 *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*. New York: Academic Press.

- Sutherland, Edwin H., and Cressey, Donald R.
 1978 *Criminology*. 10th ed. Philadelphia: Lippincott.
- Sweet, Justin
 1978 "Lawmaking by Standard Forms: A Study of AIA Contract Documents." Unpublished manuscript.
 1983 "The Architectural Profession Responds to Construction Management and Design-Build: The Spotlight on AIA Documents." *Law & Contemporary Problems* 46:69–82.
- Taylor, Ralph B., and Brooks, Debra Kaye
 1980 "Temporary Territories?: Responses to Intrusions in a Public Setting." *Population and Environment* 3:135–45.
- Tersine, Richard J., and Russell, Roberta S.
 1981 "Internal Theft: The Multi-Billion-Dollar Disappearing Act." *Business Horizons* 24:11–20.
- Teubner, Gunther
 1983 "Substantive and Reflexive Elements in Modern Law." *Law & Society Review* 17:401–46.
 1984a "Autopoiesis in Law and Society: A Rejoinder to Blankenburg." *Law & Society Review* 18:291–301.
 1984b "After Legal Instrumentalism? Strategic Models of Post-regulatory Law." *International Journal of the Sociology of Law* 12:375–400.
- Teulings, Ad
 1982 "Interlocking Interests and Collaboration with the Enemy: Corporate Behaviour in the Second World War." *Organizational Studies* 3(2):99–118.
- Tilman, Rick
 1983 "Social Value Theory, Corporate Power, and Political Elites: Appraisals of Lindblom's *Politics and Markets*." *Journal of Economic Issues* 17:115–31.
- Tocqueville, Alexis de
 1945 *Democracy in America*. 2 vols. Translated by Henry Reeve, revised by Francis [1835] Bowen, and edited by Phillips Bradley. New York: Knopf.
- Tomasic, Roman
 1984 "Business Regulation and the Administrative State." In *Business Regulation in Australia*, edited by Roman Tomasic. North Ryde, N.S.W.: CCH Australia Limited.
- Tomasic, Roman, and Feeley, Malcolm M.
 1982 *Neighborhood Justice: Assessment of an Emerging Idea*. New York: Longman.
- Trubek, David M.
 1980–81 "The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword." *Law & Society Review* 15:727–47.
- Turk, Austin
 1976 "Law as a Weapon in Social Conflict." *Social Problems* 23:276–91.
- Unger, Roberto Mangabeira
 1976 *Law in Modern Society: Toward a Criticism of Social Theory*. New York: Free Press.
- Useem, Michael
 1983 "Business and Politics in the United States and United Kingdom: The Origins of Heightened Political Activity of Large Corporations." *Theory and Society* 12:281–308.
- Vanderbilt Law Review
 1984 "Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society." *Vanderbilt Law Review* 37:845–1045.
- Vaughan, Diane
 1982 "Toward Understanding Unlawful Organizational Behavior." *Michigan Law Review* 80:1377–1402.

- 1983 *Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct*. Chicago: University of Chicago Press.
- Vladeck, Judith P., and Young, Margaret M.
1978 "Sex Discrimination in Higher Education: It's Not Academic." *Women's Rights Law Reporter* 4:59-78.
- Watts, Jerry
1983 "The Socialist as Ostrich: The Unwillingness of the Left to Confront Modernity." *Social Research* 50:3-56.
- Weber, Max
1954 *Max Weber on Law in Economy and Society*. Edited, with an introduction and annotations by Max Rheinstein. Cambridge, Mass.: Harvard University Press.
[1922]
- Weir, Stanley L.
1976 "Book Review of Carl Gersuny, Punishment and Redress in a Modern Factory." *Contemporary Sociology* 5:631-33.
- Weiss, Janet A., and Gruber, Judith E.
1984 "Deterring Discrimination with Data." *Policy Sciences* 17:49-66.
- Weyrauch, Walter O.
1969 "Governance Within Institutions." *Stanford Law Review* 22:141-53.
1971 "The 'Basic Law' or 'Constitution' of a Small Group." *Journal of Social Issues* 27:49-63.
- Whyte, William F.
1956 "The Grievance Procedure and Plant Society." In *The Grievance Process*. East Lansing: Michigan State University Labor and Industrial Relations Center.
- Wilkinson, Philip J.
1981 "The Potential of Functionalism for the Sociological Analysis of Law." In *Sociological Approaches to Law*, edited by Adam Podgorecki and Christopher Whelan. New York: St. Martin's Press.
- Williams, Martha, and Hall, Jay
1972 "Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences." *Law & Society Review* 7:99-118.
- Wirtz, W. Willard
1952 "Government by Private Groups." *Louisiana Law Review* 13:440-75.
- Yale Law Journal
1954 "The American Medical Association: Power, Purpose, and Politics in Organized Medicine." *Yale Law Journal* 63:937-1022.
1963 "Private Government on the Campus—Judicial Review of University Expulsions." *Yale Law Journal* 72:1362-1410.
- Zimring, Franklin E.
1981 "Kids, Groups and Crime: Some Implications of a Well-Known Secret." *Journal of Criminal Law & Criminology* 72:867-85.