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THE MOBILIZATION OF LAW

Donald J. Black

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## THE MOBILIZATION OF LAW

Donald J. Black\*

### INTRODUCTION

A theory of social control seeks to understand patterns of social control and their relation to other aspects of social organization. Little theory of this type can be found in social science, although over the years occasional, self-conscious efforts in this direction have been made in sociology and social anthropology.<sup>1</sup> Sociological thought about social control has been too broad for some purposes, too narrow for others. The subject matter has been defined as the conditions for social order--a subject matter some would give to sociology as a whole--while the detailed study of social control has centered on how official reactions to deviant behavior affect individual motivation.<sup>2</sup> Focussing thus upon the relationship between control and individual adaptation, sociology has neglected the character and integrity of social control as a natural system.<sup>3</sup> In the anthropological work on social control more emphasis has been placed upon systems of social control and dispute settlement than upon the influence of these systems at the level of individual motivation. Unfortunately, however, anthropologists stress concrete description and have shown little interest in the development of general theory.<sup>4</sup>

The sociology of law is in the long term preliminary to a general theory of social control. Theoretical tools for understanding social control systems of all kinds will undoubtedly be fashioned in the study of law. Although its social characteristics are highly complicated, writ large in law are properties and processes that inhere in all systems of social control but that escape our notice in systems lacking the scale, formalization, and intrusiveness of law.

Law may be defined, very simply, as governmental social control.<sup>5</sup> In this essay I discuss a single dimension of legal systems: the mobilization of law,<sup>6</sup> the process by which a legal system acquires its cases.<sup>7</sup> The day-by-day entrance of cases into any legal system cannot be taken for granted. Cases of alleged illegality and disputes do not move automatically to legal agencies for disposition or settlement. Without mobilization of the law, a legal control system lies out of touch with the human problems it is designed to oversee. Mobilization is the link between the law and the people served or controlled by the law.

The literature of jurisprudence shows little interest in the problem of mobilization, although here and there an exception is encountered. A century ago, for instance, Jhering appealed to the citizenry to call the law to action in every case of infringement of their legal rights. He argued that without continual mobilization the law would lose its deterrent power and claimed that legal mobilization is the moral obligation of

every citizen whose rights are offended.<sup>8</sup> Roscoe Pound, too, warned that the effective power of the law requires a citizenry ready and willing to activate the legal process.<sup>9</sup> Pound's point is occasionally repeated by contemporary legal critics and scholars,<sup>10</sup> but the problem of mobilization more often is ignored.

Likewise, legal sociology rarely deals with the problem of mobilization. Usually the study of law as a social control system concerns the process of legal prescription or policy-making, such as legislation, or of legal disposition or dispute settlement, such as we see in judicial decision-making or police encounters. Legal mobilization mediates between the prescriptions of law and the disposition of cases, between rules and their application. Although the usual focus of legal sociology is either rules or their application, a few theoretical references to the problem of mobilization can be found.<sup>11</sup> Also, there is a valuable body of empirical research relevant to a theory of mobilization, revolving primarily around the questions of when and why people go to the law to solve their problems.<sup>12</sup>

In the present discussion I slight the social conditions under which the law is mobilized. My concern is how the law is set into motion. I try to show that whether or not the state selects the legal cases it handles makes a critical difference in the character of law as a social control system. I examine the organization of legal mobilization as it relates to other aspects of legal control, including a) legal intelligence, b) the

availability of law, c) the organization of discretion, and d) legal change. In so doing, I show how mobilization systems influence diverse aspects of legal life, such as the kinds of cases a legal system handles, the accessibility of the population to the law, the degree of particularism in law enforcement, and the responsiveness of the law to moral change in the citizenry.

#### THE STRUCTURE OF LEGAL MOBILIZATION

A case can enter a legal system from two possible directions. A citizen may set the legal process in motion by bringing a complaint; or the state may initiate a complaint upon its own authority, with no participation of a citizen complainant. In the first sequence, a legal agency reacts to a citizen, so we refer to it as a reactive mobilization process. In the second sequence, where a legal official acts with no prompting from a citizen, we may speak of a proactive mobilization process.<sup>13</sup>

Across societies, history, and substantive areas of law there is enormous variability in how the law is mobilized, whether by means of citizens, the state, or both. Some legal processes are organized to allow the government to take action on its own; in others no such route is provided. In the United States, for example, the government has no responsibility for mobilizing what is traditionally called "private law," such as

contract law, torts, and property law. There are no government organizations or officers empowered to bring a private-law case on behalf of a private citizen. There are only the courts, where citizens, assisted by attorneys, can make their own claims on their own behalf.<sup>14</sup> American public law presents an entirely different appearance. Here the government is authorized to initiate cases independently of the grievances of private citizens.<sup>15</sup> The major examples are criminal law and the regulatory laws establishing and enforced by federal and local government agencies such as the Federal Trade Commission, the Internal Revenue Service, city health departments, and local licensing agencies. The government is organizationally as well as legally equipped to initiate public law cases since there is a network of government agencies that routinely carry out investigations concerned with detecting illegality. Most visible are the federal, state, county and city police forces, but numerous government agencies outside the operational jurisdiction of the police are also engaged in proactive enforcement of public law. In the Soviet Union, owing in good part to the office of procurator, considerably more state-initiated legal cases arise than in the United States. The Soviet procuracy is the prosecuting arm in criminal cases but it also watches over all civil proceedings and may initiate or enter any lawsuit at any stage on either side of the dispute.<sup>16</sup> In earlier historical periods, the proactive capacity of the state in the American system was considerably less than it

is now, but never was the American government so passive in the mobilization of law as was, for example, the government of republican Rome, to cite an extreme case where proactive enforcement was almost wholly absent.<sup>17</sup>

But legal agencies with the capacity to initiate cases do not necessarily use that capacity to its limits, if they use it at all. For instance, in legal theory and in the popular mind, American criminal justice is a process in which the government is highly aggressive in ferreting out illegality and bringing actions in court, but in fact the criminal justice system resembles a private-law system far more than is generally recognized. The typical criminal case comes to the attention of the authorities not on account of police initiative but through the initiative of a private citizen acting in the role of complainant.<sup>18</sup> In the uniformed patrol force of a large police department, where the heaviest part of the police workload is carried, the vast majority of citizen contacts arise at the instigation of citizens who mobilize the police.<sup>19</sup> The police do initiate most cases of vice and narcotics enforcement and are very aggressive in traffic and crowd control. These patterns disproportionately influence the police image in the community, but, again, they are exceptional. Recent studies of other public-law systems, such as antidiscrimination commissions and housing-code enforcement agencies, reveal a similar dependence upon citizen complainants for their influx of cases.<sup>20</sup>

Like any analytic distinction, the reactive-proactive distinction encounters occasional difficulties when it confronts the empirical world. One marginal situation, for example, is when legal cases are brought to court by paid citizen informers. In England the use of common informers who make money from the misdeeds of their fellow citizens has a long history. These informers were a primary source of cases in some areas of English law--notably economic regulation--in the 16th and 17th Centuries.<sup>21</sup> Informers also were frequently put to use in the early American legal process.<sup>22</sup> They are still widely employed by the police in narcotics work, vice enforcement, and political surveillance. The Internal Revenue Service offers financial incentives to informers against tax evaders. As an actor in the legal control process, the informer mixes the roles of citizen complainant and public official. Another marginal pattern is voluntary surrender and confession by a law-violator. In most areas of early Chinese law a citizen was rewarded with complete immunity if he confessed to an offense before it had been detected.<sup>23</sup> Voluntary confession still holds an important place in Chinese legal practice, and it is by no means unknown or unrewarded in Western legal systems.

I move now to several aspects of law for which the structure of legal mobilization carries significant implications, each being an important topic in its own right in the study of legal control. The first is legal intelligence.

## LEGAL INTELLIGENCE

By legal intelligence I mean the knowledge that a legal system has about law violations in its jurisdiction. How the mobilization of law is organized has profound consequences for the discovery of illegality. A reactive system lodges the responsibility for detection of violations in citizens, thereby blinding the control process to whatever law violations citizens are unable to see, fail to notice, or choose to ignore. Thus, private law systems, such as the law of contracts or torts, remain ignorant of that vast number of breaches of law about which the citizenry is silent.<sup>24</sup> On the other hand, a citizen-based system of legal intelligence receives much information about legal cases that would otherwise elude its attention. From a sociological standpoint, there is no "proper" or even "effective" system of legal intelligence. The adequacy of any aspect of legal control is not a scientific question.<sup>25</sup>

Access to Cases. The proactive strategy of mobilization often appears in legal systems where a reactive strategy would fail to uncover illegality of a particular kind. A reactive strategy would be almost useless in traffic control and impracticable in vice or "morals" control. Frequently those few among the citizens who would make vice complaints do not have access to the violative situations, so they cannot inform the police, and most of those with access do not complain. Detection and

enforcement in these cases require a government-initiated mobilization system. Apart from crimes under the authority of the police, numerous forms of illegality, such as income tax evasion and violations of health and safety standards by businesses, are unlikely to be known or recognized by ordinary citizens; enforcement in these cases necessitates a system of inspection carried out by government agencies. To facilitate its enforcement program the government may, for instance, require self-reports from citizens and organizations, as is seen in tax enforcement, antidiscrimination surveys, and price and wage control. Registration and licensing systems similarly assist the government in learning about the population and its activities. Totalitarian regimes employ self-report systems extensively. It might be added that the more differentiated a society becomes, the more illegality tends to arise in specialized domains of social life where the offenders are encapsulated beyond the reach of a citizen detection system. Accordingly, as the process of social differentiation continues, notably in the economic sphere, we see an ever-enlarging battery of administrative agencies involved in proactive enforcement.<sup>26</sup>

The location of law violations is another factor conditioning the access of a legal process to its cases. Most illegality arises in private rather than public settings, making access to much illegality difficult for a government enforce-

ment system. In part this is because of legal restrictions protecting private places from government intrusion.<sup>27</sup> Yet the impact of the law of privacy on legal intelligence can easily be exaggerated. Even if privacy law were totally eliminated, opening every private place to government intrusion at any time, still the sheer unpredictability of illegal behavior would bar the government from knowledge of most illegality. Unless it were to go to the technological lengths fictionalized in George Orwell's 1984, a government could not possibly achieve the surveillance necessary to detect even a minute proportion of all the illegal conduct. This applies to many kinds of law violations. Policemen on patrol in public settings, for instance, rarely discover any but the relatively trivial varieties of criminal behavior. The more serious violations, such as homicide, burglary, and grand larceny, take place behind closed doors. The police therefore depend upon ordinary citizens to provide them with information about crimes that have been committed. Of course much illegality escapes the knowledge of citizens as well. Nevertheless, the latent power of a hostile or alienated citizenry to undermine the capacity of the government to locate violations is undeniable and is amply demonstrated in the history of colonial, revolutionary, and other kinds of authoritarian legal systems.<sup>28</sup> Unpopular law-enforcement programs such as these often use paid informers.

The power of the citizenry is all the greater in private

law, where enforcement without the initiative of citizens is impossible. In private law, then, the location of illegality is a moot question. People can entirely ignore domestic law or the law of negligence, for example, and the government can do nothing short of redefining these areas as public law. It is popularly believed that laws fall into disuse on account of government indifference or indolence. But in fact the demise of laws is more likely to result from citizens who fail to mobilize courts or other legal agencies. One by one, citizens may lose interest in a law, and, in private, the law may die a slow death.

Limits on Legal Intelligence. Any legal system relying upon the active participation of ordinary citizens must absorb whatever naiveté and ignorance is found among the citizenry. The common man makes occasional errors when he applies what he takes to be legal standards to his everyday life, not only because of his lack of legal training but also because many social situations have a legally ambiguous character. In complex legal systems miscalculations by citizens are continually routed away from the courts by legal gatekeepers of various kinds. In private law, a major gatekeeping burden is carried by the private attorney.<sup>29</sup> In the process of advising their clients, attorneys serve the larger legal process as intelligence agents, sorting through and narrowing the raw input of cases moving toward the courts from day to day. In public law, other gatekeepers screen out the

legal dross: government prosecutors, police, and the many enforcement officers attached to administrative agencies, such as health officers, food and drug inspectors, and internal revenue agents. Without these gatekeepers all the intelligence gaps in the citizenry would reappear in the legal system.

Other intelligence losses greatly overshadow those resulting from citizen error. Much illegality is unknown because so many citizens fail to call upon the law when they experience law violations. The reluctance of citizens to mobilize the law is so widespread, indeed, that it may be appropriate to view legal inaction as the dominant pattern in empirical legal life. The number of unknown law violations probably is greater in private law than in public law, although only speculation is possible. The outline of legal inaction is just now beginning to be known through surveys of the citizen population.<sup>30</sup> Other relevant research is afoot. A recent study of dispute-settlement in a Swedish fishing village, for instance, indicates that communities can passively absorb an enormous amount of illegal behavior, even when it continues for many years and includes numerous well-defined victimizations.<sup>31</sup> In fact, legal mobilization sometimes is more socially disruptive than the illegal behavior that gives rise to it. Gradually a research literature is collecting around the question of when people mobilize the law, given illegality. The nature of the social relationship enveloping a legal dispute or violation emerges as an especially

powerful predictor of legal mobilization. Thus, we know from East African and Japanese materials, among others, that resort to a government court occurs primarily in legal conflicts between relative strangers or persons who live in different communities.<sup>32</sup> Persons in intimate relationships tend to use extralegal mechanisms of dispute settlement when quarrels arise. However, they do not hesitate to call upon the law to settle their disputes when extralegal social control is unavailable, a pattern seen, for example, in the loosely structured barrios of Venezuela.<sup>33</sup> Usually the likelihood that extralegal control will be available in a social relationship is a function of the intimacy of the relationship as measured by such indicators as its duration, the frequency of interaction, the intensity of interaction, the degree of interdependence between the parties, and the number of dimensions along which interaction between the parties occurs. Accordingly, we expect that mobilization of the law will be infrequent in what Gluckman in his classic study of the Borotse of Zambia calls "multiplex" relationships.<sup>34</sup>

Much of this may be summarized in the following proposition: the greater the relational distance between the parties to a dispute, the more likely is law to be used to settle the dispute.<sup>35</sup> With social predictors of this sort we can easily anticipate many empirical patterns, such as the finding that breach of contract rarely leads to a court case when it takes place between businessmen who have a continuing relationship

with recurrent transactions.<sup>36</sup> We may observe, then, that a reactive legal system acts to reinforce the tendency of citizens to use law only as a last resort, since it allows citizens to establish their own priorities. Because citizens use the law reluctantly, they help to make the law a conservative enterprise that for the most part leaves the status quo to its own designs. Social research on law eventually will reveal the extent and social context of legal inaction in numerous areas of law and across societies, thereby making possible a comprehensive theory of the mobilization of law.<sup>37</sup>

A legal intelligence system resting upon the initiative of citizens involves another kind of limitation, one that occurs regardless of the rate at which citizens mobilize the law. This limitation inheres in the simple fact that reactive systems operate on a case-by-case basis.<sup>38</sup> Cases enter the system one by one, and they are processed one by one. This creates an intelligence gap about the relations among and between cases. It is difficult to link patterns of illegal behavior to single or similar violators and thus to deal with the sources rather than merely the symptoms of these patterns. To discover these patterns a systematic search for factual similarities across cases is needed.

Police systems do some pattern-oriented analysis of the cases coming to their attention through citizen complaints, but most patterns of illegality escape their detection net. One con-

sequence may be a higher chance of survival for professional criminals,<sup>39</sup> although some patterned criminality is uncovered through modus operandi files. In other areas where the government does its own investigations, strategies for finding patterns of violation can likewise be used, although illegality varies in its amenability to pattern detection. Proactive enforcement campaigns often originate from single complaints. One case of processed food contamination, for instance, can lead to an inspection effort covering all businesses producing and distributing that particular variety of food. The inspection may expose one business routinely violating health standards or a number of businesses involved in the same category of violative behavior. Frequently one case of illegality by a business enterprise implies a pattern of illegality, since much business activity is by its nature programmed and repetitious. One violation of safety requirements by an automobile manufacturer, for example, usually means that numerous cases are at large in the community, and government inspections may unveil similar violations by other manufacturers. Similarly, in some cities housing-code enforcement officers inspect the whole of an apartment building when they learn, by complaint, of one violation in the building; they assume that the landlord may fail to meet code specifications in all of his units.<sup>40</sup> In the criminal justice system single complaints about narcotics or vice can provide the police with opportunities to penetrate offense networks and

markets and discover large numbers of interrelated violations.

The enforcement of private law sharply contrasts with these illustrations from public law. A good case in point is contract law, where it is not unusual to find patterns of breach emanating from a single individual or business or from members of a broader category of legal actors, such as real estate agents, mail order businesses, or insurance companies. Apart from patterns involving a recurrent breach, one act by a single business may involve numerous breaches of contract with individuals dispersed in the population, as when a holiday tour or an entertainment event is ended prematurely and the promoters do not make a monetary refund to the many victims. Private-law violations such as these can be remedied through "class actions," single legal suits covering a number of complaints of the same kind, but their frequency is far behind the rate at which patterns of private-law violation apparently occur and would be much greater if the government were involved in enforcement. The government would learn of more patterns of illegality, if only because information about all known violations would pass through one central processing system similar to a police system. At present the only official information on private-law cases is generally to be found in court records. Since no record is made of the private-law cases that do not reach the court, there can be no legal intelligence about them analogous to police records in the criminal realm. And even the court records on file are

presently irrelevant to the on-going process of legal control.<sup>41</sup>

Also eluding any case-by-case legal process is the larger pattern by which legal problems are distributed in the population of citizens. Owing to social conditions beyond the reach of any case-oriented mobilization system, legal trouble is differentially visited upon the citizenry. Crimes of violence and interpersonal conflicts of all kinds disproportionately afflict the lower social strata (family-related violence, for example, is particularly common among poor blacks) and property matters often create a need for law among the higher status segments of the population. These structurally embedded patterns cannot be a direct concern of reactive control systems, although case records can be useful to social engineering efforts of other kinds. Because these patterns of misery cannot be confronted by single legal officials dealing with single cases of so many isolated victims and violators, their job is very much a matter of picking up the social debris deposited by larger social forces. Apart from its deterrence effect, the extent of which is unknown, a reactive legal system ever listens to the troubles of the citizenry, while the larger principles and mechanisms by which these troubles come into being escape it. In this sense, a case-oriented legal process always begins too late.<sup>42</sup> While a proactive system also is unable to attack the broader social conditions underlying law violations, it does have an ability to intervene in social arrangements that reactive systems lack. It

can, for instance, destroy an illegal business operation, such as a gambling enterprise or crime syndicate, that may be the source of thousands of violations a week. Police control of automobile traffic, too, involves prevention through social engineering of a kind impossible in a legal process relying solely upon citizen complaints.

The proactive system also has the power to prevent illegality in specific situations. While it cannot reach the many forms of illegality occurring in private places, a proactive system can prevent some violations in public places. The degree of prevention is difficult to assess, however, and in any case the forms of illegal behavior subject to situational prevention are likely to be minor. In a reactive process, prevention of this kind occurs only in the rare case when a citizen contacts a legal agency concerning an illegal act that is imminent or in progress and the agency intercedes. The heavy reliance of legal systems upon citizens thus assures that prevention will not be a major accomplishment. This is a more concrete sense in which a reactive system begins too late. To this inherent sluggishness of any citizen-based system, private law adds the delay involved in gaining a hearing in court. No civil police are available for immediate aid and advice to people involved in private-law problems. This will probably come with further legal evolution and differentiation, but in the meantime private law systems lag far behind in the wake of the

problems they are established to control.

In sum, a mobilization system implies a particular organization of knowledge about law violations. A reactive system places responsibility in the citizenry and thereby brings law to the private place, with its numerous and serious forms of illegality. A proactive system can discover violations that citizens are unable or unwilling to report but misses much private illegality. In a reactive system the kinds and rates of cases are a function of the kinds and rates of complaints by private citizens. In a proactive system the kinds and rates of cases result from the distribution of official resources by the control system itself. Because of the reactive system's reliance upon citizens and its case-by-case schedule of operation, it involves certain intelligence weaknesses, such as a near incapacity to identify patterns of illegality so necessary to prevention. The proactive system can deal with patterns rather than mere instances of illegality, which gives it a strong preventive capacity, but it is limited largely to marginal and minor forms of illegality. The legally more important problems, then, are the responsibility of a mobilization system that cannot prevent them.

## THE AVAILABILITY OF LAW

The previous section concerned the access of a legal system to the cases within its jurisdiction. Now we reverse our viewpoint and consider the access of citizens to the law. We must view legal life from below as well as from above,<sup>43</sup> since every instance of legal control is also an instance of legal service. The availability of law to citizens varies markedly across and within legal systems and cannot be taken for granted in a sociological theory of law. Access to law is a function of empirical legal organization.

Two Models of Law. The reactive mobilization system portrays an entrepreneurial model of law. It assumes that each citizen will voluntarily and rationally pursue his own interests, with the greatest legal good of the greatest number presumptively arising from the selfish enterprise of the atomized mass. It is the legal analogue of a market economy.

Indeed, it has been argued that the organization of private law as a reactive system is not merely the analogue of a market economy; it is also the legal substructure essential to a market economy. Historically the system of "private rights" in contract, property, and tort law emerged and flourished with capitalism.<sup>44</sup> Here, however, I am suggesting only that a citizen-based system of mobilization--whatever the type of law--operates according to the same behavioral principles as a market system

of economic life.<sup>45</sup> In their primordial forms, both are self-help systems. The proactive system, by contrast, is a social-welfare model of law, with the legal good of the citizenry being defined and then imposed by government administrators, albeit with some influence by interest groups in the citizen population. In the pure type of the social-welfare model of law, however, no role is provided for members of the citizenry in the determination of legal policy, just as in the pure type of welfare economy the will of the population need not be systematically introduced into the decision process. We might say, then, that a proactive system does not merely make the law available; it imposes the law.

Legal systems that operate with a reactive strategy often employ mechanisms assuring that mobilization will be truly voluntary and entrepreneurial, although this may not be the motive behind their implementation. One American illustration is the prohibition against solicitation by attorneys. Were attorneys authorized to gather legal cases through solicitation, the input of legal business surely would change, since many otherwise passive victims of illegality undoubtedly would be persuaded to mobilize the law.<sup>46</sup> The already great influence that lawyers exert on the input of cases would also be increased. In the American system, where attorneys stand to profit from some cases, the same incentives that entice private citizens to bring suits, such as treble damages in private antitrust actions, might en-

tice attorneys to solicit business. Insofar as attorneys create their own business through solicitation, they in effect become private prosecutors, diluting the purity of the legal market. The legal doctrine of "standing" is another device that buttresses the entrepreneurial organization of law. This doctrine holds that before a party may complain in a lawsuit, he must show that his interests are directly affected in the case at issue. Here it is uninvolved citizens rather than attorneys who are barred from influencing the mobilization of law, again protecting the purity of the legal market.

There are few corresponding mechanisms to accommodate citizens who have occasion to mobilize the law. This is not surprising, since, like any entrepreneurial process, a reactive legal system assumes that those wanting to pursue their interests are able to do so.

Limits on Legal Availability. The cost of litigation is a widely recognized limitation on the availability of private law. While services such as legal aid programs and small-claims courts have been established to reduce the financial burden for low-income citizens, the fact remains that the effectiveness with which citizens can pursue their legal interests often is affected by their wealth. In the criminal-law domain, on the other hand, the quality of legal representation does not depend upon a complainant's wealth. This is not to deny that wealthy

and socially prominent complainants may receive better service from the public authorities, a form of discrimination in their behalf. But criminal justice is not organized so that wealthy complainants can secure better attorneys in court, since all complainants are represented by a public prosecutor.

A variety of other circumstances can lessen the availability of law, whether public or private, for some segments of the community. Sheer physical proximity to legal institutions can be a highly significant factor in pre-modern legal systems, owing to the meager communication and transportation systems in these societies. In nineteenth century China, for example, the farther a complainant lived from a court, the less likely it was that he could pursue his case. This was especially noticeable in civil matters, but it was also true in criminal matters. If the plaintiff resided in a city containing a court, his civil suit would reach a final disposition in 60 per cent of the cases, while the corresponding figure was only 20 per cent for plaintiffs living 71 to 80 li away (one li is about one-third of a mile).<sup>47</sup> Some modernizing nations now employ so-called "popular tribunals" at the neighborhood level, thereby providing law to the common people and, at the same time, a mechanism of social integration important to the modernization process itself. Other pre-modern societies, however, are characterized by a high degree of legal availability. In seventeenth century Massachusetts, for instance, each town had its own court of general jurisdiction,

easily accessible to all. In fact, the ease of access to these courts seemingly tempted the citizenry to great litigiousness, resulting in a high rate of trivial, unfounded, and vexatious suits.<sup>48</sup> Back home in England the law had not been nearly so available to the common man. In tribal societies the availability of law also tends to be quite high.

Another force that sometimes interferes with the operation of a reactive legal process is a countervailing normative system. Informal norms among some pockets of the citizenry prohibit citizens from mobilizing the official control system. Generally it seems that people are discouraged from mobilizing social control systems against their status equals. With respect to the police, for instance, some citizens are subject among their peers to norms against "squealing" or "ratting." This morality appears rather clearly in the American black subculture, a factor reducing an already low rate of police mobilization by blacks. We also see strong antimobilization norms in total institutions such as prisons, concentration camps, mental hospitals, and basic training camps in the military. Similarly, these norms appear among the indigenous population in colonial societies, schools, and factories. Even in the traditional family, children enforce a rule against "tattling." Antimobilization norms seem to be particularly strong among the rank and file wherever there is a fairly clear split in the authority structure of a social system.

In light of the foregoing, we may propose that whenever there is comparatively open conflict between an authority system and those subject to it, reactive legal systems will tend toward desuetude and there will be pressure for greater use of the proactive control strategy.<sup>49</sup> We should therefore expect to find that governments disproportionately adopt proactive systems of legal mobilization when a social control problem primarily involves the bottom of the social-class system. It appears, for instance, that the emergence of a proactive police in early nineteenth century England reflected the elite's fear of growing class-consciousness among the lower orders.<sup>50</sup> In cross-national perspective we see that police authority and political power are generally concentrated at the same points and that every police system is to some extent an instrument of political control. This is especially noticeable in the underdeveloped world; in most of Asia, Africa, and the Middle East the roots of proactive police systems are to be found in earlier colonial policies.<sup>51</sup> Similarly, it appears that proactive control in republican Rome was routinely exercised only upon slaves and that urban throng sometimes known as the "riff-raff."<sup>52</sup> The common forms of legal misconduct in which upper status citizens indulge, such as breach of contract and warranty, civil negligence, and various forms of trust violation and corruption, are usually left to the gentler hand of a reactive mobilization process.

In theory the law is available to all. In fact, the availability of law is in every legal system greater for the citizenry of higher social status, while the imposition of law tends to be reserved for those at the bottom. Thus, the mobilization of law, like every legal process, reflects and perpetuates systems of social stratification. In contemporary Western society the availability of law is nevertheless greater for the mass of citizens than in any previous historical period, and the trend is toward ever-greater availability. And yet it appears that the scope and depth of legal imposition is also greater than ever before.

#### THE ORGANIZATION OF DISCRETION

Students of law often comment that legal decision-making inevitably allows the legal agent a margin of freedom or discretion. Sometimes this margin does not much exceed the degree of ambiguity inherent in the meaning of the law, an ambiguity resulting in uncertainty about how the law will be interpreted under variable factual circumstances. Because of this ambiguity and factual variability, a degree of slippage is unavoidable in legal reasoning.<sup>53</sup> Sometimes the decision-maker's margin of freedom is so great, as in much of administrative law, that more of the man than the law determines the decisions made.<sup>54</sup>

Moral Diversity. The organization of a legal system allocates the discretion to decide when legal intervention is appro-

priate. A reactive system places this discretion in the ordinary citizen rather than in a legal official. This has far-reaching consequences for legal control. It allows the moral standards of the citizenry to affect the input of cases into the legal system. Much of the citizen's power lies in his ability not to invoke the legal process when he is confronted with illegality; this gives him the capacity to participate, however unwittingly, in a pattern of selective law enforcement. Each citizen determines for himself what within his private world is the law's business and what is not; each becomes a kind of legislator beneath the formal surface of legal life.

The anthropologist Paul Bohannan suggests that law functions to "reinstitutionalize" the customary rules of the various social institutions, such as the family, religion, and the polity.<sup>55</sup> According to this view, law is an auxiliary normative mechanism that comes into play to lend needed support to non-legal rules. This notion of "double institutionalization" is an extension of the older and simpler view that law enforces the common morality. A conception like this may have serious shortcomings as a way of understanding modern legislative and judicial behavior,<sup>56</sup> but it has some relevance to an analysis of legal mobilization. When citizens call the law to action according to their own moral standards, they in effect use the law as supplementary support for those standards. The functional relationship between the individual and the law is an analogue of the re-

lationship proposed by Bohannan at the level of the total society. But this individual pattern cannot be generalized to the level of the total society, since the moral standards of the citizenry are not homogeneous across the social classes, ethnic groups, the races, the sexes, generations, and other such aggregates. On the contrary, the reactive system makes it possible for members of these social segments and enclaves to use the law to enforce the rules of their own moral subcultures. From this standpoint, when the law is reactive it does present a pattern of double institutionalization, but it is a doubling of multiple institutions, as multiple as the moral subcultures we find in society. Thus the law perpetuates the moral diversity in the mass of citizens.<sup>57</sup> This may seem a strange role for some government agencies such as the police and for other predominantly reactive control systems, but the law and morality relationship is very complicated and is bound occasionally to disagree with common sense. In societies characterized by moral heterogeneity, it is only through proactive control that one morality can be imposed on all.<sup>58</sup>

Discrimination. Discretionary authority often carries with it the possibility of particularistic law enforcement or, more simply, discrimination. From a sociological standpoint, legal discrimination provides an interesting problem in the relation between law and social stratification. The liberal fear of a

proactive legal system has long been part of a fear of discriminatory enforcement. But whether a system of mobilization is reactive or proactive does not determine the probability of discriminatory enforcement; rather, it organizes that probability. A reactive system deprives state officials of the opportunity to invoke the law according to their own prejudices, but it creates that opportunity for the average citizen. When a legal system is brought into operation by citizen demands, its direction follows the designs of the unmonitored population, whether they are universalistic or not. Each citizen has the discretionary power to decide which people, of those who are legally vulnerable, deserve official attention. The white citizen has the power to be more lenient toward the white than the black, and vice versa; the bourgeois can discriminate against the bohemian, the older against the younger, the rich against the poor. Even if we assume, arguendo, that each citizen does what his conscience dictates, what he thinks is right, the aggregative result of all these individual decisions surely distributes legal jeopardy unequally across the population of law violators, especially when we consider decisions not to mobilize the law.<sup>59</sup> The possibilities of government surveillance over this kind of discrimination seem minimal. Reactive mobilization is no more accessible to surveillance than many of the illegal acts in private settings that a reactive system uncovers. The amenability of a proactive legal system to surveillance and control is far greater, if only because a proactive

system by its nature involves an organizational base that can be penetrated. Proactive control is itself subject to proactive control while reactive control is dispersed in the citizen mass and is therefore extraordinarily difficult to reach. In short, patterns of legal discrimination in reactive systems, the more democratic form of legal process, are more elusive, and consequently they are more intransigent than are similar patterns in proactive mobilization systems.<sup>60</sup> And yet it remains likely that a government-initiated mobilization system contributes more to the maintenance of the existing forms of social stratification than does a system geared to the demands of the citizenry. Discriminatory decision-making by citizens to a degree cancels itself out in the citizen mass, while discriminatory behavior by legal officials mirrors their own biases, and these are apt to flow in only one direction.

Besides accommodating discrimination by citizens, a reactive legal system permits individuals to appropriate the law for functions that lawmakers may never have anticipated. People may mobilize the law in order to bankrupt or destroy the reputations of their competitors,<sup>61</sup> to delay transfers of property or payments of debts,<sup>62</sup> or for revenge.<sup>63</sup> Within the limits imposed by law and legal officials, the discretion accorded to every citizen by a reactive control process, then, lets every citizen do with law what he will, with little concern for the long-range social results.<sup>64</sup>

## LEGAL CHANGE

Students of legal change have traditionally occupied themselves mainly with changes in the substance of legal rules. Legal scholars have paid particular attention to changes in legal rules occurring by accretion in the judicial decision-making process,<sup>65</sup> whereas recent work in social science has been concerned more with legislative change.<sup>66</sup> There has also been some interest in changes in legal organization.<sup>67</sup> Yet in modern societies nearly every aspect of legal life is in a state of flux. Apart from changes in legal rules and organization, continuous shifts are taking place in the kinds and rates of cases that enter the legal process through mobilization, in modes and patterns of disposition, in legal personnel, and in the relationship between legal control and other aspects of social life, such as status hierarchies, informal control mechanisms, the cultural sphere, political movements, and, as Durkheim noted,<sup>68</sup> the ever increasing scope of social differentiation.

Moral Change. As changes occur in the kinds of legal problems citizens have, and in their definitions of legal problems as such, changes follow in the workload of a legal system organized to respond to the citizenry.<sup>69</sup> A reactive system by its nature absorbs every such change that comes about in the population.<sup>70</sup> A control agency such as the police, who are notorious for their conservatism, will nonetheless change their workload

to adapt to moral changes in the citizenry. Because they are organized to respond to citizen calls for service, they are organized for change, just as they are organized to provide different police services to the various segments of the population. Whatever the police attitude toward the status quo may be, the citizen-based mobilization process renders them eminently pliable.

The legal work that government officials come by through their own initiative is not nearly so adaptable to the felt needs of citizens. Although citizens can and often do affect the course of proactive legal work by a kind of lobbying activity, the fact remains that it is possible for attitudes of officials that may not be shared by many or even most citizens to influence the selection of cases. A proactive system therefore displays a potential rigidity under conditions of moral change in the citizen population. Beyond its potential rigidity, a proactive control process can aggressively enforce a legal policy upon a resistant population, as has been strikingly illustrated by the political police of authoritarian regimes. It is just this kind of aggressiveness that may be essential to the implementation of law in a modernizing society, where the population is likely to be legally flaccid or apathetic, if not hostile toward official innovations. Still, because there is no mechanism by which the sentiments of the citizenry are routinely recorded or sampled, as we find in reactive systems, it is always

difficult to ascertain whether a proactive control process is following, repressing, or leading moral change in the mass of citizens.

Planned Change. While a citizen-based system may be more attuned to moral shifts in the population, it may be recalcitrant in the face of attempts at centrally directed planned change. Just as the discretionary authority of citizens in a reactive system creates the possibility of discrimination and provides no sure means of controlling it, so in general the citizenry is beyond the reach of other kinds of intentional legal reform. In a reactive process there is no way to intervene systematically in the selection of incidents for legal disposition; hence, public policy may be redefined and public purpose invisibly attenuated.<sup>71</sup> The proactive system, by comparison, is a willing instrument of planned change, for it is under the authority of the planners themselves.

Questions about legal change again call up the economic analogy. Because the reactive mobilization system is built around an entrepreneurial model, because it operates in accordance with the market for legal services, it registers legal changes just as changes appear in economic markets. The changes do not and cannot arise from a center; they arise by increments throughout the citizen population, following a plan no more tangible than the "invisible hand" of the market. Historical

drift can express itself in market behavior, and it can similarly flow through the many channels of a citizen-based mobilization system.<sup>72</sup> Proactive mobilization, resembling as it does a social-welfare system, in its pure form involves a central plan with intentional changes and constancies that may or may not take the expressed wishes of the citizenry into account.

Even in a proactive system oriented to the felt needs of the population, however, individuals may not come forth to make known their wishes, since only in isolation from their fellows are individuals likely to pursue their interests with positive action.<sup>73</sup> In a mobilization system geared to the initiative of citizens, each individual in fact is isolated and must pursue his interests, or no one will. Where a government system is concerned, on the other hand, aggregates of individuals typically share concerns realizable through law, but for that very reason each individual by himself can assume that someone else will look after the legal policies that benefit him. When others use the same calculus as he, they do not act to influence legal policy, and the outcome is an unknown relation between the changing interests of the citizenry and the selection of cases through the initiative of the state. Where planned legal change is possible, then, there is no mechanism to learn the felt requirements of the population. Where there is such a mechanism, there is no way to plan.

Legal Evolution. Perhaps the clearest trend in legal evolution over the past several centuries has been the increasing role of law as a means of social control, a development closely related to the gradual breakdown of other agencies of control such as the kinship group, the close-knit community, and the religious organization.<sup>74</sup> This trend continues along a number of dimensions of the legal world, including the ever greater volume and scope of legislation and adjudication by the state. There seems to be a historical drift toward a state monopoly of the exercise of social control.<sup>75</sup>

An examination of the role of mobilization systems in legal evolution shows that this trend is proceeding in part at the bidding of the citizenry. With the continuing dissolution of extra-legal social control, these atomized citizens more and more frequently go to the state to help them when they have no one else. One by one these individual citizens draw in the law to solve their personal troubles, although one by one they would probably agree that the larger outcome of their many decisions is an historical crisis. And yet to deprive these individuals of the initiative they now possess may do nothing more than to substitute a plan for what is now unplanned, while their fate would remain the same.

## CONCLUSION

How deviant behavior and disorder come to meet resistance is a problem for investigation, whatever the social context and form of social control. Some societies have managed very well with almost no social control beyond that brought to bear by the complainant and his kinfolk.<sup>76</sup> In others, systems of proactive mobilization emerge and disappear in rhythm with the collectivity's involvement in corporate action; during warfare or a hunt in some earlier societies, proactive control would arise, only to recede during less eventful times.<sup>77</sup> Another pattern occurs in coercive institutions, such as prisons or mental hospitals, where it seems that proactive strategies are used almost exclusively in the everyday maintenance of the official order. At still another extreme are face-to-face encounters among social equals, where social control is more diffuse and there appears a kind of orderly anarchy with no mobilization at all.<sup>78</sup> We see variation expressing the texture of life from one setting to the next, and it is apparent that law makes visible a process found in every system of social control.

One scientific advance consists in raising the level of generality at which the empirical world is understood. A relationship once seen as unique is shown to be one of a set; that set may in turn be revealed as a member of a still more general class. My observations on the mobilization of law are very gen-

eral, since they cut across substantive areas of law, societies, and history. This is both the strength and weakness of the observations. Any reader can produce exceptions to my generalizations, and perhaps I made some overgeneralizations, where the number of exceptions will overturn the initial formulations. Yet even with this tentativeness, it is useful to point the direction of a still more general level to which we aspire in legal sociology. We may generalize about all of law, again without regard to substance, place, or time, but now also without regard to a particular dimension of the legal process.

What consequences follow when law is arranged reactively so that ordinary citizens can direct its course? What should we expect if law is proactive, the responsibility of government officials alone? These questions have guided our analysis of legal mobilization. Yet citizen participation in legal life is a problem for study not only in the mobilization of law, but also in other legal processes such as legal prescription and legal disposition. The ultimate issue is: How democratic is the law? Legal rules and policies may arise at the direction of the citizenry, as by plebiscite or by a representative legislature, or at the direction of state officialdom alone, as by dictum or edict. Like the mobilization of law, the degree to which the prescription of law is democratic, then, varies across legal systems. Likewise, the disposition of law, or dispute settlement, may be more or less democratic, as is clear when we compare, for

instance, the popular tribunals of some socialist countries<sup>79</sup> to the lower courts of the United States with their powerful adjudicatory officials.<sup>80</sup> In modern societies the grand jury and the trial jury are well-known mechanisms by which the citizenry is introduced into legal decision-making. A general theory of law should tell us what difference democratic organization makes.

I close with several examples of propositions about democratic law applicable to a variety of legal situations. Patterns in the mobilization of law suggest these more general propositions. As illustrations, consider the following:

1. The more democratic a legal system, the more it perpetuates the existing morality of the population.  
Democratic law perpetuates moral diversity as well as moral homogeneity among the citizenry.
2. The more democratic a legal system, the more the citizenry perpetuates the existing system of social stratification. Where law is democratic, legal discrimination is practiced by citizens more than by government officials and is therefore more difficult to detect and eliminate.
3. The more democratic a legal system, the more the law reflects moral and other social change among the citizenry. Democratic law accommodates social change by historical drift more than planned change.

These propositions about democratic law are preliminary and in need of much refinement. But even primitive propositions give us a necessary starting place. With each unexplained exception comes the possibility of creative reformulation, the heart of theoretical development. With each successful application we have the satisfaction of explanation, even as uncultured as it may presently be. Surely it is worthwhile to build a vocabulary and to make some statements, however haltingly, in a general theory of law.

FOOTNOTES

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1. For examples of the earlier works, see Edward Alsworth Ross, *Social Control: A Survey of the Foundations of Order* (1901); Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926); Karl Mannheim, *Man and Society in an Age of Reconstruction: Studies in Modern Social Structure* (1940); Karl N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941); August B. Hollingshead, *The Concept of Social Control*, 6 *Am. Soc. Rev.* 217 (1941).

2. E.g., Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961); Thomas J. Scheff, *Being Mentally Ill: A Sociological Theory* (1966); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 *U. Pa. L. Rev.* 949 (1966); William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 *Wis. L. Rev.* 703.

3. But see, e.g., Richard D. Schwartz, Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements, 63 Yale L.J. 471 (1954); Irving Piliavin & Scott Briar, Police Encounters with Juveniles, 70 Am. J. Soc. 206 (1964); Donald J. Black, Production of Crime Rates, 35 Am. Soc. Rev. 733 (1970); The Social Organization of Arrest, 23 Stan. L. Rev. 1087 (1971).

4. But see, e.g., Paul Bohannan, The Differing Realms of the Law, 67 Am. Anthro., Special Publication, No. 6, Pt. 2, at 33 (Dec. 1965); Leopold Pospisil, Anthropology of Law: A Comparative Theory (1971).

5. Donald J. Black, The Boundaries of Legal Sociology, 81 Yale L. J. 1086 (1972). My approach to law is uncompromisingly positivist and therefore departs fundamentally from much recent work by sociologists. Cf. Philip Selznick, Law, Society and Industrial Justice (1969), and Sociology and Natural Law, 6 Natural L. Forum 84 (1961); Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society (1966).

6. While this use of the word mobilization is hardly standard, it is not utterly unknown. For instance, Bronislaw Malinowski speaks of the "juridical machinery" being "mobilized." A New Instrument for the Interpretation of Law -- Especially Primitive, 51 Yale L. J. 1237, 1250 (1942). Nevertheless, I have misgivings about the appropriateness of the word "mobilization" in this context. Colleagues have commented that it has a militaristic flavor

and that it is too heavy for these purposes. I agree with these criticisms and would add that mobilization is a word ordinarily used in the analysis of larger-scale social phenomena, as in the mobilization of a society for war or the mobilization of dissent for a political movement. Still, I have been unable to find an adequate substitute. "Invocation" is too narrow, for instance, while "activation" seems even more awkward than mobilization. It is to be hoped that someone will eventually improve upon my choice. In the meantime I console myself with the thought that the problem with words reflects the lack of scholarly attention to the analytic problem itself.

7. Perhaps more specification is required: By "legal system" I mean any governmental organization involved in defining or enforcing normative order. Thus, I speak of a total governmental apparatus as a legal system--the American legal system--but I also refer to a specific legal agency such as the police as a legal system. By "case" I mean any dispute or instance of alleged illegality that enters a legal system. A breach of contract, for example, becomes a case only when a suit is filed; a burglary becomes a case when it is reported to the police. A mobilization of law, then, is a complaint made to or by a legal agency. Mobilization occurs at several stages in some legal processes, e.g., at a detection stage, an evidentiary or prosecutorial stage, and an adjudicatory stage.

8. Rudolph von Jhering, *The Struggle for Law* (1879).

9. The Limits of Effective Legal Action, 27 Int'l J. Ethics 150 (1917).

10. E.g., Harry W. Jones, The Efficacy of Law 21-26 (1969).

11. Leon H. Mayhew, Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination 15-16 (1968); Paul Bohannon, supra note 4; Vilhelm Aubert, Courts and Conflict Resolution, 11 J. Conflict Resolution 40 (1967).

12. E.g., P.H. Gulliver, Social Control in an African Society: A Study of the Arusha, Agricultural Masai of Northern Tanganyika (1963); Alan Macfarlane, Witchcraft in Tudor and Stuart England: A Regional and Comparative Study (1970); Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963); Laura Nader & Duane Metzger, Conflict Resolution in Two Mexican Communities, 65 Am. Anthro. 584 (1963); Takeyoshi Kawashima, Dispute Resolution in Contemporary Japan, in Law in Japan: The Legal Order of a Changing Society 41 (Arthur Taylor von Mehren ed. 1963).

13. In psychology the concepts "reactive" and "proactive" have been used to classify individual actions in terms of their origins, the former referring to actions originating in the environment, the latter to those originating within the actor. See Henry A. Murray, Toward a Classification of Interactions, in Toward a General Theory of Action 434 (Talcott Parsons & Edward A. Shils eds. 1952).

Instead of reactive and proactive legal systems we could

speak, respectively, of passive and active legal systems. See Philip Selznick, *Law, Society, and Industrial Justice*, supra note 5, at 225-28.

14. Of course, the state can and often does initiate private-law cases on its own behalf as a private party such as when the government is the victim of a breach of contract. The point is that the government cannot bring a private-law case on behalf of a private individual as it does, in effect, in many criminal cases. The participation of a legal-aid lawyer in a private action does not constitute government initiative analogous to a criminal prosecution, since legal aid implies no partisanship on the part of the state itself.

15. In fact, mobilization provides a useful way to distinguish between public law and private law, although it corresponds only roughly to traditional usage. We can define public law as law that the state is authorized to enforce upon its own initiative, private law as law in which the initiative is granted exclusively to private citizens. By this definition a legal process formally is part of public law whether or not in practice the state acts upon the authority vested in it.

This distinction is very close to one advanced by A.R. Radcliffe-Brown: "In the law of private delicts a dispute between persons or groups of persons is brought before the judicial tribunal for settlement; in the law of public delicts the central authority itself and on its own initiative takes action

"against an offender." Structure and Function in Primitive Society 219 (1965).

16. A description is provided by Harold J. Berman, Justice in the U.S.S.R.: An Interpretation of Soviet Law 239 (rev. ed. 1963).

17. See generally A.W. Lintott, Violence in Republican Rome (1968).

18. See Albert J. Reiss, Jr., & David J. Bordua, Environment and Organization: A Perspective on the Police, in The Police: Six Sociological Essays 25, 29-32 (D.J. Bordua ed. 1967).

19. See Donald J. Black, The Social Organization of Arrest, supra note 3, at 1090-92.

20. Morroe Berger, Equality by Statute: The Revolution in Civil Rights (rev. ed. 1967); Leon H. Mayhew, supra note 11; Maureen Mileski, Policing Slum Landlords: An Observation Study of Administrative Control, 1971, at 60-65 (unpublished dissertation in Dep't of Sociology, Yale Univ.).

21. M.W. Beresford, The Common Informer, the Penal Statutes and Economic Regulation, 10 Econ. Hist. Rev. 221 (2d ser. 1957).

22. Selden D. Bacon, The Early Development of American Municipal Police: A Study of the Evolution of Formal Controls in a Changing Society, 1939 (unpublished dissertation in Dep't of Pol. Sci., Yale Univ.).

23. W. Allyn Rickett, Voluntary Surrender and Confession

in Chinese Law: The Problem of Continuity, 30 J. Asian Studies 797 (1971).

24. Perhaps it is apparent that my concept of illegality is considerably broader than an American lawyer might deem proper. I treat an act as illegal if it falls within a class of acts for which there is a probability of official sanction, resistance, or redress after the fact of detection. Put another way, an act is illegal if it is vulnerable to legal action. A concept of this kind is required if a breach of private law not responded to as such is to be understood as illegality. By contrast, the American lawyer tends to view a breach of private law as illegality only if a complaint is made or if it is defined as such in a court of law. From this legalistic view it is impossible to consider the mobilization of private law as a problem for investigation, since where there is no mobilization there is by definition no illegality. From a sociological standpoint, however, unenforced private law is perfectly analogous to unenforced public law; in both cases the mobilization of law is problematic.

25. For a critique of studies on legal effectiveness, see Donald J. Black, *The Boundaries of Legal Sociology*, supra note 5.

26. See Emile Durkheim, *The Division of Labor in Society* 221-22 (George Simpson transl. 1964).

27. See Arthur L. Stinchcombe, *Institutions of Privacy in the Determination of Police Administrative Practice*, 69 Am. J. Soc. 150 (1963).

28. E.g., Gregory J. Massell, Law as an Instrument of Revolutionary Change in a Traditional Milieu: the Case of Soviet Central Asia, 2 L. & Soc. Rev. 179 (1968).

29. See Talcott Parsons, A Sociologist Looks at the Legal Profession, in Essays in Sociological Theory 370 (rev. ed. 1964).

30. See U.S. President's Comm'n on Law Enforcement & Admin. of Justice, Crime and Its Impact -- An Assessment 17-19 (Task Force Report, 1967).

31. Barbara Yngvesson, Decision-Making and Dispute Settlement in a Swedish Fishing Village: An Ethnography of Law, 1970 (unpublished dissertation in Dep't of Anthropology, Univ. of Calif., Berkeley).

32. P.H. Gulliver, supra note 12, at 204, 263-66; Takeyoshi Kawashima, supra note 12.

33. Lisa Redfield Peattie, The View from the Barrio 57-59 (1968).

34. Max Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia 18-19 (rev. ed. 1967).

35. See Donald J. Black, Production of Crime Rates, supra note 3, at 740-42; The Social Organization of Arrest, supra note 3, at 1107-08.

36. Stewart Macaulay, supra note 12.

37. As noted earlier, I make no effort here to survey the social factors that predict the mobilization of law. My discussion of relational distance above is intended only to allude

to this issue and to illustrate how it may be approached with general theory. A more comprehensive treatment would include, for example: the seriousness of the dispute or illegality, measured by the nature of the sanction or restitution or by its effects upon the on-going social order; the organization and integration of the community context; the resources required for the mobilization of law; the social status of the parties; the cultural context, including the degree of normative integration between the parties; and the organization of the dispute-settlement process itself, whether adversary or conciliatory, formal or informal. The concern of this essay--the organization of mobilization--also relates to the probability of mobilization.

38. Leon H. Mayhew, supra note 11, at 159.

39. Egon Bittner & Sheldon L. Messinger, Some Reflections on the Police and "Professional Crime" in West City, Sept. 1966 (unpublished paper, Center for the Study of Law & Society, Univ. of Calif., Berkeley).

40. Maureen Mileski, supra note 20.

41. I make no effort in this essay to review the extra-governmental controls operating in response to illegal behavior. Some pattern-oriented control of private-law violations, for instance, occurs through credit bureaus and informal reputational networks and blacklisting systems.

42. This is not to deny that a legal agency can respond to pressures built up in a reactive mobilization process. For

instance, a high rate of purse-snatching complaints may lead the police to institute patrol or undercover operations to deal more effectively with the problem. In this way, the case-load of a citizen-based mobilization system can be an important source of intelligence to legal administrators and policy-makers.

43. Laura Nader & Barbara Yngvesson, *On Studying the Ethnography of Law and Its Consequences*, in *Handbook of Social and Cultural Anthropology* (John J. Honigmann ed. forthcoming).

44. David M. Trubek, *Law, Planning, and Economic Development*, 1971, at 65-70 (unpublished paper, Yale Law School).

45. This claim has also been made for the common law system in general, since, like an economic market, it is highly decentralized, competitive, largely private, and generates strong pressures for efficient performance among individuals. Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal Studies*, 29, 49 (1972). Posner also notes that the mobilization of negligence law is literally an economic market system:

The motive force of the system is supplied by the economic self-interest of the participants in accidents. If the victim of an accident has a colorable legal claim to damages, it pays him to take steps to investigate the circumstances surrounding the accident; if the investigation suggests liability, to submit a claim to the party who injured him or the party's insurance company; if an amicable settlement cannot be

reached, to press his claim in a lawsuit, if necessary to the highest appellate level. The other party has a similar incentive to discover the circumstances of the accident, to attempt a reasonable settlement, and, failing that, to defend the action in court. By creating economic incentives for private individuals and firms to investigate accidents and bring them to the attention of the courts, the system enables society to dispense with the elaborate governmental apparatus that would be necessary for gathering information about the extent and causes of accidents had the parties no incentive to report and investigate them exhaustively. Supra, at 48.

46. It may be useful to distinguish between mere advertising and active solicitation, although both are ethical breaches in the United States. By mere advertising I mean a process by which the legal consumer is simply informed of available legal services, while active soliciting involves an attempt to persuade an already informed consumer. Mere advertising would appear consistent with an entrepreneurial legal process since, unlike solicitation, it does not fly in the face of the assumptions of voluntariness and rationality in the entrepreneurial decision-making model. But then it is also arguable that even active solicitation does not disturb assumptions of voluntariness and ration-

ality. Honest advertising and solicitation of all kinds are usually understood as consistent with a market economy.

47. David C. Buxbaum, Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895, 30 J. Asian Studies 255, 274-75 (1971).

48. George Lee Haskins, Law and Authority in Early Massachusetts: A Study in Tradition and Design 212-13 (1960).

49. While I am emphasizing here the role of informal norms against the mobilization of law, it might be noted that one of the hallmarks of social oppression is a formal incapacity to mobilize the law. For instance, in early medieval England a woman could not bring a felony complaint unless the crime of which she complained was violence to her own person or the slaughter of her husband. Women were excluded from other aspects of the legal process as well, such as jury service, with the result at that time that they were largely unable to give evidence. Frederick Pollock & Frederic William Maitland, 1 The History of English Law: Before the Time of Edward I 484-85 (2d ed. 1968).

50. See Allan Silver, The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police, and Riot, in The Police: Six Sociological Essays 1 (David J. Bordua ed. 1967).

51. See David H. Bayley, The Police and Political Change in Comparative Perspective, 6 L. & Soc. Rev. 91 (1971).

52. A.W. Lintott, supra note 17, at 102, 106.

53. Edward H. Levi, *An Introduction to Legal Reasoning* (1948).

54. See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

55. Supra note 4, at 34-37.

56. See Stanley Diamond, *The Rule of Law Versus the Order of Custom*, in *The Rule of Law* 115 (Robert Paul Wolff ed. 1971).

57. For a comment on this pattern in police work, see Donald J. Black, *The Social Organization of Arrest*, supra note 3, at 1105.

58. Proactive control sometimes emerges under conditions of moral diversity in a population and serves to integrate the larger system. The same may be said of law itself. See M. Fortes and E.E. Evans-Pritchard, *Introduction*, in *African Political Systems* 9 (M. Fortes and E.E. Evans-Pritchard eds. 1940). Proactive law seems particularly likely to arise when moral diversity in a population includes a high degree of normative conflict among the diverse elements, as we see, for instance, among tribal and ethnic groups in new nations. We might go further and suggest that normative conflict is an important predictor of authoritarian law in general.

59. Donald J. Black, *Production of Crime Rates*, supra note 3, at 739.

60. Just as it organizes the possibility of discrimination and its control, a system of mobilization organizes the

possibility of legal corruption. Like discrimination, we discover corruption where it is easier to control, namely, in proactive systems of law enforcement. In police work, for example, we hear about corruption in vice control and traffic control rather than at the level of the citizen complainant, where it is probably most frequent.

61. See, e.g., Bernard S. Cohn, Some Notes on Law and Change in North India, 8 Econ. Devel. & Cultural Change 79 (1959).

62. E.g., Daniel S. Lev, Judicial Institutions and Legal Change in Indonesia, 1971, at 64 (unpublished paper, Dep't of Pol. Sci., Univ. of Washington).

63. E.g., Maureen Mileski, supra note 20, at 66-68.

64. The diverse input of requests made upon reactive legal processes can teach much about the internal dynamics of a community. We learn about aspects of male-female interaction, for instance, by looking at who brings whom to court. Laura Nader, An Analysis of Zapotec Law Cases, 3 Ethnology 404 (1964). Likewise, the fact that citizens implicate the police in so many non-criminal disputes suggests that American urban life lacks the battery of extra-legal mechanisms of dispute settlement often seen among preliterate peoples. The police find themselves playing conciliatory as well as adversary roles in dispute settlement. These roles are sometimes wholly differentiated in tribal societies. See, e.g., James L. Gibbs, Jr., The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes, 33 Africa

1 (1963).

Like reactive control, systems of proactive mobilization can be put to a variety of uses. These may be public or private. A proactive enforcement campaign, for example, can augment the government treasury through the collection of fines, such as traffic fines, or it can advance or subvert the interests of political figures or political organizations, as is sometimes seen in vice crackdowns and corruption scandals.

65. E.g., Oliver Wendell Holmes, Jr., *The Common Law* (1881); Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921), and *The Growth of the Law* (1924); Edward H. Levi, supra note 53.

66. E.g., Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (1963); Leon H. Mayhew, supra note 11; Edwin M. Lemert, *Social Action and Legal Change: Revolution within the Juvenile Court* (1970).

67. E.g., Max Weber, *Max Weber on Law in Economy and Society* (Max Rheinstein ed., Edward Shils & M. Rheinstein transl. 1954); Richard D. Schwartz & James C. Miller, *Legal Evolution and Societal Complexity*, 70 *Am. J. Soc.* 159 (1964); Sally Falk Moore, *Politics, Procedures, and Norms in Changing Chagga Law*, 40 *Africa* 321 (1970).

68. Emile Durkheim, supra note 26.

69. I make no assumption that citizens will see their own problems as those problems are defined by law, nor that they will necessarily be willing or able to act upon what they experience

as their problems. When they do act upon their grievances, however, the reactive system can listen in a way the proactive system cannot.

70. It has been suggested that democratic organization in general--of which the reactive system is an instance--is especially suited to accommodate social change. Warren G. Bennis & Philip E. Slater, *The Temporary Society* 4 (1968).

71. Philip Selznick, *Law, Society, and Industrial Justice*, supra note 5, at 228.

72. See Laura Nader & Barbara Yngvesson, supra note 43, at 46-48.

73. See Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965).

74. Roscoe Pound, *Social Control Through Law* (1942).

75. See Stanley Diamond, supra note 56, at 124.

76. E.g., Rafael Karsten, *Blood Revenge, War, and Victory Feasts Among the Jibaro Indians of Eastern Ecuador* 1-32 (1923); E.E. Evans-Pritchard, *The Nuer: A Description of the Modes of Livelihood and Political Institutions of a Nilotic People* 150-91 (1940).

77. A pattern common among many Indian tribes of North America; see Robert H. Lowie, *Some Aspects of Political Organization Among the American Aborigines*, 78 *J. Royal Anthro. Inst.* li (1948).

78. See Erving Goffman, *Embarrassment and Social Organ-*

ization, 62 Am. J. Soc. 264 (1956).

79. E.g., Jesse Berman, The Cuban Popular Tribunals, 69 Col. Univ. L. Rev. 1317 (1969).

80. E.g., Maureen Mileski, Courtroom Encounters: An Observation Study of a Lower Criminal Court, 5 L. & Soc. Rev. 473 (1971).

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