Vanderbilt Law Review

Volume 17
Issue 1 *Issue 1 - December 1963*

Article 6

12-1963

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When the architects of this program asked me to discuss non-legal social controls, I assume they had in mind the need for greater humility within the legal profession. So proud an occasion as this calls for sober reflection on the limits of the distinctively legal—on the contingent, derivative, and partial place of formal adjudication and control within the larger ordering of human society.

I have no objection to communicating such a perspective, thereby adding an appropriate note of piety to these proceedings. Nevertheless, I think it may be more important for us to consider some of the great social changes that are occurring in modern society, how they affect the balance between legal and non-legal controls, and what problems this changing balance poses for the legal order. The humility we ask of lawyers may be all too welcome to them. The real message may be a summons to responsibility and joint effort, not a suggestion that lawyers retreat to what they know best.

My assigned topic covers a very large part of what sociology (or more broadly, behavioral science) is about. For we are interested in all the ways social order is created and sustained. We study control in small groups and large ones; we study gross mechanisms of control and subtle ones; we see in every human setting the forces that encourage and enforce responsible conduct. Of course, we also give much attention to the breakdown of social control and to the emergence of what is, from the standpoint of the group or situation, irresponsible or "deviant" behavior.

Paralleling every major legal concern is a much larger and more finely textured system of codes and relationships. Interests of personality are recognized and protected in many areas of the law, yet how little we really depend on law for the day-by-day comfort we gain from orderly arrangements that save us from embarrassment, unwanted intrusions, or worse. The law of contracts facilitates and protects concerted activity, but the bonds of organization rest far more on practical and informal reciprocity and interdependence than they do on the availability of formal sanctions. Society is still held together by self-help and not by the intervention of legal agencies.

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Claims of right are asserted, adjudicated, and enforced for the most part outside the formal legal system.

Having said this much, I must hasten to add that there is considerable variation, at different times and places, and in different sectors of society and law, in the effectiveness of self-help and in reliance on legal controls. It is here, at the point of variation, that real inquiry begins.

I.

The evolution of modern society is marked by two master trends that have brought with them decisive changes in social control and in the role of law. The first of these trends is often referred to as the drift toward mass society. The second and closely related master trend is the increasing bureaucratization and centralization of industrial society.

There is a cruel contrast in these twin lines of evolution. In a mass society there is more freedom, more participation, more mobility, more equality. On the other hand, the bureaucratic trend creates a world of complex organizations, of more formalized controls, of centralized power, of individual helplessness and dependency. Yet both trends have the same source—the creation of an industrial society that imposes a remorseless logic on every human community that comes within its sway.

In contemporary social science there is much interest in studying the effects of industrialization on the non-Western world. These societies, rapidly emerging out of a preindustrial past, are breaking the bonds of tradition, family, and locality. Reaching out for modern technology and its fruits, they are indeed experiencing great strains. To a certain extent, the history of industrialization in Europe and the United States is being recapitulated. All this is of great importance and eminently worth pursuing. On the other hand, I venture to suggest that we have not yet fully absorbed the significance for *our own* institutions of the industrial and urban revolution.

For a long time, our society has had much to cushion it against the full impact of modernization. Until quite recently we continued to have a fairly strong rural and small-town counterweight. Our large immigrant population had its own resources of social organization. Political, economic, and cultural diversity set limits to change and helped give men roots. The inertia of tradition could sustain for generations a sense of identity and of moral continuity.

The loosening of social bonds, and the concomitant weakening of non-legal controls, is manifest in many ways. The most important, of course, is the decline of kinship as the major unit of social organization and therefore of social control. That the functions of the family

have changed in recent history is a familiar sociological tale. What was once an enterprise and a nuclear community, a unit of production and an indispensable alliance against a forbidding external world, has now become a more specialized and limited institution. What it can do for its members, and what it may ask of them, have both been radically curtailed.

This is not to say that the family is unimportant. Of course it is still the chief source of personal gratification, the main agency for socializing the young, the true staff of life for most men and women. But the family has become a significantly weaker reed, both for the individual and for society. After all, we are not speaking here of complete social breakdown but of shifts that markedly aggravate our problems of social control. We still ask much of the family, but we have not fully recognized that its resources as an institution, its tools for doing the job, have become more and more limited.

As I see it, we are not dealing primarily with moral atrophy, the corrosion of personal values. If that exists, it is a symptom and not a cause. The main reasons for the waning role of the family in social control are practical and stem from larger changes in our economic life. The truth is that discipline in the family is less effective today because its practical significance in the routines of life has sharply declined. In an important but limited sense, it is no longer needed. When the family is really a going concern, and the activities of its members must be coordinated, if not for production then at least as a condition of survival, the need for discipline is apparent. Authority makes sense to the individual because it is justified by urgent necessity. Moreover, the family member is heavily dependent on this small social world and its resources. Given such a setting, it is easy for appropriate moral sentiments to be created and sustained.

Let us remember that for the most part society must rely on the willing acceptance of discipline. Without consent, discipline may be enforced, but that is always less effective and has heavy costs. Now what is the foundation of this consent? It may be that some societies have won consent to authority by creating an irresistible cake of custom, a communicated sense of what is right and wrong, respectable and disreputable. I suspect that this sort of thing is greatly exaggerated. The natural habitat of the human being is a world of opportunity and constraint, of alternatives set by the practical exigencies of making a living and winning self-esteem. Customs are enforced, not abstractly and mechanically, but in the course of giving guidance to activities that make sense in their own terms. When the activities no longer make sense, we can expect social codes and symbols to attenuate and lose their force.

That the adolescent needs discipline in his own psychic interests I do not doubt. That society would be better off if the family could exercise more effective control may also be true. But such a function cannot be simply "assigned" to the family. It will not be performed at the desired levels if it does not flow naturally out of the requirements of everyday life.

The weakening of the family as an agency of social control is only a phase, although a major one, of the broader trend toward a looser, less disciplined social order. Thus another feature of our society is the steady decline of *fixed status* as a vehicle of social control. For today's Americans, of all groups and classes, status-seeking is a sign of a society on the move. It is a good guess that many fewer people today than two generations ago "know their place" and limit their actions and their aspirations accordingly. We sometimes forget, I think, how much even our own society has depended on the proprieties of status, on the giving and receiving of deference. Perhaps most important, we have counted on a large amount of voluntary segregation, so that the more privileged and the better integrated member of the community might live out his respectable life without being much affected by his more vulgar fellow citizens.

This comfortable scheme of things already seems unreal. It will soon be gone forever. The dispossessed are knocking at the door. They are making their presence known, refusing to accept the rightness of middle-class values, appealing to a broader sense of justice. The revolution of rising expectations is far from restricted to the underdeveloped countries. On the contrary, it is no less important right here.

One way of observing the breakdown of group barriers is to take note of the spread of working-class patterns of dress and leisure-time activity among middle-class children. In our open, fluid society, styles do not flow only from the top down. They also move up from below. The result is a cultural diffusion that adds little to the stability of community life. We have created a society that makes these things possible and even inevitable. This we have done for good and sufficient reasons, but we must be ready to pay the price.

It seems obvious to me that we are in no position to deplore this waning of non-legal controls. Dedicated as we are to personal autonomy and well-being, we cannot very well yearn for the submergence of the individual in family or community. We expect and value his self-assertion; we shall honor in due course his new claims of right. Committed as we are to political freedom and legal equality, we cannot fail to accept the social transformations born in part of those

ideals. Perhaps it is not logically necessary that political freedom be translated into social opportunity, or that legal equality produce a social leveling. But our political and legal concepts have, for better or worse, been hooked on to large-scale industry, the mass market, and mass communications. Together they create a revolutionary thrust that loosens and tears the social fabric.

The changes to which I have referred must inevitably increase the burdens of our legal institutions. If society cannot depend on an informal, autonomous, self-regulating, person-centered order for the maintenance of social control, it will turn to more explicitly organized agencies and to more powerful instruments of surveillance and regulation. Not only the police, but the schools, social work agencies, and perhaps other institutions, will be called upon to serve the needs of social control.

Traditionally, the formal agencies of control have been relatively weak. Their resources were limited, their techniques crude. Their effect on the life of the community was softened by a recognition of their own dependence on the people around them and by the continuity of the official and the ordinary citizen. The cop on the beat belonged to the community and he manifested his membership in dress and demeanor. Are we not already describing things remembered, a fading era?

The combination of social demand and technical competence will, in the not too distant future, create far more effective agencies of legal control. They will be more efficient and more honest, more isolated from the community and less dependent on it. They will be expert monitors of the round of life and will naturally tend to move from partial to total surveillance. Perhaps most important, the new agencies will have absorbed a prophylactic orientation, a doctrine of prevention to supplement repression.

When coercive authority enlarges its competence and adopts new, more positive goals, we have an obligation to sit up and take notice. The chief barrier to unbearable despotism has always been the limited competence of the ruler. It is one thing to have the ideology of autocracy, and its trappings; it is another to have the means to put it into practice. Thirty years ago Charles Merriam could write of the "poverty of power"—the "wide gap between the apparent omnipotence of authority and the actual operation of power, between the iron fist of force and its incidence upon human flesh and feeling."[1] This is still very largely true. But is it not the deeper lesson of our century that effective, total power *can* be mustered and sustained, if not

1. MERRIAM, POLITICAL POWER 156 (1934).

forever, then at least long enough to exact a memorable toll in suffering and degradation?

When an institution has low capabilities, it tends to conserve its strength, to be passive rather than active. It waits for things to happen, to make themselves visible. Increase its capabilities and a subtle transformation may occur. Now the agency can exercise more initiative and reach out to deal with potential trouble. Such a prospect raises very real questions regarding the security of citizens who occasionally run afoul of the law.

As agencies of control become more rational and efficient, we may well hope for more searching study of how our institutions actually operate and what values lie half-hidden in accustomed practice, in administrative use and wont, in the traditional way of doing things. For example, how much do we depend on the policeman's role as a kind of magistrate, a dispenser of rough and ready justice as he exercises discretion in the streets? What will happen to this role in the motorized and mechanized elite corps of the future?

The ideal of equal justice seems to require that all offenders be treated alike. Yet there is evidence that the police routinely attempt to distinguish, especially among juveniles, the apparently casual offender from the committed delinquent. Lawyers and other social scientists may see in this a violation of even-handed justice. And indeed this is so, especially where racial and class bias are operative. But when confronted with these facts I am moved to ask: If the law is administered with prudence, does this not require some differential treatment at the first point of contact and not only after judgment, when ultimate disposition is made? Do we need or want agencies of control so efficient and so impartial that every actual offender has an equal chance of being known and processed? In considering this point we should bear in mind that offenses of all kinds are probably very much more numerous in fact than in record.

As you can see, I am concerned that we do not respond too eagerly and too well to the apparent need for more effective mechanisms of social control. In the administration of justice, if anywhere, we need to guard human values and forestall the creation of mindless machines for handling cases according to set routines. Here vigilance consists in careful study of actual operations so that we may know what will be lost or gained when administrative changes are proposed.

I have emphasized the dangers of competence, particularly in the technology of surveillance. Other problems arise, however, because of institutional *in*competence. I refer to the quest for rehabilitation, for transforming punishment into treatment, for a mode of organiza-

tion and decision that will permit the courts and other agencies to act in the offender's own interests.

The most remarkable feature of our criminal law is indeed this effort to seek new ways of doing justice. The civilized impulse manifest here does honor to us all. And yet, some doubts are raised. If a man is to be rehabilitated, he must be accessible. What are the limits of this access, both physical and psychological? If injustice occurs, what are the principles to which appeal can be made? Are the institutions within which this work goes on really capable of doing more than providing, at best, humane custody? If these institutions cannot provide treatment, yet purport to do so, what are the actual rules according to which time is served? Are these rules subject to criticism and control?

I do not mean to throw cold water on the attempts being made, notably in my own state, to transform the administration of corrections. In the long run there is hope for it. In the shorter run, there are limitations. Among these limits are the administrative resources, including appropriate knowledge, available for carrying out the intent of the law. The more we ask of the law, from the standpoint of creative change, the more important is this administrative base. And the problem is exacerbated when the legislature offers, in response to public sentiment, a murky mixture of incompatible demands.

Perhaps the most important issue raised by these developments is the violation of personal privacy. It is one of the ironies of our age that men of good will are concerned about privacy but, at the same time, support the most ruthless invasions of it. When official control is combined with sensitivity to personality, the outcome may be greater protection of basic human rights, including the right to be secure in one's private fears and fantasies. Another possibility, however, is the kind of intrusive probing and exposure that is incompatible with personal dignity.

The answer to this cannot be a withdrawal from or rejection of the "treatment" perspective. With the weakening of more intimate settings, and the persistence, nevertheless, of humane ideals, society will inevitably assume responsibility, through more formal agencies, for personal help and guidance. The question is, have we worked out the legal consequences of this uneasy and conceivably virulent combination of coercive power and moral persuasion?

Much of what I have said thus far adds up to a plea for more intensive study, by lawyers and other social scientists, of the organizational aspects of legal procedure. The legal order is more than a set of rules and principles. It is a congeries of administrative agencies whose ways of working must decisively affect how the law actually

impinges on the citizen and what its contribution is to the broader life of the community. Presumption of innocence is no empty slogan in our system, yet we have reason to believe that in actual operation there is an administrative presumption of guilt. I do not say that this, if true, is shocking or deplorable. It may be, in the end, perfectly compatible with the legal assumption properly understood. Yet this is the kind of thing that needs to be opened up for examination, if only because there is always a serious possibility that administrative exigencies will subvert a legal ideal.

For it is still true that legal policy, like any other, needs effective social supports. The more sensitive the policy, the more readily subject it is to distortion, and the more urgent are these supports. Some laws, as we know, are self-administering, because they stimulate and channel private initiative. Historically our system has depended on that, but the more we ask of the law the more often shall we find that this private initiative is lacking or ineffective. A recent study of National Labor Relations Board cases involving union members who lost their jobs because of union discrimination touches on this problem.[2] The workers were interviewed and a full story of the context of the case, including what happened after the NLRB decision, was obtained. The results are illuminating. When the worker is a lone individual who has run afoul of union rules or otherwise given offense, the NLRB proceeding may be better than nothing, but on the whole it is quite ineffective. The worker has a hard time pursuing his case and faces an even rougher time if he is rehired. The law, as administered, offers little to the isolated individual confronted with great organizational power. On the other hand, in those cases where the member belonged to a faction, and thus had group support both during the litigation and after it, he fared rather well. In that setting, as in many others, a non-legal, autonomous order lends its strength to the law.

For many purposes, we are not going to be able to depend on this prior social organization, this force in being, this socially given capability of implementing legal norms. The legal order of the future will strive to develop the conditions of its own effectiveness. This suggests, again, more emphasis on the organizational side of things. In addition to new, more or less distinctively legal institutions, such as the juvenile court and the public defender, we should expect that other parts of government, and some private associations as well, will play a part in adding to the resources of the legal order. The coordination of these activities and agencies, within the framework of a

2. Manuscript in preparation by Bernard Samoff. The study was sponsored by the Trade Union Project, Fund for the Republic.

unitary legal system, will stretch the minds and perhaps try the souls of legal analysts.

For example, how deep is our commitment to the adversary principle in the administration of justice? Is that principle fully compatible with new modes of adjudication and control? How much variation in the adversary idea is acceptable? How far should it be built into administrative structure and process? It seems clear that this hallowed if sometimes embattled procedural canon needs a great deal more study to assess its relevance for the legal system of the future.

Another problem is the emergence of new bodies of law, founded in dimly understood principles, confused by the *ad hoc* character of our legislation and case law. Have we been witnesses to the development of a law of welfare whose concepts and doctrines, including implications for procedure, need explication? What is the relation between this emergent branch of law, if it is one, to the rest of the system, especially the law of crimes? Is contemporary legal scholarship prepared to do the job of cutting across old categories and creating new ones? These things are suggested, not by an abstract concern for doctrinal clarity or symmetry, but by the compelling pressures of the living law, the law in action.

II.

Earlier I suggested that we must accept a secular trend toward the waning of non-legal social control. To the sociologist, this is a phase of the drift toward mass society. I have also suggested that, at the same time, legal agencies of control will have increased responsibilities thrust upon them.

There is another and rather different part of this picture to which I should like to call attention. I refer to the growth of the large-scale organization as the representative institution of modern life. In industry, government, education, medicine, philanthropy—you name it!—the principle of rational coordination, the bureaucratic principle, holds sway. Self-perpetuating leadership and centralized authority are fixed stars in our firmament. In these areas there is no waning of social control. Quite the contrary. But is it *non-legal* control? That question might provoke a prolonged debate.[3]

In an important sense, we are of course speaking of the private sector of economy and society. On the other hand, many observers have noted a blurring of the public and the private. A striking

3. The following comments draw upon my paper, "Private Government and the Corporate Conscience," prepared for a Symposium on Business Policy at the Graduate School of Business Administration, Harvard University, April 1963.

feature of this development is the *convergence* of governmental and non-governmental forms of organization and modes of action. A great deal of government activity is similar to that carried on by private groups. Government today includes many activities and agencies that have little to do with the distinctive functions of the sovereign and to which, therefore, the traditional logic of public law may not properly apply. At the same time, discussions of the modern corporation and trade union have increasingly stressed their "quasi-public" status. It is asked quite seriously whether such institutions are really so different from large public enterprises or service agencies.

Furthermore, and perhaps more important, a kind of legality seems to develop within these large enterprises. In both public and private bureaucracies, authority and rule-making tend to take on the impersonality, the objectivity, and the rationality of a legal system. The elaboration of formal rules creates expectations regarding the consistency and fairness of official action. In modern management there is an inner dynamic tending toward a progressive reduction in the arbitrariness of decision-making. In ever-wider areas of administration there is a demand that decisions be made in the light of general principles.

We are coming to see the private association as a group organized for defined and public ends—public, that is, from the standpoint of the group itself rather than the general community. Known and acknowledged purposes provide the basis of adherence and discipline. Given such ends, rational criteria may be developed to assess the means used to attain them. Thus membership in an association is a way of participating in a system of rationally coordinated activities. Objective and impersonal standards, determined by the requirements of that system, may be invoked for the assessment and control of organizational members. The members in turn may claim the protection of those same rational criteria.

It is this commitment of professional management to an atmosphere of legality—a commitment derived more from the necessities of modern enterprise than from good will or ideology—that underlies the widespread acceptance of private bigness as compatible with freedom. In our society the fear of corporate power has eased considerably. Criticism is muted in temper, reformist in intent. I believe that this is mainly due to the growing conviction that the large corporation is not necessarily a "rough beast." It is obscurely understood that the enterprise is enmeshed in circumstances that brake its power and create, indeed, a corporate conscience.

What and where is the corporate conscience? The corporate conscience is the internally accepted system of fair dealing, of respect

for personal rights, of authority constituted and justified by rational necessity in the light of public ends. In a familiar phrase, it is corporate "due process."

This emerging ethic has its chief source in the practical necessities of industrial management. We see a convergence of three major tendencies in the institutional history of the firm:

(1) The growing importance of impersonal procedures in the conduct of the enterprise—something I have already noted;

(2) the recognition of "human relations" as a critical factor in management, especially the significance of respect and status-protection for employee morale; and

(3) the widespread adaptation of management to the power of trade unionism and the creation thereby of systematic procedures for the formulation and redress of grievances.

To say that a corporate conscience exists is not to say that we can rely on it. In questions of power and justice, we do not rely upon the individual conscience either. Our legal and political system necessarily postulates the existence of evil, especially the danger that some merely human form, believing itself free of error, will attempt to match its claimed perfection with unlimited power. Because of that risk, we cannot rely upon good will, personal or institutional.

We should distinguish, however, what we can rely upon from what we can aspire to. The ethic of rational coordination provides the foundation for new expectations, new claims of right, new legal controls. The existence of internal order within the enterprise validates external control and, at the same time, makes it feasible. It is just because fairness is already institutionalized to a large extent in the private sphere that an appeal to the larger political community, to the legal order, is warranted. The firmer the sense of legitimate expectation, the more likely it is that there will be an appeal beyond the immediate setting. Moreover, if a quasi-legal system of fair dealing already exists, there is some assurance that the routine case will be handled satisfactorily. Therefore, enforcement of exceptional claims for redress of grievances becomes feasible.

I take the view that, in the evolving law of private associations, we are responding to opportunities rather than resisting oppression. I do not say that private power is not abused, but the really important fact is that we now have the possibility, a product of modern history, of extending the ideals of due process to private associations. This might always have been a worthy objective, but the development of an inner order within the modern enterprise brings that objective into close accord with what historical reality makes possible.

These reflections suggest that we take a long, leisurely look at the so-called "limits of effective legal action." Can we assume fixed legal resources? What if changing institutions, both inside and outside the legal sphere, offer new opportunities for enriching the sense of justice? The answer may require a radical revision of that hard-nosed legal philosophy which celebrates the settlement of disputes and the curbing of irresponsible conduct. Today the law is summoned to fulfill aspirations, not merely to meet the minimal needs of social order. The business of taking that truth seriously may occupy us for some years to come.