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HOW DOES LAW MATTER?

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A RESOURCE THEORY OF THE CRIMINAL LAW: EXPLORING WHEN IT MATTERS

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RICHARD LEMPERT

1. INTRODUCTION

This paper might look very different had I been asked a sensible question. Instead, I was told that the focus of the program for which this paper was originally prepared was "Does law matter?" and that my particular assignment was to discuss the question of whether the criminal law mattered. Of course criminal law matters. One hardly need be a committed functionalist to conclude from the dense net of criminal laws that envelop modern societies that criminal law must matter or else we would not have so much of it or, conversely, because we have so much of it, it must matter. And if this abstract exercise were not satisfying, one could go to any prison and ask the men or women therein whether the criminal law mattered. They would tell you it did; if it didn't they would not be forfeiting years of their lives. Moreover, there is a long tradition of research on the deterrent and other preventive functions of the criminal law (Lempert 1981–82; Gibbs 1975). The evidence, ranging from Andenaes's (1966) anecdotal evidence of a crime wave during a Montreal police strike to the most sophisticated modern quantitative research (e.g., Loftin, McDowall, and Wiersma 1992) is that people's actions are sometimes ordered at least in part by fear of criminal sanctions, and it may be that other aspects of the criminal law, such as its presumed educative effects, also affect behavior.

The situation is, to be sure, somewhat more complicated than this. Certainty of punishment appears far more important in ordering behavior than

differences in the severity of the punishment that violators receive (Gibbs 1975; Lempert 1981–82). Thus, what matters most is that some sort of police force catch those who violate legal norms. The legally specified penalties and those actually inflicted appear less important; and marginal differences in penalty severity, such as the symbolically important difference between the death penalty and life imprisonment, may not matter at all (Lempert 1981).

Indeed, it may not be fear of the law's penalty which mediates the criminal law's impact. In many cases, particularly involving minor offenses, the implications for personal relations of being caught—including the anticipated embarrassment—may account for most of law's impact. Thus, various researchers have reported that for minor crimes like shoplifting or smoking marijuana, anticipated peer sanctions are more important than legal sanctions as determinants of behavior (Anderson, Chiricos, and Waldo 1977; Burkett and Jensen 1975; Saltzman, Waldo, and Paternoster 1983). Even in the case of serious felonies which can result in long sentences, the law's efficacy may depend more on the threat of breaking up relationships or destroying them than it does on the actual apprehension of violators or the sentences they receive (Lieb, Zurcher, and Ekland-Olson 1984). Moreover, deterrence is a subjective phenomenon. Lon Fuller (1964), the eminent jurisprudent, was more than philosophically right: a law that is not communicated is no law at all. Indeed, how a law is communicated and the degree of threat inherent in the communication may be more important in ordering behavior than the law's specific content. Thus Ross (1982), who investigated crackdowns on drunk driving throughout the world, consistently found marked deterrent effects in the early days of highly publicized crackdowns, but, except in rare instances, the effects did not endure the dissipation of publicity over time, even when neither the law nor enforcement patterns reverted to their pre-crackdown patterns (Ross 1982).

These contingencies, while interesting in their own right, do not, however, problematize the fundamental question of whether the criminal law matters. The quick answer, "of course it matters," is still the most obvious and the most obviously correct. Only John Griffiths's (1979) tactic of separating law from power and criminal law from its enforcement seems to problematize the question. But power is not something that can be separated from law. As sociolegal theorists from Weber (1968) through Black (1976) have recognized, power, which is to say the potential for enforcement, is built into law's very definition.

So why was I asked to address the question, "Does (the criminal) law matter?" Why wasn't the answer presupposed and the more sensible question asked, "How does (the criminal) law matter?" The latter was the question I would have to address in any event, but the former question started my thinking. Contemplating it, I was reminded of a comic strip I had seen some years ago. An older man is reflecting on love and marriage. In the strip's first panel, he is recalling the innocence of a youth when, fueled by romantic novels and Hollywood movies, he envisioned marriage as a state of continual

love in which one lives happily ever after. In the second panel, he is recalling his college and early postcollege years. Failed affairs rendered him cynical and he came to believe that there was no such thing as enduring love and that marriage was largely an institution of convenience. In the final panel, he is reflecting on twenty years of married life and says of love in marriage, "I had no idea it was every other day."

If we make our L-word not "love" but "law," and criminal law in particular, we have here (1) a nice metaphor for the mattering of criminal law; and (2) a reason why it was perhaps not so silly to ask the question "Does (the criminal) law matter?" in the first instance. The metaphor is nice in two ways. First, if we look to where we expect to see criminal law mattering, we do not always see effects we associate with law. With respect to the criminal law as a mechanism for ordering behavior, for example, most often when we see behavior ordered in accordance with the criminal law's norms, we give the criminal law's norms no weight whatsoever in explaining perceived compliance. If people are not killing each other, it is not because criminal law proscribes killing but because people know, totally apart from criminal law, that killing is morally wrong and that killers are detested. In subgroups or situations where this is not true, where, for example, killing is a way of proving manhood, murder, despite criminal law, occurs with alarming frequency. Yet occasionally, as is revealed in some of the deterrence studies previously cited, law affects the behavior of enough people so that its measurable aggregate impact is unmistakable.[1] Thus the effects of criminal law on social order are not always obvious, but from time to time they appear. Second, as with marriage and love, the relationship which allows law's effects to appear and disappear continues. Without an enduring marriage, the love that our comic strip character spoke of would not be felt every other day. Similarly, without the ongoing applicability of criminal law and a continually viable enforcement apparatus, the world would not occasionally appear ordered by the application of criminal law.

2. LEGITIMACY

But now I wish to get away from compliance mechanisms like deterrence to discuss other (and in my view more interesting) ways in which criminal law has this "now you see it, now you don't" form of mattering. Criminal law is symbolic. It not only symbolizes a society's abhorrence of certain behavior (Durkheim 1984; Garland 1990), it also and perhaps more powerfully symbolizes the restraints that a society puts on itself and on the government that is its agent in dealing coercively with its members. Indeed, when we speak of the "rule of law," we largely have in mind criminal law and its associated regulatory law, like rules of criminal procedure, that condition the application of criminal sanctions. If criminal law is largely what we have in mind when we speak of the "rule of law," criminal law must matter or at least must appear

to matter, for if criminal law clearly did not matter, the rule of law could not be a dominant motif in ideologies of capitalist democracies.

In ascribing this role to criminal law, I am following the lead of E. P. Thompson (1975), Douglas Hay (1975), Isaac Balbus (1973), and others (e.g., Genovese 1972) who have agreed that the idea of the rule of law, as worked out through the visible play of the criminal justice system, is a central feature in capitalist systems of domination. In their view, fairness—exemplified by occasions on which criminal law honors its own restraints to free less powerful social actors from the threat of social sanctions or respects its own norms in punitively sanctioning powerful social actors—is the central mechanism by which criminal law legitimates an unequal social order.

Thus, Thompson describes the workings of the Black Acts—draconian legislation which punished severely (often capitally) such seemingly small (to modern eyes) violations of the forest order as poaching deer and breaking fish dams. Some people were hung for these crimes; but others, known in the country to be equally guilty, were acquitted because the law's rigorous requirements for proof could not be surmounted. With known poachers going free, even those most oppressed by the acts could not dismiss the legal cloak for oppression as mere window dressing. Hay (1975) recounts the tale of Lord Ferrers, a British nobleman hanged and then dissected like a common criminal for murdering his steward. Not only was his hanging a contemporary subject of story and song; his story was still being told in the countryside half a century after the event. The story's inescapable conclusion is the lesson that no one is above the law, but it seemed to have fascinated most not those who might reasonably have aspired to be above the law but rather the classes who would be subject to law in any event.

Isaac Balbus (1973) describes the fates of many black citizens arrested for race rioting in the 1960s. Low bail was eventually set for most of them, and many cases foundered for want of proof. Again, these are the kinds of outcomes that law formally demands; they are unexpected only to the extent that when class interests are palpable one might expect the rule of law to give way.

This expectation, which accords most closely with an instrumental Marxist worldview, is, however, naive. The point which each of the above authors in his own way makes is that the interests of capitalists as a class are by and large independent of the outcomes of any particular clash of capitalist and noncapitalist or even anticapitalist interests. Capitalist systems of government are more viable and their domination is more complete when the governed are prone to accept the legitimacy of laws the elite has enacted than when subordinate classes view capitalist law simply as an instrument of class warfare. If legitimacy can be enhanced by hanging the occasional nobleman or not hanging a known poacher, the collective interest of the capitalist class is thereby advanced, not threatened.

One might, of course, argue that criminal law need not matter to achieve these ends. All that is needed is for people to think the law is being applied fairly, and to achieve this end widespread false consciousness suffices.

Theoretically, this is true, but the empirical examples belie the argument. The law mattered to those Black Act violators who lived because the state could not muster sufficient proof. It also mattered to Lord Ferrers who was convicted because he had broken the law and was sentenced to death and executed according to the law's strictures. He would not have believed that his execution was mere appearance. More generally, if these arguments about the connection between the rule of law and legitimacy are correct, I do not think that there is any escape from the notion that criminal law as a set of punitive norms and state constraints sometimes matters. The best and sometimes only way to get people to think that law applies is to apply it.

People confronted with examples like those mentioned above are not mistaken if they think law mattered in these instances: surely it did. Their mistake, if they make one, is to think that the clear, visible appearance of law's importance means that law always matters in the same way as it does in its visible appearances. The fact that there are cases in which law matters more than immediate instrumental class interests does not mean that powerful interests cannot in large measure determine when law matters. The Black Acts mattered not only when the law freed some accused but when the law hanged, punished, or deterred others. Thus, both the punitive substantive and restraining procedural aspects of the criminal law seemed to have served class interests. Moreover, prosecutions and convictions under the Black Acts were not uniform over time; rather there was an ebb and flow which may have reflected the felt needs of dominant classes for the protections these laws accorded their interests. This does not mean dominant classes necessarily turn on and off the two sides of criminal law as if they were working a spigot; rather a less than fully conscious sense of urgency may motivate the application of law and the degree to which law matters.

Where the felt need for punitive measures is great, constraints that inhere in proceeding through criminal law may not for a time matter. A good example of this is the application of law in the riots that Balbus discusses. While the riots were ongoing, rioters arrested were often not brought immediately before judges as the law required; or if brought, there was no serious effort made to determine whether charged felonies were really misdemeanors or whether there was enough evidence to constitute probable cause to hold a person. Bail, when it was set, was set far out of proportion to the charged crime. Some days later, when the rioting had ended and it was becoming costly to hold those arrested, proper forms were followed. Bail was set or alleged participants were released on recognizance, felony charges were dropped, and the like.

Even more instructive is the "exception that proves the rule." Judge George Crockett, Jr., a black Recorder's Court judge in Detroit, was almost alone among judges hearing riot cases in Detroit in that he tried to make law matter even while the riot was ongoing. Rioters brought to his court had reasonable bail set based on the charges brought against them even if it meant releasing them to the streets before calm prevailed. For this he was excoriated in the press as if he were acting illegally. In a sense, the press was not too far

from the mark. Judge Crockett was not acting illegally, but he was not acting role-responsibly if his role was to be a social control agent. Arguably, this is a judge's most fundamental role; it is simply one that in democratic societies is latent most of the time, for it ordinarily does not clash with the judge's manifest role as an agent of the rule of law. But in the midst of a riot, the roles can clash.

During the riot, Judge Crockett was a hero only in portions of the black community and at some local law schools, segments of the community that are atypical in the seriousness with which they are likely to take a judge's rule-of-law role. When the riot was safely ended, praise for Crockett grew and his performance during the riot eventually sent him to Congress where he served for many years in the House of Representatives.

Those who continued to excoriate Judge Crockett for his role in the riots were not acting in completely bad faith, even from a rule of law perspective. They wanted to believe that when Crockett freed alleged rioters in the midst of the riot there was some aspect of his manifest role responsibility—his responsibility as an agent of the law—that he was violating. They could not believe that a good faith interpretation of the law not only allowed him to act as he had but in fact required it. The intuition that "there ought to be a law," an intuition that elevated the judge's social control responsibilities above his legal duties, was a strong one. I still recall the Wayne County prosecutor, who in the spring following the Detroit riots visited a seminar I was teaching on riots. When he learned that Judge Crockett had participated a week earlier, he tried to pump me for information about what Judge Crockett had said. He was sure that there was evidence somewhere that the judge had acted in bad faith or from illegal motives. And he assumed that I as a law professor would share this view.

To recapitulate briefly, the criminal law in both its procedural restraining and its substantive punitive aspects typically has an on-again/off-again quality. In order to fulfill a legitimating function, the criminal law must sometimes matter in the sense that the norms inherent in the law's rules are occasionally applied, to the apparent frustration of a dominant class's interests. But the criminal law need not always matter in this way to fill a legitimating function. Indeed, law that matters too much is potentially counterproductive. Too many instances of contravening the dominant class's interests could aggregate to the point where their total cost to the dominant group outweighed the benefits they brought. However, so long as the dominant group largely controls the content of legal norms in the first place, this danger, even in an avowedly liberal legal system, is unlikely to be great.

A second implication of this analysis is that criminal law matters in a different, larger sense, whether or not it matters in the sense that its norms are applied in individual cases. It matters because the on-again/off-again pattern of mattering at the case level lends legitimacy to a system of domination at the macrolevel. This is essentially the argument of the three authors I have focused on most closely in this section. There is a problem with this implication,

however. No one has ever proven that law matters in this larger sense. Although the arguments of such scholars as Thompson, Hays, and Balbus are plausible, and are additionally attractive in their ability to rescue us from a simplistic, empirically untenable instrumental Marxism, there is no proof that the rule of dominant classes is legitimated by the occasional legal victories of the dominated or by instances in which those on top are criminally prosecuted. And it is hard to see how this legitimation hypothesis could be rigorously tested. Although contrary to the views of some skeptics (Hyde 1983), it is clear that legal procedures can have legitimating functions (Thibaut and Walker 1975; Lind and Tyler 1988; Tyler 1984). These functions, however, operate at the case level and largely turn on procedures that allow parties to feel that they have participated in legal decisions affecting them. To this extent, the implementations of the procedural protections that the criminal law grants the accused may affect how criminals regard their treatment by the law (Casper 1972, 1978). The hypothesis that the criminal law matters because it legitimates class domination through the support it renders the rule-of-law ideology must, however, remain an hypothesis.

3. LAW'S INTERMITTENCY

The idea of the rule of law does not, of course, just apply at the macrolevel. The processing of each case is supposed to be an occasion for the application of the rule of law, but here too the criminal law sometimes matters and sometimes does not. Let me give two mundane examples which illustrate the themes of the appearance, disappearance, and reappearance of the rule of criminal law in case processing and the tension between the need for social control and the genuine pull that the rule of law ideology has on actors within the criminal justice system.

Consider first the initial case in a string of narcotics cases. In this case, the arresting officer, when pressed, admits that the only reason he searched the defendant and found the heroin he uncovered is because the defendant appeared to be a suspicious-looking person. The judge, applying the *Mapp* exclusionary rule, suppresses the heroin as the fruit of an unreasonable search, and the criminal goes free. Here the criminal law which proscribes unreasonable searches and seizures clearly matters. Without this norm, the accused would no doubt have been convicted of drug possession.

The next case is similar, except that the officer testifies that he saw the suspect reach into his pocket for a cigarette lighter and pull out not just the lighter but a clear plastic packet containing white powder, which fell to the ground. Since the powder looked like heroin, the officer picked it up and arrested the accused. The judge finds that there was probable cause for arrest; she denies the motion to suppress, and the accused is convicted of drug possession. Again the criminal law appears to have mattered. In this instance,

the requisites of a reasonable search and seizure were met; and in accordance with the law, the evidence was allowed.

The case, however, has the surprising consequence of spawning a generation of clumsy criminals. In hundreds of cases that follow, police officers testify that they made arrests for drug possession after they saw suspects accidentally drop packets containing illicit drugs like heroin, marijuana, cocaine. Such testimony becomes so common that cases of this type are given a name: the "dropsy" cases. In each case, motions to suppress the evidence are made. In each case, the motions are denied on the ground that an officer who sees a suspicious pack drop to the ground acts reasonably when she picks it up and, if it looks as if it contains drugs, has probable cause to seize it and to make an arrest. Now it appears that criminal law as a set of authoritative legal norms does not matter, for surely most of these officers are lying.

In fact, the situation is more complex and illustrates the many ways in which criminal law can matter, for whether or not it matters depends on whose perspective one takes. From the defendant's point of view, law does not matter because he is being convicted despite the law's norms and his actual behavior. From the judge's point of view, law does matter, because had she heard a different story, such as the suspicious appearance story in our first example, she would have suppressed the evidence. Experienced judges, to be sure, will be suspicious of dropsy cases. But what should a judge do? One judge put it something like this, "I have heard enough dropsy stories that I am suspicious. But what am I to do? In any given case a police officer's testimony appears more credible than that of a self-interested defendant."[2]

From the police officer's view, the story is mixed, for two criminal law norms are involved. The first, the criminal proscription of perjury, appears not to matter at all, for to make good pinches officers are willing to lie with abandon. However, search and seizure law does matter—not in the way that it should, which is channeling an officer's behavior on the streets, but in channeling behavior in court, which is to say in specifying the content of an efficacious lie. As Weber ([1922] 1978) long ago pointed out, the lawbreaker who operates by stealth is just as surely orienting himself to the demands of the criminal law as the person who refrains from tempting behavior because it is illegal. Each is acting differently than he would if the law's norms were different.

Finally, to continue with this example, dropsy cases are sufficiently publicized, get such a bad name, and threaten to give the law such a bad name that crucial actors decide they have had enough. In one New York case the New York County District Attorney even urged the state's highest court to overturn dropsy seizures by shifting the burden of persuasion on the issue.[3] Other judges also express skepticism of dropsy testimony, and its incidence seems to diminish. Indeed, in one instance long after the great concern over dropsy testimony had dissipated, a police officer was actually indicted for telling a dropsy story from the stand (Gellman 1988). Again criminal law matters. Although dropsy testimony has not disappeared and some of it may

have been replaced by different, more acceptable lies, to some extent law mattered.

Both the complexity and the on/off nature of how criminal law matters are also nicely illustrated when we consider trials. In criminal cases, a steady but small source of reversals is due to error in instructing the jury. Considering the incidence of errors at trial, reversals for erroneous instructions are proportionately more common than reversals for violating procedural rules of evidence because instructions often state the law as it applies to cases, and it is stretching things to hold such errors harmless.[4] When courts do reverse for instruction errors, it is easy to see that criminal law, as enunciated in instructions, matters.

However, research consistently reveals that jurors have great difficulty in comprehending instructions, sometimes performing at no better than chance levels (Charrow and Charrow 1979; Hastie, Penrod, and Pennington 1983; Ellsworth 1989; Reifman, Gusick, and Ellsworth 1992).[5] Thus, it would seem that criminal law as enunciated in instructions hardly matters, for if jurors do not understand the instructions, how can instructions influence their decisions? An implication is that when appellate courts reverse for errors in instructions, thus making law matter, they are likely to be reversing for reasons that wouldn't have mattered had the jury heard the law stated correctly in the first instance.

The puzzle here is that jurors often appear to decide cases correctly (Kalven and Zeisel 1966; Hastie, Penrod, and Pennington 1983). How can they do this if the law as given to them by the court does not matter?[6] The obvious explanation is that their folk norms of what constitutes particular crimes largely coincide with the law's formal definitions, and it is folk norms rather than legal norms that matter. But where do the jurors' popular conceptions of what constitutes particular crimes come from? They may in some measure come from the criminal law's norms as conveyed to jurors through various media. At the same time, the law's norms in many areas reflect popular conceptions of what constitutes specific crimes. Thus, when jurors judge criminals, the law's norms probably matter whether or not the jurors fully understand their instructions. At the same time, the law's norms may in large measure (depending on the crime) define behavior that jurors would have regarded as conviction-worthy regardless of the law. Thus, law matters; but so do popular views, and one cannot separate out their effects on each other.

To add a further wrinkle, there is another way in which instructions that state the law can matter. It appears that jurors late in their deliberations often have instructions reread as an aid in breaking deadlocks. The tactic may work because it gives one or two dissenting jurors a face-saving way to withdraw from a minority position. They can claim that although they continue to subscribe to the factual story they have been advocating, they realize that for technical legal reasons even their factual portrait does not mandate their verdict preference. Here the law matters simply because it exists. Indeed, a hard-to-understand instruction may be more helpful in this respect than a

clear one because dissenting jurors can read into the instruction whatever is needed to justify their switch to the majority. Alternatively jurors may understand or misunderstand an instruction as reread, and may use their new sense of understanding to break their deadlock. Whether legal norms matter in this situation depends on whether they have been correctly understood.

4. LAW AS RESOURCE

The argument thus far is that criminal law matters, sometimes in unexpected ways, both at the macro (societal) level and at the micro (case) level. At each level, however, criminal law norms or their potential availability do not determine occasions of mattering. Rather, criminal law has what I have called a "now you see it/now you don't" or "on-again/off-again" character. In one situation, where the law's norms lead one to expect it will matter, it does; but in another situation where there is the same normative expectation that the law will matter, it does not. In the remainder of the chapter, I will offer a general explanation for this phenomenon, as I illustrate the law's intermittent mattering in other settings.

The criminal law (indeed all law) matters in some settings where it is supposed to matter and not in others because it is a resource. At one time, I thought that to speak this way was to speak metaphorically—that the law was not really a resource but was simply like one. But upon further reflection I think that to call law a resource is to speak precisely. It is a source of support that people may draw on in the same way they draw on other resources in their environment such as savings accounts, accumulated human capital, and the availability of others to help them achieve their goals. Law may be an intangible resource, as when one invokes the law's authority to order another's behavior, or a tangible one, as when one calls the police to achieve the same end.

In one sense, however, criminal law is a special resource. Its norms specify when it is to be deployed.[7] But criminal law is not self-deploying. People must do this. More than occasionally, particularly in more formal legal settings, people draw on law as a resource in the way law "intends." People are arrested because they have violated the law; they are charged with crimes their behavior best fits, and the rights that criminal procedure grants to the accused are honored throughout the guilt-determining process. More often, however, people treat law as they would any other resource available to them. Legal norms do not determine law's activation. Rather people draw on law when it is handy, convenient, and cheaper than alternative means to particular goals. Even when law is invoked as its norms specify it should be, the invocation is less likely to reflect respect for the law's norms than the sense that invoking those norms precisely is a cheap way to achieve an actor's interests.

This helps explain the law's on-again/off-again quality. The law's norms specify a wide area where it should be deployed (i.e., where it should matter).

But people generally invoke law—which is to say, make it matter—only when invocation is an efficacious route to their ends. So often when it appears law might or even should matter, it does not, for its authority is not needed. Conversely, the law's authority may be invoked in situations where its own norms appear to preclude this. This occurs because law can limit its own authority only when those who are responsible for enforcing law respect those limits. This does not always happen. Ironically, those specially responsible for enforcing law are often in the best position to avoid its limits.

5. INDIVIDUAL USE

Whether law is handier, cheaper and more convenient than alternative ways to achieve particular ends depends not just on what the law as a set of rules is, but also, and usually more importantly, on how law can be mobilized; that is, on those institutional arrangements that allow people to invoke the law. Two examples, drawn from the literature on policing, illustrate this point.

First, consider policing of skid rows. As both Bittner (1967) and Spradley (1970) emphasize, skid row policing is not so much about law enforcement as it is about order maintenance or peacekeeping. Indeed, Bittner's motivation to look at skid row was his interest in how police functioned as peacekeepers. He believed skid row would provide him with the purest example of maintaining order without law, but he found this could not be done. His conclusion in this respect is worth quoting:

> Though our interest was focused initially on those police procedures that did not involve invoking the law, we found that the two cannot be separated. The reason for the connection is not given in the circumstance that the roles of the "law officer" and of the "peace officer" are enacted by the same person and thus are contiguous. According to our observations, patrolmen do not act alternatively as one or the other, with certain actions being determined by the intended objective of keeping the peace and others being determined by the duty to enforce the law. Instead, we have found that *peace keeping occasionally acquires the external aspects of law enforcement.* (Bittner 1967: 714, emphasis in original)

The police it seems are almost totally confused—or perhaps it is better to say "fused"—with the law they enforce. The skid row situation reminds one of the classic Western movie scene in which a stranger in town taps an old timer on the shoulder and asks him, "Is there any law in this burgh?" The old timer points to the marshal and replies, "Yep, you're looking at him." If the same question were asked of a skid row denizen, he would answer "yes" and point to the policeman. Indeed, most people would find the linkage a natural one.

Phenomenologically, the connection between law and enforcer cannot be disputed, but one may nonetheless ask whether the link is conceptually

justified. From the legal perspective, it is not. The criminal law distinguishes between its norms and those that enforce them. Indeed, as we have already noted, there is a special subset of criminal law norms—rules of criminal procedure—that is intended to control the behavior of the criminal law's enforcers.

From a sociological perspective, the situation is more interesting. Whether the fusion of law and enforcer is conceptually justified depends on how law is defined. Black's (1976) definition of law as governmental social control suggests that if there is any divergence between the law's norms and the actions of governmental control agents, it is the latter rather than the former which defines the law. More classic definitions of law, like Weber's (1978) or Llewellyn and Hoebel's (1941), have two ingredients: a set of authoritative norms and an enforcement staff. The assumption is that the latter will act in conformity with the former. But this only sometimes happens. For example, on skid row the criminal law is sometimes appropriately enforced in full conformity with its norms, as when a drunk is arrested for his drunken behavior. On other occasions, the law's requirements for enforcement are fully met, but the invocation of the law is pretextual. Thus, Bittner describes a situation in which, in order to break up a group and forestall the possibility of a fight, one of four equally drunk men was arrested while the others were simply sent on their way. On still other occasions, legal norms are largely irrelevant. Thus, a person who has been drinking but is not drunk may be arrested on a drunkenness charge when his real "crime" is cursing the police officer or, as in another of Bittner's examples, the paddy wagon is handy, and it is more efficient to arrest the drinker at the time than to wait until he is actually drunk and send again for the paddy wagon.

From the point of view of the arrestee, what matters is the police officer's action rather than the norms that also figure in law's definition.[8] But is it law that is mattering to an arrestee when an officer acts? Where the officer's actions and legal norms are congruent, it is easy to conclude that it is law that matters. Where, however, the law is a pretext for action, the question of whether law matters has no simple answer, even conceptually. To the extent law is a set of rules, law appears not to matter since legal norms are not being correctly applied; but to the extent that law consists of the actions of an authorized enforcement staff, law matters, for actors with a generalized legal authority to act are so acting, even if the specific reasons they invoke are inapposite. Thus, it is law which allows police to make arrests, even if law in a narrower, rule-reverential sense does not authorize it. One might say in these situations that law matters, but that the law is not working as intended. Yet even this conclusion is risky because it assumes the intent behind law is obvious from the language of a law's provisions. In applying drunkenness or vagrancy statutes to people who are not actually drunk or legally vagrant, the police officer may nevertheless be using the law for precisely the peacekeeping purposes the law's drafters intended (cf. Wilson and Kelling 1982). Indeed, such laws

often only vaguely define forbidden behavior in order to provide police, and through them society, with generalized order maintenance resources.

In some situations where police conduct differs from the commands of law, there is a clear sense in which criminal law does not matter because police action does not simply fail to conform with the literal requisites of legal norms; it positively violates them. Examples include police who solicit bribes to tear up traffic tickets or who charge those they have beaten with resisting arrest in order to provide cover stories for their abuse. But in another sense, the law matters here as well. It is the police officer's privileged position with respect to legal resources that allows the officer to transform criminal law, a public resource, into an instrument for private benefit. In exploiting these resources for personal gain, the officer is acting much like the office worker who copies her tax return on an office xerox machine. The difference between the two is the easy access to resources that their institutional positions allow. The office worker is fortuitously situated with respect to a xerox machine, while a police officer is fortuitously situated with respect to the law.

In most circumstances, of course, the police are not violating the law. Most of the time, the criminal law in its normative sense matters to the police, and so it matters to us as well. Motorists who have not been speeding are seldom stopped for speeding, and those given speeding tickets usually have been traveling at least five miles per hour over the speed limit. *Miranda* warnings are real and given, and the "third degree" has largely disappeared from the repertoire of police interrogation techniques. Arrested drug dealers have typically been dealing drugs, arrested murderers are usually likely to have killed or are legitimately suspected of doing so, and so on. In short, the police typically use the public resource that is law for public ends and invoke the criminal law in ways consistent with the law's norms. Their major failing, if it is a failing, is that they do not invoke the law in many situations where the law apparently intends its own invocation. Thus the criminal law often does not matter the way it should, or it does not matter at all because of limited institutional capacities for enforcement. Some legal scholars (Goldstein 1960) have been quite troubled by this, while other, more sociologically oriented students of the police (Skolnick 1975) see underenforcement as inherent in the nature of police work.

Criminal law is, of course, a resource not just for the police but for all of us. Anyone can "call the cops," and many people do. Indeed, the police are a resource apart from the law, for many calls to the police seek aid, such as help in transporting a sick person to the hospital, that the caller knows is not part of the police's law enforcement mission (Wilson 1968). Even where the police are called because the law has been broken, there is a tendency among both police and citizens to privatize the public resource that is law. Black (1971), for example, found in his study of the social organization of arrest, that complainants' preferences were a major factor in determining whether an alleged lawbreaker was arrested. The other two major factors predicting arrest in Black's study were whether the offense complained about was a felony

(arrest more likely) or a misdemeanor and whether the suspect in the field was disrespectful (arrest more likely) or not. We have thus, in one study, a nice illustration of the three ways that criminal law as a resource is most commonly employed. First, it is employed by police for the public end of crime control. Second, it is employed by police as a private resource to revenge affronts. And third, it is employed by complainants as a private resource to control others' behavior.

Returning our attention to the last of these uses, that is to the use of criminal law as a resource for citizens, one can ask how effective it is in this respect. This depends on both legal and institutional considerations. Sometimes laws that citizens wish to draw on do not exist. Thus, until recently most states did not have legislation that prevented "stalking." Police receiving complaints of stalking often purported to be helpless. The best they could offer terrorized victims was "if he attacks call us," which was, no doubt, of small solace. Ultimately, stalking incidents culminating in beatings or homicides persuaded legislatures to pass laws making stalking itself a crime. These laws provide a new resource for both citizens and police.

Passing a law, however, is not enough to provide citizens with a viable resource. Legal resources are of limited value to citizens unless they can mobilize law. With respect to criminal law, this most often means mobilizing the police—which can be problematic. Indeed, members of the same minority groups that disproportionately feel victimized by police exploitation of the criminal law for police ends (such as enforcing respect) also disproportionately feel victimized by their inability to exploit the law for their own ends. The police, they complain, often show up late when they call, or fail to respond at all (Hacker 1992; Skolnick and Fyfe 1993).

Merely mobilizing police, however, is not enough to privatize law as a resource, for there is no guarantee police will respect a complainant's private preferences. Consider the situation of a woman who has called the police because her husband has struck her. Once police are on the scene, they have many options. They may ignore a caller's request for leniency and reaffirm the public nature of the law; as when the police, following department policy, arrest an abuser that the complainant wants only to be warned. Alternatively, once the police are on the scene they may appropriate the law to their own ends, as when they ignore a complainant's preferences and arrest a man because he has been disrespectful toward them. In other situations, both public and private claims to the use of law are denied as when police refuse to arrest an abuser despite the complainant's preference. Another police response devalues the legal resource by giving a caller less enforcement than the law provides, as when an abuser is only separated from a spouse who wants him arrested. Finally, police may follow a complainant's preferences, privatizing the legal resource in a way which may or may not conflict with the public's interest in how law is deployed. Only the last of these options allows those who mobilize the police to fully privatize the law as resource. In each of these circumstances, except where nothing is done, criminal law clearly

matters, but it matters for different ends. And even where nothing is done, law matters in a more limited sense, for it provided the excuse that brought police to the scene, and the event that precipitated the call is at least likely to have been transformed (Sherman and Berk 1984).

I have chosen the police to illustrate how criminal law can be used as a resource and to show how the same cost-benefit considerations that mean that any resource will be used only intermittently depending on circumstances apply to the use of the criminal law. Thus, it is not surprising that the scope of criminal law's mattering is not defined by criminal law's self-proclaimed scope of applicability, but instead turns on the contexts in which it might be applied and on alternative means to achieve goals within these contexts. The same point could have been made in the context of other institutional sectors. Totalitarian regimes, for example, need not free offenders whose actions challenge state interests on legal technicalities because the overwhelming force at their disposal means that they need not depend on legal legitimacy to maintain order. In some regimes at some times it is, in other words, less costly to rely on mechanisms like secret police than on law. Public defenders and prosecutors need not agree on pleas which comply precisely with the law a defendant has violated. Subject to certain constraints, they may use the array of laws as a resource for fitting a punishment to the degree of crime (Sudnow 1965; Maynard 1984). Judges can ignore penalties that law puts at their disposal when they feel that lectures or other "situational sanctions" will have an adequate punitive and deterrent effect (Mileski 1971; Wheeler et al. 1968; Merry 1990). Prison officials can turn much of the social control of prisons over to the inmates, and prison guards can prefer "tune ups" to formal legal proceedings when prisoners have behaved improperly (Sykes 1958; Jacobs 1977; Marquart and Couch 1985).

6. GROUP USE

The examples I have used to develop this resource theory are instances where individuals seek to privatize the ostensibly public criminal law. Groups may do the same thing with both the criminal and civil law. The classic example from the civil law is the interest group which secures a special subsidy or tax benefit, but this is just one way in which groups promote laws, including criminal laws, that turn portions of the wealth or power of the state into group rather than public ends. Less obvious is that the state itself and entities within the state are often such interest groups. Calavita (1992), for example, describes the *Bracero* program which, in allowing the temporary importation of Mexican farm workers, seems to have been ideally designed to provide growers in the South and West with cheap labor. Yet she tells us the Immigration and Naturalization Service (INS) originally had to sell the program to skeptical farmers. They persuaded farmers that the *Bracero* program would solve their labor problems because the program was even better designed to solve the

INS's core problem, keeping control of the Mexican-United States border. While parts of the program were refined or adjusted so that it better served farmers' needs, in those rare instances when clashes arose between farmers' interests and the INS's interests, the INS often had sufficient strength to adjust its policies for its own bureaucratic ends.

Groups may also use the law in conflict with other groups. In the first portion of this paper we noted how law may be an instrument of domination in that its restrained use can help legitimate regimes, which is ordinarily a cheaper way of maintaining superiority than force of arms. Piven and Cloward (1993) show that from the sixteenth century on, laws implementing poor relief have been used by the state or dominant groups within it both as devices to regulate labor markets and as "pressure release valves" that serve to contain potential revolts from below in the hardest of times. Thus, early in Franklin Roosevelt's first term, when the threat of social upheaval was greatest, there was strong general support for direct relief. As recovery proceeded and the threat of revolt receded, the consensus broke down and the welfare system became increasingly suffused with elements of labor market control (e.g., benefit cutoffs in rural areas when the spring planting season commenced). It may be no coincidence that today, with competition from low-cost foreign workers rising, welfare "as we know it" has ended and been replaced by a system designed to force welfare recipients to work without guaranteeing that jobs paying enough to replace lost welfare income will be available.

Even before the sixteenth century, vagrancy laws were used to assure a steady supply of cheap labor in the English countryside by prohibiting workers in times of labor shortage (e.g., after the black death had decimated the countryside) from leaving their native villages to sell their labor to those who would pay the most (Chambliss 1964; Piven and Cloward 1993). Monsma (1990; 1992) has documented an attempt to use vagrancy law for the same purposes in colonial Argentina. When there were no labor shortages, enforcement of such laws was lax because labor could be secured more cheaply through ordinary labor market activity.

Perhaps the most interesting use of the law as a group resource is a twist on the legitimation function I describe early in this chapter. Rather than use the law to legitimate its own rule, a group may use the law to legitimate its own values, often by delegitimizing the values of some group with which it is in conflict. Gusfield (1963) provides a good example of this in his book *Symbolic Crusade*, which calls attention to the Protestant, nativist elements of the prohibition movement and the extent to which the movement was fueled by a desire to distinguish native Protestant American from immigrant Catholic (especially Irish) cultures and to establish the moral security of the former. The goal of establishing cultural superiority seems to be a similarly strong motivating force for activists on both sides of the abortion controversy (Luker 1984).

When law is used this way, it seems to be chosen because there is no easier way of securing social validation for the morality a group asserts. Indeed, such

movements often take to politics and seek legal change only after voluntary efforts at "converting the heathen" have failed. Unlike the situation where law is used to legitimate a group's domination of the state, groups that seek to legitimate a moral position seldom are in full control of the state, although they may be more powerful than those whom they seek to morally dominate, and they may be able to secure powerful allies who see acquiescence in the group's morality as a small price to pay for support that can further cement their own rule.

Groups that sponsor symbolic crusades are, however, seldom part of a ruling class. Moral status groups often cut across lines of social power, and it may be a lack of real power that motivates group members to demonstrate their moral superiority. Moreover, going to law for these purposes presupposes a strong state or a willingness to fight, for it makes ruling over the less dominant group more rather than less difficult. It also seems to presuppose state authorities more powerful than either group, because part of the motivation for seeking laws of this sort is to secure the state's imprimatur on what would otherwise be a contestable moral claim. Thus, as the prohibition movement advanced, whether a politician drank on the sly seemed less important than whether he supported the proposed Eighteenth Amendment, and anti-abortion activists hold no grudge against those who have had abortions so long as they support the movement.

7. CONCLUSION

Whereas I was reminded of a comic strip at the start of this chapter, I am reminded of a W. S. Gilbert lyric at its conclusion. In the operetta *Ruddigore*, at the conclusion of one of Gilbert's finest patter songs, the characters sing:

> This particularly rapid, unintelligible patter
> Isn't generally heard, and if it is it doesn't matter!

If the patter songs were not generally heard, there would be no sense in writing them; nor would there be a point to the quoted lines, if hearing them did not matter. But as Gilbert well knew, his patter songs were showstoppers. They were the standout features of the most popular Gilbert and Sullivan operettas and made for the few memorable moments in the less popular ones.[9] Gilbert could mock them because they mattered so much. So I think it is with criminal law. If we expect law to matter as it is enunciated, we can spot many situations in which it does not matter. We can even spot situations where apparently applicable criminal law does not matter by any standards. But ultimately the question, "Does the law matter?" is worth asking not because the law's mattering is problematic, but because it matters in so many ways that we are well advised to sort them out. I have begun that task in this paper.

NOTES

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1. Even when the parallel between law and morality is as close as it is in the case of murder, we cannot be certain that some of the compliance we attribute to morality is not, in fact, a result of the law's threat (Andenaes 1966; Stephen 1883).

2. I have no citation for this quote—I read something like this once, but I no longer remember where. The reader will have to accept my claim that at least in gist it is accurate. For a similar sentiment expressed by a former district attorney, see Heilbroner (1990).

3. *People v. Berrios*, 28 N.Y. 2d 3rd, 279 N.E. 2d 709, 321 N.Y.S. 2d 884 (1971).

4. Courts often do so, however, by looking at the instructions as a whole. In fact, the Supreme Court permits harmless error analysis even when instructions are constitutionally flawed. There are some limits however. Recently the court held that an erroneous instruction on the meaning of the "beyond a reasonable doubt" burden of proof could never be harmless error. Sullivan v. Louisiana; 508 U.S. 275 (1993).

5. From a rhetorical standpoint, instructions are often written in prose that even the college educated have great difficulty understanding. I have long speculated that one reason that may contribute to this is that marginally correct, difficult to understand instructions are most likely to be appealed. Appellate courts faced, as they usually are, with criminals who appear factually guilty strain not to overturn merited convictions and approve dubious instructions. These instructions, bearing an appellate court's stamp of approval and widely disseminated through appellate opinions, then become safe instructions. Judges know they have been approved and that they will not get reversed for using them. I have, however, no way of testing this hypothesis; the most I can say is that it seems plausible to me.

6. I am now assuming an extreme situation which probably only characterizes a minority of instructions. Even if some or most jurors do not understand difficult instructions, those who do can sometimes educate their fellow jurors in what these instructions mean. The empirical research, however, does not give one great confidence in such educational efforts (Ellsworth 1989; Hastie, Penrod, and Pennington 1983).

7. In this, criminal law differs from much civil law. Civil law provides norms that may be deployed but does not specify that they should be simply because occasions for their application exist (Lempert 1972).

8. The latter may come to matter as the arrestee is further processed.

9. E.g., "My name is John Wellington Wells" in *The Sorcerer*.

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