

THE BEST OF TIMES AND THE WORST OF TIMES IN THE SOCIOLOGY OF LAW

RICHARD WEISMAN

Roger Cotterrell. *The Sociology of Law: An Introduction*. (London: Butterworths, 1986). xiv + 409 pp. Notes, bibliography, index. \$25.00.

These are interesting times in the sociology of law. The contemporary reappraisal of the place of law in Marxist theory, the hermeneutic challenge to legal positivism emanating both from poststructuralism and critical legal theory, and the rediscovery of law's centrality to grand theory from Max Weber and Emile Durkheim to Niklas Luhmann are merely some of the more conspicuous recent developments that have begun to reorient inquiry in this area. To produce an introductory text that is alert to this intellectual ferment and yet communicates a coherent analytic framework to beginning students in law and sociology is no simple task. But Roger Cotterrell's *The Sociology of Law: An Introduction* meets this difficult assignment in a work that offers not only an intelligent account of each of the major theoretical frameworks to have guided research in the past but also an overview of the problems and concerns that are likely to be the sites of future research. If, as the book jacket advertises, it is "the first full-length modern British text" to survey sociolegal studies, the delay is in part redeemed by the quality of the debut.

Cotterrell's presentation is marked by its tight, analytic organization. Because the work goes far beyond simple exegesis to offer penetrating insights into the linkages among different theoretical frameworks, both the beginning student and the more experienced reader can benefit from a text of sufficient depth to repay the additional effort required to master it. After two preliminary chapters that define in broad terms the theoretical and substantive focus of the work, Cotterrell begins with the practical or applied question of how legislative change affects social change. His review of the deficiencies of legal impact studies suggests that the practical question of how to gauge the effects of legislation cannot be addressed without raising the theoretical question of how law and social structure are connected. This demonstration of the need for theory then becomes the point of departure for the theoretical section of Cotterrell's book, which consists of the next three chapters. In the first of these chapters, theories premised on

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the assumption that law is a source of social integration are presented in order of ascending complexity and generality from Durkheim to Talcott Parsons. This chapter concludes with a discussion of the limitations of functionalist approaches that view law as the expression of consensus and thereby understate or ignore its coercive character. Similarly, in the succeeding two chapters, Marxist and Weberian perspectives are presented in a manner that builds incrementally on earlier chapters so that the reader is provided simultaneously with an explication of major sociological perspectives on law and social structure, an analysis of their limitations, and an overview of areas of complementarity and divergence among the various perspectives.

The next section of the work applies these theoretical frameworks to three major institutional components of law—professionalization, adjudication, and enforcement—with a chapter devoted to each. All three chapters deserve to be read as contributions to the sociological literature rather than as mere summaries of it. The discussion of enforcement is especially valuable for its provocative juxtaposition of regulatory offenses with criminal offenses. Microsociological studies are effectively used to describe how those who enforce regulations against corporations are tempted into accommodation with the offender, while those who enforce criminal law are impelled through situational exigencies to prefer order to procedural safeguards. The chapter on adjudication is notable for its canny functionalist analysis of the judicial craftsmanship exercised by courts in fulfilling their crucial roles as legitimators of government. And while the chapter on the legal profession offers a more or less conventional account of professional formation, Cotterrell ventures further to describe how the content of the lawyer's work as well as its form—legal knowledge itself—makes a decisive if inadvertent contribution to legal ideology.

In the final chapter, the theoretical and substantive concerns of the work are unified around the contemporary theme of the changing relations between law and the modern state. Drawing upon both the insights of Michel Foucault and recent Marxist theory, Cotterrell argues that the scope of state power in Western society has expanded to embrace activities previously regulated by other systems of social control. This collapsing of boundaries between the state and civil society, he suggests, has been accompanied by a gradual change in the expression of state power from jurial to administrative forms of adjudication. An exploration of the possible consequences of these changes for professional autonomy, public participation in decision making, and legal doctrine offers an opportunity for a pedagogically stimulating reexamination of the relationship between law and social structure.

I regard *The Sociology of Law* as an important work not only for its obvious merits as a comprehensive and thought-provoking

introduction to the field but also because it is written from a point of view that is generally underrepresented in this literature. Cotterrell quite explicitly allies himself with what is currently referred to as interpretive sociology but which, as the author notes, has clear antecedents in Weberian sociology. As formulated in the text, this perspective distinguishes itself from other schools in sociology primarily by its insistence that actors' consciousness be viewed as an irreducible category of social life. Coupled with this antireductionist stance is a rejection of the positivist claim—appropriated from the natural sciences—that neutral and value-free observation is possible or even desirable in sociology. Interpretive sociology thus entails not just a critique of positivism for its dubious epistemological assumptions but also a repudiation of sociological models that represent human action as fully determined by structural constraints. Indeed, it is this neglect of actors' definition of the situation in explaining social order and social change that Cotterrell sees as a major failing of functionalism and at least some variants of Marxist theory.

This reluctance to reduce human complexity to accommodate quantitative models of human behavior or to conform to the assumptions of grand theory serves Cotterrell well in his attempt to reach a dual audience of beginning students in law and sociology. On the one hand, *The Sociology of Law* resists the all-too-frequent tendency of sociological treatises on law to describe legal actors, whether lawyers, judges, or police, as if the subjective meanings they attach to their work had no effect on their actions. On the other hand, Cotterrell's appreciative stance toward legal actors does not require any blunting of the critical force of sociological theory. The phenomenon of legal autonomy—inevitably a focus of theoretical concerns, whether from functionalist, Marxist, or Weberian perspectives—is intelligently approached throughout the book as problematic, contingent, and historically situated. Cotterrell's methodological commitment to interpretive sociology implies no concession to the assumption in legal positivism that legal norms are generated independently of social conditions.

Yet, just as *The Sociology of Law* exemplifies much of what is valuable in interpretive sociology, it also exhibits what is most problematic in this perspective. By discarding positivistic criteria for evaluating sociological theory, it reopens the question of whether there are any extrinsic criteria at all for confirming or refuting a theory. One response is to search for alternative criteria that are compatible with more qualitative approaches to data gathering. Another is to accept the possibility that no methodology can transcend subjectivity—a position that Cotterrell seems to advance when he writes in the concluding paragraph of his chapter on Marxist theory that “social theory cannot prove or be proved, but can merely elaborate a perspective on society” (p. 144). Similarly, his stipulation that the primary goal of the sociology of law is “to

contribute to an understanding of the meaning and conditions of justice" (p. 16) is consistent with a view that it is the enhancement of consciousness rather than any correspondence to an ascertainable reality that is the test of sociological theory. From this vantage point, the author is able to offer only aesthetic or subjective criteria for preferring one theoretical framework to another.

But it is clear elsewhere in the text that Cotterrell is not content to confine himself to the mere explication of theories. *The Sociology of Law* does make choices among theoretical frameworks although not in a way that overcomes the limitations of subjectivism. For example, in a discussion of the relations between the state and the corporation, Cotterrell rejects as equally dogmatic a Marxist approach in which the corporation is viewed as dominating the state and a "corporatist" approach in which the state is viewed as constraining the corporation. A better approach, the author (p. 137) argues, would be to conceptualize corporate power as involving both cooperation and domination. Earlier in the text, Cotterrell (p. 120) adopts a similar strategy with respect to law and power in which he rejects critical and conventional interpretations in favor of a position that conceives of law as both an expression of power and a source of constraint over power. But, in the absence of any extrinsic criteria for evaluating a theory, why should an undogmatic or "reasonable" position be preferred to one that is immoderate or "unreasonable?" Reasonableness, unencumbered by rule or method, is no less arbitrary a standard in deciding between conflicting approaches in sociology than in resolving disputes in law.

Indeed, it is perhaps to avert the more insidious consequences of using reasonableness as a standard of evaluation that Cotterrell produces one of the more striking passages in the text. Having equivocated on the question of whether law expresses the distribution of power in society, he (*ibid.*) writes that, nevertheless, "enough sound empirical evidence of the workings of law now exists for us to be able to say with total confidence that law in its practical effects is not 'neutral'; that the (haves) 'tend' to come out ahead in their capacity . . . to obtain legal advice and assistance, to benefit from prosecutorial or sentencing discretion, to avoid or insure law enforcement . . ." (p. 120). Here Cotterrell seems to suggest that there is no reasonable compromise between a perspective that would acknowledge inequality and one that would not. But if factual authority—"sound empirical evidence"—can be invoked to privilege one claim over another, perhaps Cotterrell has not left positivism so far behind after all.

If there is any shortcoming in *The Sociology of Law*, it is that the methodological consequences of rejecting positivism in favor of a hermeneutic approach to social inquiry have not been formulated clearly or consistently. While this is hardly a trivial problem, it is not unique to this work and does not detract from Cotterrell's

overall achievement. I anticipate that beginning students will find the book difficult but rewarding, while more advanced undergraduate and graduate students will also benefit from familiarity with the text. Moreover, the book should survive a transplanting to this side of the Atlantic. Cotterrell, of course, deals extensively with the British literature on the sociology of law but not at the expense of the American literature; the text and bibliography are simply more comprehensive than in the usual introductory work. For those skeptics who view sociological approaches to law as unchallenging, disconnected from current developments in law, or simplistic, a work as scholarly, tightly reasoned, and provocative as *The Sociology of Law* is a most eloquent response.

RICHARD WEISMAN is an Associate Professor in the Department of Sociology, York University, Toronto. His recent publications include *Witchcraft, Magic and Religion in Seventeenth Century Massachusetts* (Amherst: University of Massachusetts Press, 1984).