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Informal Law

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Informal law has three meanings within the social science literature. Traditionally it refers to the ways groups and communities bring conformity to their social norms, and as such, it forms part of the wider concept of social control. More recently, informal law has come to refer to a set of more-formalized dispute settlement procedures involving mediation and restorative justice that scholars see as alternatives to the formal law of courts, trials, and judges. Third, informal law refers to the ways that formal law operates in practice rather than in theory, such as informal discretion by police officers, plea negotiations by attorneys, and the unwritten norms and practices of the legal system. In each case, informal law is a mechanism used by a social group both to bring consequences to an offender and to affect the future behavior of individuals within the group. Issues that arise concerning informal law include its mechanisms of control, its relationship to formal law, and its effectiveness.

Mechanisms of Control

Informal law arises in relation to behaviors that offend others, whether in the majority or minority, and whether powerful or powerless. In the classic statement of Émile Durkheim (1858–1917), behavior that “shocks the common conscience” is subject to controls by the collectivity. Informal law can also arise in anticipation of unwanted or untoward behaviors, as when a group channels its members toward desired goals or norms. It may appear in response to noncompliance with the normative will of the collectivity. Those with power, who perceive the behavior as threatening, worrying, or troublesome, will do something to control the behavior (or people). Action taken to bring conformity constitutes informal law.

Informal law brings conformity through one of three mechanisms: (1) coercion, being the threat or use of negative sanctions that reduce a person's social standing; (2) persuasion or ideological control that uses positive inducements to conformity; and (3) suggestion, which reminds people of their obligations, responsibilities, and duties to one another.

There are numerous ways that informal law delivers these mechanisms of control. Coercion can be brought about through sanctions such as physical force, psychological

threats, ostracism, shaming, group social pressure, embarrassment, gossip, ridicule, social disapproval, expressions of displeasure, reprimands, or criticism. Alternatively, informal law may persuade group members to conform through positive rewards such as flattery, praise, encouragement, and bestowal of honor and prestige. Finally, informal law may simply bring people together to recognize the consequences of their offensive actions and to participate in the resolution by redressing the harm caused.

Narrowly conceived, mechanisms of informal law subordinate individual differences to group acceptability, which is expressed through norms, folkways, and mores. More broadly, informal law reaffirms the relations of collective social reality. In this sense, informal law merges with ongoing daily interaction as an integral part of the group process to develop stability, predictability, and order that is at the heart of the observation by Eugen Ehrlich (1862–1922) that “living law” dominates life itself even though it has not been posited in legal propositions.

Relations between Formal and Informal Law

There are several senses in which informal law is related to formal law. First, from a legal developmental perspective, scholars see informal law as the precursor to formal law. Second, they see it as existing in a symbiotic relationship with formal law to establish effective societal control. Third, it can exist in opposition to formal law, undermining its effectiveness. Fourth, it provides an alternative means of solving disputes that can be efficient, cheap, effective, and [p. 744 ↓] more conducive to repairing societal fissures than the imposed decisions of formal law.

Informal Law as a Precursor to Formal Law

In a continuation of the idea of informal law as the mechanism of group normative control, formal law becomes necessary when informal law breaks down or becomes inadequate. Karl Mannheim's (1893–1947) principle of transmutation states that when one form of social control diminishes, others increase. Communitybased societies are

characterized by multistranded relations whose members see each other in daily face-to-face interaction in a wide variety of network settings. Such societies have a low social distance between members, who are subject to the continuous informal controls of other members. As societies become complex and industrialized, they change from predominantly integrated communities with a low division of labor and high levels of face-to-face interaction to highly fragmented, divided, specialized, and individualized associations of people whose interaction is severely restricted in range and scope. Here society is characterized by single-stranded relationships, whose members see each other infrequently for the purpose of accomplishing specific tasks. Such societies have low levels of face-to-face interaction and high social distance, such that the occasions of informal law are low and the need for formal law is high.

However, the conclusion that formal law emerges and completely displaces informal law in complex industrial societies misunderstands the development process. Rather, formal law becomes an additional layer of control, sometimes subordinating, incorporating, and co-opting informal law, yet never totally displacing it, often relying on it, and even being challenged by it. At the same time, informal law is constantly emerging as part of group processes, sometimes shaped by the wider law, sometimes shaping it. Indeed, as Donald Black has argued, although industrial societies have become dependent on formal law, by replacing it with alternative informal law, they can reverse this situation. The “more alternatives, the less law. Increasing the level of alternatives reduces the level of dependence on law,” and “because law and other kinds of social control have an inverse relationship, the stifling of the former advances the latter ... and strengthens social cohesion as well” (1989: 83–85).

The Symbiotic Relationship between Formal and Informal Law

To comprehend the relationship between formal and informal law more comprehensively, it is helpful to adopt Georges Gurvitch's (1894–1965) framework of forms of law existing in two planes. On the horizontal plane are the range of different types of law based on the level of organizational complexity and scale on which they operate. This horizontal continuum ranges from the group to the global, with a variety of

intermediate levels, including community, organization, and society in between. Within any one type are many different subtypes of organization and many subtypes of groups, each with its own kind of law. On a vertical plane, and existing for each type of law, is the degree of formality, ranging from informal on the bottom to formal on the top. For Gurvitch, the formal is characterized by being organized, written, fixed, and planned in advance, while the informal is unorganized, flexible, spontaneous, and intuitive. This schema shows that informal law is not the exclusive control mechanism of the group but exists in a greater or lesser amount in any kind of law.

Conversely, formal law is not the exclusive mechanism of the state or formal organization. Rather, each type of collectivity has depths of formal and informal law. Indeed, rather than only one type of law, a collectivity typically uses a combination of types and of levels of law simultaneously. While their level of organizational development typically precludes small groups' having highly formal law, they do develop rudimentary formal law. More important, although developed organizational forms, such as the state in capitalist industrial society, appear to be dominated by formal law, numerous levels of informal law exist within law's organization and constitutive agencies reflective of the groups that make it up. This web of what Leopold Pospíšil calls *legal pluralism* may exist in harmony or conflict, reinforcing or undermining [p. 745 ↓] the informal law of other subsystems and even the formal law of the state.

Informal Law as Oppositional to and Constitutive of Formal Law

Recognizing the significance of informal law has led theorists to revise their thinking about the law and society relationship. Until the mid-1970s, legal pluralism explored the relationship between indigenous tribal custom and European colonial law. This tradition saw indigenous orders as autonomous, independent, yet subordinate to colonial law. Similarly, by the mid-1980s, scholars saw informal justice institutions in Western industrial societies as subordinate normative orders and examined how they serve the ideological function of blurring the power of the state. Theorists showed that ideological subordination is accomplished by the co-optation and exploitation of a human desire for informal, localized, community justice and that the episodic tendency toward informal,

decentralized state control serves a dual legitimating and net-widening control function for the state.

During the late 1980s, attention turned to the contribution made by informal law to formal state law. Critics argued that informal law should be seen, not merely as subservient or alternative, but also as presenting a critical challenge to the dominance of formal law. One such approach is based on Sally Falk Moore's idea that law is, in part, social relations and social relations are, in part, law. It is, as David Nelken has said, the movement and tension whereby these are socially constituted, the way society is produced *within* law and how law is produced within society, rather than how they interact, that is crucial to understanding the law and society interface.

This constitutive theory of the relationship between informal and formal law directs our attention to forms and mechanisms whereby extralegal social relations, often constituted as informal law, penetrate formal legal relations. A constitutive approach examines both the presence and the source of other social forms. It is not merely that classes or interest groups create law to maintain or increase their power. Rather, some of the relations of these groups, particularly their informal rules and procedures, are, and indeed become, the relations of law, as relations of law similarly become social relations. This dialectical analysis suggests that "any site of social relations is likely to be traversed by a variety of state and non-state legal networks" and that "what constitutes 'the law' in any specific context will depend upon which legal networks ... are mobilized, and how they interact" (O'Malley 1991: 172). Researchers have not done much work on the way that semiautonomous informal law interrelates with and constitutes formal law while also being constituted by it.

Informal Law as an Alternative to Formal Law

During the 1990s, scholars examined informal law as part of a general movement to resurrect community and popular justice within capitalist society. From the burgeoning of self-help and mutual aid groups for personal and social problems, to neighborhood groups and take-back-the-streets movements, they saw the informal

as a force of stability and as a panacea of resistance to urban decay and crime. More important, informal law has become an integral part of various neighborhood watch and community and neighborhood justice systems, which include community courts, community corrections, and a general problem-solving, preventive, and restorative, rather than retributive, response to crime and deviance in communities. Indeed, they see the strength of informal law as stemming from the social capital that insulates neighborhoods from crime. This has involved mediation and dispute settlement procedures that recognize that law and rule breaking are part of a relational process that needs managing within that context. In its most celebrated form, informal social control has become part of the restorative justice movement, which has elevated ways to bring offenders and victims together to deal constructively with past offenses and prevent future ones. Researchers are waiting to see whether this semiformalization of informal law ultimately strips it of its effectiveness or resurrects the very community that formal law seems to undermine.

[p. 746 ↓]

Significance and Effectiveness of Informal Law

In the late 1990s and into the twenty-first century, informal law gained increased prominence and significance. Scholars have found it to be the more effective mechanism of bringing about normative compliance, the most feared (negative) or appreciated (positive) sanction, and a crucial implied component in mediation, restorative justice, and other alternative social responses to crime and deviance. Since Ehrlich's living-law observation that an untold number of associations in society exercise coercion more forcefully than the state does, the empirical question exists. Scholars claim informal law is effective where those subject to it care what those dispensing it think. This occurs in rural rather than urban settings as well as in urban neighborhoods that have high levels of social interaction among residents who know each other. Empirical research has shown informal law to be a more effective deterrent than formal sanctions. Charles Tittle found that informal law from intimates such as family and friends was more feared than formal law, such as arrest and prison, which was seen as

a largely irrelevant supplement to the informal controls. Importantly, others have found that the reason for this effectiveness is personal shame about law violation and fear of public humiliation. Comparative research by Freda Adler and by Marshall Clinard revealed that a high degree of popular involvement in criminal justice and a high level of informal social control characterize low-crime countries. Low crime rates also correlate with strong, enduring, and stable family structures, social interaction among neighbors, and greater social integration, itself reinforced by religious, moral, and secular values.

However, it is important not to romanticize the role of informal law; while it is spontaneous and flexible to changing values, it also conveys the structure of the group. Where groups are democratic, informal law reflects participation of the whole. Of course, that does not mean the majority necessarily limits its coercion of ethnic minorities or certain individuals. Under formal law there may be no effective protection of individual rights, even against cruel punishment, as has been illustrated in the United States by lynching, in the former Soviet Union by party-controlled workers' courts, and in China by people's courts. Where the group is hierarchically organized, informal law may reflect the will of the dominant members rather than the whole collective. Urban research has documented informal strategies of exclusion and hostility via ethnic stereotyping against minorities and immigrants that create social and physical distances which can ultimately lead to further social conflict and fragmentation. Moreover, there is nothing exclusive about informal law that aligns it with peace-producing rather than harm-producing groups, whether these are street gangs, organized crime syndicates, or terrorist cells. Indeed, as Black has noted, there is a sense in which crime itself can become a mechanism of informal law, such as with self-help or vigilante justice.

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See also

- [Alternative Law](#)
- [Constitutive Criminology](#)
- [Crime Statistics](#)
- [Customary Legal Norms](#)
- [Discretion in Legal Decision Making](#)

- [Dispute Resolution, Alternative](#)
- [Durkheim, Émile](#)
- [Ehrlich, Eugen](#)
- [People's Courts](#)
- [Pluralism, Legal](#)
- [Private Legal Systems](#)
- [Relativity, Legal](#)
- [Restorative Justice](#)
- [Sanctions](#)
- [Social Norms, Emergence of](#)
- [State, Law and the](#)

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