

Review Essay

The impact of law: A view from north of the border

by Herbert M. Kritzer

Consequences: The Impact of Law and Its Complexity by W. A. Bogart. University of Toronto Press. 2002. 416 pages. \$95. \$29.95 (paper).

There are two ways to read W. A. Bogart's *Consequences: The Impact of Law and Its Complexity*. First, Bogart himself sees the book as an argument that we need to recognize that we know relatively little about the results produced by law. Second, in his use of the United States to illustrate his concerns about what may be unrealistic expectations of what law can accomplish, it becomes a book on American exceptionalism in law. While there have been many recent works on American legal exceptionalism, almost all have been by Americans, often lamenting the depths to which the United States has fallen in its excessive reliance on law, lawyers, and litigation. The fact that Bogart is a Canadian (professor of law at the University of Windsor) has the benefit for American readers of providing an analysis by an astute observer looking in rather than one of us who is swimming around in the fishbowl thinking how much better, or at least different, things might be on the other side of the glass.

In many ways, Bogart's own core argument in *Consequences* is neither complex nor surprising; we simply are not very good at predicting the conse-

quences of law, and thus law may not be a particularly good vehicle for social engineering. This is not the same argument advanced by Gerald Rosenberg in his much-discussed *Hollow Hope*. For Bogart, the issue is not that courts fail to produce social change, but that we cannot predict when legal change, whether through courts or through legislatures, will successfully produce social change or when our efforts to accomplish social change through law will either make things worse or introduce unanticipated, undesirable side consequences.

Undoubtedly Bogart is correct on this central point. The problem is that the central point is too narrow, and this may undercut the central conclusion he seeks to convey: "*Consequences* urges more caution in turning to law as a solution to complex social, political, and economic issues when we know so little about what effects law actually produces" (p. 4). Someone whose field is not law could just as easily have written a book with a slightly different title: *Consequences: The Impact of Policy Change and Its Complexity*. That is, law is simply one vehicle for effecting public policy, and all policy change produces uncertainty. Many policy changes fail to accomplish their intended goals. Some policy changes produce results that are the opposite of what was intended. And most policy changes produce at least some unanticipated consequences.

Of more importance to readers knowledgeable about the uncertainties of law and policy are Bogart's observations and analyses of law in the United States. He sees a focus on the U.S. as crucial because he believes that

the "growth of legalization has occurred especially in the United States." Given the emphasis on the rule of law around the world, and the growth of "judicialization," a good argument could be made that legalization has grown more rapidly in other, perhaps many other, countries. Still, whether or not legalization has grown most rapidly in the United States, Bogart's emphasis on the U.S. is appropriate because "America, more than any other industrial nation, is the land of law" (pp. 5-6).

In opening the book, Bogart lays out a variety of pieces of evidence that law has grown rapidly over the second half of the twentieth century. The indicators he uses are familiar: growth in the number of pages in the *Federal Register*, in the size of statute books, in the number of published court cases, in the number of lawyers, and in law-generating bodies (i.e., regulatory agencies). The result, according to Bogart, is a "qualitative and quantitative shift in the way that [the United States, Canada, and England] are invoking law" (p. 28). Along with this has come "an enormous enlargement of society's expectations concerning what litigation can—and should—do about complex social, political, and economic issues" (p. 31). While this shift in expectations is not limited to the United States, claims made about the potential of litigation as a vehicle of policy in the U.S. stand out.

The "turn to law"

What then accounts for the "turn to law"? Bogart discusses several explanations. First, the growth of law may reflect the breakdown of other

mechanisms of social control, such as norms and rules enforced by voluntary organizations, families, churches, and the like. Second, declining trust in political institutions may lead to greater emphasis on policy modes that are perceived as delegating less discretion to those political institutions; law is the policy vehicle that constrains discretion. Third, the second half of the twentieth century saw a shift to a politics of rights, what is often labeled the “rights revolution,” with a focus on rights embedded in difficult-to-change constitutions that were interpreted and enforced by invoking legal procedures in court.

While the “rights revolution” is typically associated with the left (never mind that before the 1930s it was the rights of the right that the American courts enforced by invoking rights of property and of contract), a fourth development flows from conservative forces in society, and that is the use of criminal law as the primary means to control and reduce crime. Thus, while law and legalization are often associated with progressive politics, Bogart notes that conservatives are also enamored with the law, but with different purposes in mind. Economic conservatives see law and rights as a vehicle for protecting property and the use of property from government. Social conservatives see law as a vehicle for protecting society from forces that undermine morals and traditional values.

A major element of Bogart’s central question—whether law can accomplish all that is expected of it—is the issue of how we know what results from law rather than from other forces in society. After all, “[m]ost people obey most laws most of the time,” and that compliance may be the result of persuasion, exchange, or command (p. 55). Bogart sees the United States as overly reliant on deterrence as the way to achieve compliance. Popular demands, fanned by media and political elites, to do something about crime lead to ever more severe sanctions, culminating in the adoption of the death penalty in most states. Even more important to Bogart is the issue of legitimacy: “If

people perceive the law and its administration as legitimate, they tend to obey it; if not, then not” (p. 75). The implication here is that underlying the crime problem in the United States is a crisis of legitimacy.

Assessing law’s impacts

Moving on from deterrence, Bogart explicates his primary argument regarding the difficulties and uncertainties of assessing the consequences of law: “Law surely has significant effects—but what are they?” (p. 110). Bogart’s discussion of the complexities of assessing law’s impacts does not provide any surprises, particularly to socio-legal scholars:

- Asserting impacts is easy; demonstrating that those assertions are true is rife with complexities and uncertainties.

- The very notion of what constitutes “fact” is problematic, and the nature of a specific fact is deeply embedded in theory, language, and experience.

- While law is seen as a system of social control through command, it is also a framework of discourse and interpretation; how do we balance the possible effects of law operating through commands and law operating by structuring people’s perceptions of what they do and why they do it?

- In any impact assessment, it is necessary to rule out alternative explanations (“plausible rival hypotheses”); these alternatives often exist in significant numbers, and designing assessments that successfully take them into account is a complex and difficult task.

- The difficulties of assessing whether law accomplishes its intended effects reappear with equal or greater force when it comes to dealing with the unintended consequences of law.

Not only are these familiar issues to socio-legal scholars, but, with one possible exception, these are issues that apply not just to law, but to any policy assessment. The exception is the discursive/interpretive impacts of law: given the normative underpinnings of the way we think about law, law may

have much greater potential impacts on how people think about issues than is likely to be the case for other types of policy tools.

Bogart goes on to discuss a number of widely varying, cross-cutting, and contradictory “ideas about the impact of law.” A significant element of this discussion concerns “America the outlier” because of what he sees as “dominance of America in debates about legalization” (p. 110). By this, I take it Bogart means the way that the United States is often held up by analysts and observers to be an outlier or to be fundamentally different from other countries, *even if that is not actually the case vis-a-vis specific legal phenomena* (a point to which I will return below). Bogart does not offer any new evidence of American exceptionalism, relying upon the extensive writing by other scholars on this topic.

Emphasis on rights

Bogart argues that “the aspect of America’s legal system that surely sets it apart is the prominence of rights determined by the courts” (p. 143). He quotes Mary Ann Glendon: “in its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over” (p. 144). It is not that other countries fail to recognize rights; rather, it is the prominent role of rights discourse, and the resulting inclination to turn to the courts, that sets the United States apart.

But what accounts for this emphasis on rights? Bogart alludes to a disarray in the political process, particularly vis-a-vis domestic policy. However, this neglects the fact that rights discourse has been a part of American political culture for most, if not all, of the country’s existence (for the first 150 years, the discourse focused more on rights related to economic concerns such as property and contract). Thus, it is not so much that “rights” are new on the political agenda, or that the courts are newly engaged in rights-based decision making, but rather which rights lie at the center of the agenda.

In concluding this discussion, Bogart returns to Canada to speculate on what changes may have occurred over the 20 years since the adoption of the Charter of Rights. Is Canada moving in a direction whereby the increased focus on rights will bring its broader political culture closer to that of the United States? Bogart seems worried that this is the case, depicting Canada's courts as "warm[ing] to the task [by] involving themselves in questions relating to abortion, mercy killing, assisted suicide, language rights, and an array of issues related to the administration of justice, to name but a few." Bogart sees the potential for broad changes in the political process in Canada, although he has doubts that the Charter and the courts are "bring[ing] about a new era in progressive politics" (pp. 143-44).

Variation and inconsistency

About half of *Consequences* explores the impact, or consequences, of law in the specific areas of control of crime through punishment, improving the environment, ending racial discrimination, regulating smoking, and restricting access to pornography. In these discussions, Bogart seeks to show the variation and inconsistency in the impact of law. A detailed discussion of his analysis of these five important areas is beyond the scope of this essay, but some major themes are worth a brief discussion.

One particularly interesting issue area is the strong emphasis on punitiveness that marks crime control efforts in the United States. Bogart observes that while the U.S. stands out in the rate of violent crime—particularly crime involving the use of firearms—overall the U.S. is not especially crime-prone. Other countries have higher rates of property crime; in recent years Canada has had a higher rate of robbery. Still, the approach to controlling crime in the U.S. focuses on punishment and deterrence, as evidenced by the use of capital punishment and a rate of imprisonment that vastly exceeds that of other comparable western-style democracies (by a factor of five

compared to Canada and England). The emphasis on punitiveness continues in the face of declining crime rates. Why has the "punitive paradigm" (p. 168) dominated the American approach to crime control? Why is "America ... a society determined to believe, regardless of the evidence, that the solution to violent crime is to force people to stop committing it?" (p. 178).

Bogart sees one answer in the realm of politics. It is not simply an issue of public opinion. While one might be tempted to explain the continuance of the death penalty as simply the result of politicians respecting the public will, Bogart points out that the death penalty has been abolished in other countries despite popular support (p. 171). Yet U.S. politicians, of both the right and the left, seem to feel that they must honor the public's desire to deal with crime through punishment. Other countries take a multi-faceted approach to crime control, including social safety nets and "designing out" situations and conditions that might increase crime through measures such as restricting firearms. Ultimately, Bogart never really answers the central question of why the United States relies so heavily on punitiveness. His discussion makes clear that it is not simply an issue of what the public wants, because if that were the case the United States would not stand in near isolation on the issue of capital punishment.

Another area that Bogart examines is racial discrimination and the impact of a variety of legal strategies to end and remedy that discrimination. Although employment opportunities for African Americans have improved significantly over the last 40 years, Bogart concludes that it is very difficult to sort out the impact of these laws from broader developments in the overall labor market. To what degree do greater opportunities for African Americans flow from the demands of the market, and to what degree do they flow from prohibitions on discriminatory practices? It is simply hard to allocate change to one cause or the other. In

the area of pre-university education, Bogart argues that civil rights laws and litigation have produced "decidedly mixed results" (p. 306), citing de facto segregation, disappointing school achievement among minorities, and the lack of significant impact of changes in school funding methods. Although Bogart may be overly sanguine in accepting some of the extant analyses of law's role in and impact on efforts to end discrimination in the United States, his broad conclusion about the role of law in this domain is probably correct: "it is [emphasis added] difficult to isolate the effects of law as opposed to other factors such as education, a changing job market, shifts in population, and alterations in public attitudes, particularly between blacks and whites" (p. 309).

While much of Bogart's analysis focuses on the experience of the United States as a locale for understanding the limits of law as a vehicle of social and behavioral change, in one area, the control of pornography, it is Canada that allocates a more prominent role to law. Specifically, a legal theory that has been rejected in the United States—that pornography creates generalized harms to women, including subordination—has been accepted by the Supreme Court of Canada under provisions of the Charter of Rights, which provides rights, such as freedom of speech and freedom of the press, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (pp. 264, 388 n63).

Although it may be relatively early to be sure of the impacts of this decision and the laws it upheld, there is no evidence of a diminution in availability or sale of pornography in Canada. The upheld statutes have been applied not so much to materials aimed at heterosexual men who would be the victimizers of women, but at materials targeted at gays and lesbians. Thus, it is not surprising that there is no evidence that the statutes have in any way improved the status of women in Canadian society (pp. 268-270). This is probably because the

efforts at legal limitations on pornography constitute a rear-guard action seeking to hold back, or reverse, changing social mores regarding sex and sexuality.

Bogart's discussion of efforts to control smoking through legal restrictions illustrates his central concern about assessing the consequences of law: can law play a major role in controlling materials that are deemed to be harmful to individuals and society? Bogart's analysis leads him to the conclusion that control efforts will work only if they are supported by popular agreement with the goals of control. Thus, in the United States, tobacco use has fallen sharply because increasing legal strictures related to tobacco (e.g., restrictions on advertising, tighter controls on sales to minors, increasing taxes, bans on smoking in public places) have been accompanied by a shift in public attitudes—smoking has gone from being perceived “as a glamorous indulgence to being seen as a dirty, deadly addiction” (p. 204).

Law probably buttressed the changes, but the changes grew more from public education about the risks of smoking, and the growing intolerance of nonsmokers who did not want to have to endure others' tobacco smoke than from the legal changes themselves. In countries such as France, the absence of sharp changes in cultural norms has meant that tobacco consumption has dropped much less, even in the face of legal changes (advertising bans, increased taxes) paralleling those in the United States, from about a decade earlier (p. 205). While Bogart is prepared to attribute some role to law in the reduction of smoking in the United States and Canada, he argues that it was the interaction between changing attitudes and changing law that allowed law to play a role (pp. 318-319).

An uncertain enterprise

In *Consequences*, W. A. Bogart has produced an important reminder that social engineering through law is an uncertain enterprise. Law, like other tools of public policy and social

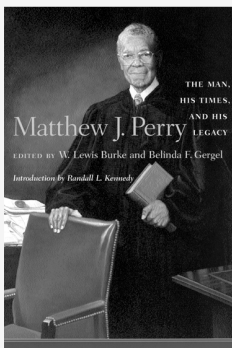
change, has both anticipated and unanticipated consequences; equally important, there is no good way to predict whether the intended consequences will be achieved. While students of public policy recognize the inherent uncertainties associated with new policy initiatives, it remains tempting to think of law as one tool that might be more predictable because of the command qualities we associate with it. Bogart's book should disabuse legal optimists who see law as a better tool than other policy mechanisms.

While not his goal in writing the book, Bogart's outside view of American legalism may be his more interesting contribution. Unlike most discussions of American exceptionalism in law, Bogart provides examples where America does not lead in the choice of legal mechanism (e.g., controlling pornography). Equally important, by identifying the theme of punitiveness, Bogart has probably identified a more serious issue than the usual concerns about American's supposed litigiousness.

While Bogart does not develop the theme of punitiveness beyond his analysis of criminal justice, it is an important element in other areas involving law. These areas include regulatory implementation and such tort law areas as products liability. Law in the United States covers a broad terrain, yet it is inevitably linked in citizens' minds with criminal justice and criminal sanctions. Thus, citizens tend to transplant concepts associated with criminal justice (e.g., “guilt,” “beyond a reasonable doubt,” and punitiveness) into the broader legal and policy arenas. The roots of law's breadth are deep; after all, the United States enjoys a “government of law, not of men.” Concepts from criminal law regularly get imported into legal areas where they do not belong—including the punitiveness that Bogart expertly documents. ☞

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