

Deviants or Consenting Adults: A Human Rights Approach to Defining and Controlling Deviant Behavior

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This article examines the concept of deviance within a human rights perspective. The current debate over the need for consent, and the difficulty inherent in attempting to reach a consensus regarding definitions of deviance, are discussed. The positivist and subjectivist-constructionist approaches to defining deviance are outlined and critiqued. It is concluded that both of these models are inadequate for defining deviance and that a more objective approach is required which reflects society's interests, while also protecting individuals from the tyranny of the majority. This conclusion leads to the development of a new model of deviance which incorporates human rights into the method for defining deviance. This model rests on the argument that there is a crucial difference between behaviors which are undesirable and those which are unacceptable. It is further argued that only unacceptable behaviors should be prohibited and that behaviors which are merely undesirable should be tolerated and regulated. A model is elaborated in which five criteria are posited as a methodology for determining whether particular behavior is deviant and/or whether it should be controlled through criminal sanctions.

Keywords: Deviance; Positivist; Constructionist; Human Rights; Social Harm; Social Control; Legal Sanctions

Introduction

Concepts of deviance, and the quandary over how deviance should be defined, involve questions and debates that have plagued human societies since the beginning of time. Cultural anthropologists argue that "deviance", as a concept, constitutes a broad cultural universal because all known societies have incorporated such a concept into their cultures. However, despite the universality of the concept, there is very little agreement regarding the specific activities that are considered "deviant", and thus precise definitions of deviance vary greatly across societies and time periods. In addition, there is a great deal of debate regarding the degree to which a society should limit or prohibit certain types of deviant behavior in order to protect the interests of a majority of society's members. Such limitations or prohibitions are usually referred to as "social control", and it is generally agreed that any form of social control necessarily limits the freedom of individuals who wish to engage in the controlled behavior. For this reason, the manner in which behavior is defined as deviant, and the decisions to control some behaviors but not others, reflect some of the most important and fundamental issues facing any society.

In one sense, the definition of deviance is simple. Behavior which contravenes accepted standards of behavior, often called social norms, is considered deviant. Thus, college professors who cancel most of their classes, or fail to administer exams, would likely be considered deviant by their peers, even though they might be popular with their students. On a more serious level, unprovoked assaults or premeditated killings would also be considered deviant because most societies have social norms

against such activities. However, the reliance on social norms as a means of defining deviance is problematic because it does not address the crucial question of why these social norms were created in the first place¹. The traditional response that social norms attempt to control behavior that is undesirable or threatens social order is inadequate because it fails to account for why many activities are considered deviant and/or controlled. It is easy to understand why there is widespread agreement in most societies that assault and murder are deviant and should be controlled. Clearly, uncontrolled assaults and murders would disrupt social order and cause a great deal of harm to a society's members. Indeed, one can also see why canceling classes and the failure to administer exams would be undesirable insofar as it would ultimately result in a lowering of educational standards.

On the other hand, there are many other activities that are often considered deviant, and frequently controlled through criminal sanctions, where this definition is harder to apply. For example, activities such as prostitution, homosexuality, viewing pornographic materials and drug use are frequently considered deviant and sanctioned by formal and informal means of social control. Although some of these activities have the potential to disrupt social order, it is difficult to argue that they pose the

¹Robert Merton, one of sociology's more renowned deviance specialists once argued that it is "absolutely true and trivial" that deviance is a transgression of norms (Merton, 1971: p. 827). Although it is generally agreed that Merton meant that the norms were to be accepted as a given it is also possible to argue that such a definition is "trivial" because it is circular and tells us nothing substantive about what deviance really means in a specific context.

same degree of harm as assault and murder. It is also clear that there is a great deal of ambivalence in many societies regarding the degree to which these activities should be considered deviant. Further, there is even more debate over whether such activities should be sanctioned through the criminal law. Indeed, homosexuality and pornography are already legal in most respects, and there is a growing movement to legalize the medical use of marijuana. It is also important to note that public and legal attitudes towards these activities vary greatly throughout the world, and that many European countries exhibit much more tolerant attitudes towards them². Further, attitudes and conceptions of deviance have also changed dramatically throughout history, and activities that are now commonplace were once considered serious crimes. In this respect, sodomy (homosexuality) was a capital crime as late as the early 19th century, and midwives were burned at the stake as witches during the 17th century.

Although reaching a consensus over the definition of deviance is a difficult and elusive task, one thing is clear. Definitions of deviance represent a particular set of values, and there is often a lack of consensus regarding the degree to which such values are reasonable or appropriate. In this respect, it is extremely important for any democratic society to ensure that the definition it uses to define activities and behavior as deviant is based on values that reflect the interests of the society as broadly as possible. It should also be clear, however, that reaching a consensus is not the only important criteria. One only has to recall the widespread consensus among white southerners against inter-racial marriages during the civil rights era to realize how a “consensus” can easily represent the “tyranny of the majority”. In formulating an acceptable definition of deviance, it is important to employ a set of criteria that make the process as “objective” as possible, while also recognizing that the process is inherently and irrevocably “subjective”. It is the intent of this article to explore the ways in which different approaches to deviance can be used to protect the majority from disruptive or harmful behavior, while also protecting the legal and civil rights of individuals who wish to engage in behavior which is merely different, but not necessarily dangerous. In order to develop this “human rights” approach to deviance, it is first necessary to discuss several of the approaches currently used in socio-legal studies.

Contemporary Socio-Legal Approaches to Defining Deviance

In addition to the social and cultural preoccupation with deviant behavior, socio-legal theorists also wrestle with how to define deviant behavior for the purposes of analysis. This approach to deviance is distinct from the definitions applied by society³, even though socio-legal theorists often attempt to mirror the definition used by the particular society that they are studying. First, whereas societies define deviant behavior to facilitate social control, socio-legal theorists use definitions of deviance to delineate the limits of what is included in the anal-

ysis of deviance and social control. In other words, the definitions help them define what they will study. A second major difference between societal and socio-legal conceptions of deviance is that socio-legal theorists do not necessarily accept or agree with the negative stigma applied to the behavior encompassed by the definition. In this respect, socio-legal theorists are concerned primarily with how societal conceptions of deviance affect social interaction and social order. They are also interested in how the application of deviant labels affects the lives of people who are labeled, as well as those doing the labeling. Thus, for socio-legal theorists, the definition of deviance is often a heuristic tool that defines what they study, and provides points of departure for analyzing different aspects of deviant behavior.

The Positivist Approach to Defining Deviance

Most socio-legal⁴ conceptions of deviance are descriptive in the sense that they attempt to define what *is* considered deviant, rather than question whether an activity *should be* considered deviant. One of the earliest definitions was articulated by Talcott Parsons, who argued that deviance was any failure to abide by the norms of a common culture (Parsons, 1951: p. 206). This definition did not argue that a negative reaction was necessary, and seemed to imply that deviance was inherent in the departure from social norms, regardless of whether it elicited any social or moral disapproval. Many other socio-legal theorists adopted Parsons’ basic premise that deviance was objectively tied to social norms. Indeed Robert Merton, a disciple of Parsons, argued that it was so obviously true that deviance was a violation of social norms that it did not need to be questioned further (Merton, 1971). Subsequent discussions of this *normative* definition of deviance debated such issues as how significant the norm violation had to be, whether the violated norm had to be related to the violator’s social status, and whether a negative reaction was a necessary element of the definition (Goode, 1997: pp. 16-26). This latter question was resolved in favor of the position that a violation of social norms was deviant, even if it happened in secret and no negative reaction occurred.

This approach to defining deviance evolved into what is currently described as the *positivist* approach to deviant behavior⁵. There are many different versions of the *positivist* approach and these different versions are frequently in disagreement over key points⁶. Nevertheless, it is possible to identify several common assumptions and arguments that are essential elements of the approach. First, positivist socio-legal theorists view deviance as *intrinsically real* in the sense that it is qualitatively different from non-deviant behavior. In this respect, it possesses an inherent ability to affect people disagreeably (Thio, 2007: pp. 5-8),

⁴It should be noted that although much of the early work on the topic was carried out by sociologists, for the sake of consistency, the term “socio-legal” will be used throughout this discussion.

⁵This approach is also sometimes referred to as the *objectivist* approach.

⁶For example, some socio-legal theorists still include the concept of *absolute* norms and values as part of the positivist approach, despite the fact that no one has ever been able to articulate a single example of an activity that is considered wrong in all circumstances (Jacobs, 2002: p. 2). Most positivist socio-legal theorists now recognize that concepts of deviance are relative to time and place, just as norms and values change over time and are relative to a particular cultural milieu. However, this latter statement is quite different from the argument that deviance is simply a label that has no meaning outside of a particular context.

²Amsterdam, for example, has built a thriving tourist industry that relies heavily on visitors drawn by Holland’s liberal approach to drugs, pornography and homosexuality, three activities that are stigmatized to varying degrees in many other societies.

³For the purposes of this discussion, the term “society” will be used to refer to all social groupings that apply conceptions of deviance to the activities of their members.

and evokes an automatic negative reaction that stems from its conflict with society's core values. This negative reaction is independent of the behavior's legal status, and thus the decriminalization of an activity will not diminish its deviant status until cultural and social norms also change to accept it (Jacobs, 2002: p. 3)⁷. Further, the assumption that deviant behavior is qualitatively different from non-deviant behavior also leads positivists to conclude that deviant behavior is caused by factors that are themselves outside the norm, and which require explanation. An example of this approach can be found in the search for the causes of homosexuality, whereas the existence of heterosexuality is assumed to be a normal state of affairs and is rarely subjected to causal analysis. This emphasis on causality lends a deterministic character to positivist theories that attributes deviance to factors that are beyond the control of the individual (Thio, 2007: p. 8). Although contemporary positivists generally accept the role that free will plays in human behavior, they nevertheless still attempt to explain deviant behavior by attributing it to "causal" factors other than simple choice. Thus, homosexuality is frequently explained by genetic differences or attributed to a weak or absent "father figure". Although more recent work on the causes of homosexuality does incorporate social learning and choice, this is frequently seen as threatening by gay rights groups who fear that it will negatively affect their quest for equal rights.

Two further aspects of the positivist perspective center on the related arguments that a widely held *consensus of values* exists regarding important norms and values, and that the enforcement of norms promotes social well-being. Positivists argue that the consensus of values, which develops over time because society's members consistently experience the negative effects of certain activities, makes it easy to identify deviant behavior (Rubington & Weinberg, 1999: p. 1). Further, because this consensus of values represents the collective interests of a society, it is imperative that it be enforced to deter undesirable and/or socially disruptive behavior. In this respect, the enforcement of the consensus of values, either formally or informally, serves the dual functions of preserving a society's way of life, while at the same time reinforcing a sense of community among its members. It must be stressed that the positivist approach does not give any serious consideration to whether the norms are actually reasonable or correct. They are accepted as a "given" and the positivists focus their attention on explaining why deviants fail to comply with these objectively defined norms. A critical analysis of why these norms exist, or whether they are applied fairly, is left for other theorists to explore.

The Subjectivist-Constructionist Approach to Defining Deviance

A second sociological approach to defining deviance is exemplified by the often quoted definition coined by Howard Becker in his classic work *Outsiders: Studies in the Sociology of Deviance* (Becker, 1963). Becker argued that "groups create deviance by making rules... and applying those rules to particular people and labeling them as *outsiders*" (Becker, 1963: p. 7).

⁷It must be noted that this argument is far different than arguing that the *harmfulness* of an activity is independent of its deviant status. It is quite possible for behavior to evoke widespread negative reactions without being harmful in itself. An excellent example of this paradox can be found in the attitudes that existed in the south towards interracial marriages prior to desegregation.

Becker further argued that deviance is not inherent in the act of breaking the rule, but is simply a social construction that is applied to some people but not to others. Once applied, however, the label exerts significant effects on the person being labeled, not the least of which are changes to the labeled person's self image and public identity (Becker, 1963: p. 7). Thus, in Becker's analysis, there can be no deviance until a label is applied to particular behavior. Since these labels are applied unevenly to different people and different activities, and because the labels negatively affect the people who are labeled, societal definitions of deviance ultimately serve to perpetuate unequal social control.

Becker's arguments form the central focus of the *subjectivist-constructionist* approach to deviance⁸. This approach embodies three major assumptions or arguments. The most important argument centers on the subjectivist belief that norms and values are social constructions that have little meaning outside of a specific context. In other words, deviance is both defined and experienced *subjectively* by all people involved, whether as deviants, observers or labelers (Rubington & Weinberg, 1999). For example, the intentional killing of another person, although generally considered deviant in most instances, may vary in terms of its perceived deviance depending on the specific circumstances. It would be considered extremely deviant if it occurred during a bank robbery, in which a robber coldly executed an elderly customer because she refused to hand over the cash that she needed to live on for the next week. On the other hand, if a bank employee or customer drew an illegal handgun and killed one of the robbers while his back was turned, their behavior, although potentially illegal, might well be considered *heroic* instead of deviant. The difference would depend on how the participants, and the general public, subjectively interpret the events. The fact that many people consider theft wrong would likely affect their assessment of every behavior that flows from the initial action of robbing the bank. Further, the fear and anger experienced by the bank employees and customers would also affect their interpretations of the events, and also serve to legitimate their reactions. Thus, the bank employees and customers would likely be viewed with much more sympathy and understanding than the robbers, even though some of their actions might also be illegal. All of these examples illustrate the constructionist contention that the degree of deviance attributed to a particular behavior depends on the subjective experiences and interpretations of all people involved in the event.

A second important aspect of the constructionist perspective on deviance centers on the argument that deviant status results from a process of labeling, and that deviant behavior results from a voluntary decision to engage in behavior that is subsequently labeled as deviant (Thio, 2007: p. 10). This argument directly contradicts the positivist contention that deviance is intrinsically real. Obviously, if it is simply a label, the negative reaction will exist only in *some* people's minds, and there cannot be any qualitative difference between deviant and non-

⁸As in the case of the positivist approach, there are several distinct approaches which can be encompassed under the subjectivist-constructionist umbrella. For example, the subjectivist arguments in the model are frequently referred to as the "humanist" approach, whereas the more strictly constructionist position is integral to the "labeling" approach to deviance. Despite these differences, however, it will be sufficient for the purposes of this discussion to synthesize the approach into a single perspective, which will be referred to as the *constructionist* approach.

deviant behavior. Thus, the constructionist perspective is much less concerned with why people engage in deviant behavior than it is with why certain behavior is defined as deviant while other behavior is defined as normal. For constructionists, this concern breaks down into a consideration of at least three sub-processes: 1) The creation of behavioral categories that are considered deviant; 2) The assignment of specific examples of behavior into the deviant categories; and 3) the enforcement of negative sanctions against some perpetrators of the behavior that is included in the categories.

This entire process is complicated by the constructionist argument that there is much less consensus about which activities are deviant than the positivists imply. Thus, the first problem in constructing a definition of deviance would be to reach agreement on which categories of behavior should be considered deviant. Further, even when there is general agreement that a particular category of behavior is deviant, the operationalization of the categories is still far from clear-cut. For example, if a society decides that problem-drinking constitutes a type of deviant behavior, it is still possible that the actual definition of problem-drinking will vary considerably among different groups within the society. What might be considered “problem-drinking” by conservative, middle-class church goers, might well be viewed as normal social drinking by university students, who customarily consume large amounts of alcohol on weekends and in the student pub after classes. In this situation, both groups agree that problem-drinking is deviant, however, they differ greatly in their definitions of what exactly constitutes “problem-drinking”. The process becomes even more complex when we consider the third sub-process, namely the application of negative sanctions as a result of the deviant behavior. This can be illustrated by comparing the example of a skid-row alcoholic, who drinks to excess virtually everyday, with a middle class business executive, who drinks a comparable amount of alcohol in the course of a normal business day. In all likelihood, both individuals are alcoholics⁹, and the basic activities that they engage in are similar. However, the skid-row alcoholic is much more likely to be stigmatized and attract attention from the police and other agents of social control.

These arguments, when combined with the assertion that deviant behavior is voluntary, make it pointless to search for the causes of deviance. Constructionists argue that the answer is simple. Deviant behavior is motivated by the same factors that motivate non-deviant behavior and, ultimately, it occurs because people choose to engage in it. Thus, the sexual behavior of heterosexuals, homosexuals and pedophiles is similar insofar as all are motivated by the desire for sexual pleasure. The fact that heterosexuality is considered “normal”, homosexuality is gradually being accepted as an alternate lifestyle, and pedophilia is almost universally condemned is irrelevant to the issue of causation. Constructionists view human beings as rational actors who choose between different courses of action, based on their own interests and priorities. As such, they completely reject the determinism that is implied by the positivists’ search for the “causes” of behavior. For this reason, constructionist theories place a much greater emphasis on why certain behavior is defined as deviant than they do on why people engage in the behavior. The latter is assumed to be motivated by personal choice, whereas the former results from a much more complex

set of interactions and negotiations among different groups in society.

In summarizing this discussion of the positivist and constructionist perspectives, it is important to note that both perspectives agree that normative standards change over time and vary between cultural groups. As was noted previously, the absolutist sentiments that were once a key part of the positivist perspective have been largely replaced by the relativist argument. However, there is a crucial difference between arguing that norms and values are relative and arguing that deviance is simply a label. It seems clear that some types of behavior, such as murder, rape, armed robbery and drunk driving, pose such serious threats to society that it is difficult to argue successfully that they are only deviant because someone has labeled them as such. Clearly, the positivists are correct in their argument that these activities will evoke negative reactions from most people, and that the stigma applied to their perpetrators represents a reasonable bias. At the same time, it is equally clear that many activities, such as homosexuality, smoking marijuana and watching pornography, do not pose such clear cut threats and evoke negative reactions only from some people. These conclusions bring this discussion back to the point from which it started; namely how can any society devise an appropriate set of criteria for defining behavior as deviant and deciding which behavior should be controlled through legal sanctions? This question focuses squarely on the implicit contradiction that always exists between the individual rights and the rights of society in any democratic society. In order to resolve this contradiction, concepts of human rights must be explicitly integrated into any model of deviance and social control.

An Integration of Deviance, Human Rights and Social Control

Any attempt to integrate human rights into a model of deviance and social control must recognize that human diversity is both normal and desirable, insofar as it adds richness to a society’s culture and is a society’s best guarantee of freedom of choice. Second, it must be recognized that definitions of deviance are irrevocably inter-twined with power, and that elite groups attempt to control both the definitions of deviance and the agents of social control to reflect and support their interests. Finally, it must be recognized that there is a difference between behavior which is *unacceptable* and that which is merely *undesirable*. The difference between these two categories can be described as a society’s level of *tolerance* (Stebbins, 1996). In some societies, all undesirable behavior is prohibited and no distinction is made between undesirability and unacceptability. It is argued in this article that not all undesirable behavior is unacceptable, and that tolerance is a virtue that is particularly important in multi-ethnic and multi-cultural societies such as the United States and Canada. Thus, only serious deviant behavior that is truly unacceptable should be prohibited, and less serious forms of deviance should be tolerated or regulated (Stebbins, 1996; Gomme, 2002).

The intent of this discussion is to outline several criteria that can be used in deciding whether activities should be considered deviant and/or prohibited. There are a minimum of three categories involved in this approach to deviance: 1) Non-deviant activities that are acceptable to most people; 2) Activities that are classified as “deviant but tolerable”. Such activities are considered undesirable but they can be tolerated under most

⁹In this case, the term “alcoholic” is being used to refer to someone who is physically and psychologically addicted to alcohol.

circumstances; and 3) Activities that are classified as “deviant and intolerable”. Such activities would be considered unacceptable to a society¹⁰. It will be argued in this discussion that only the third category should be made illegal, and then only when the proposed laws can satisfy the “test of relative usefulness”. This approach will also attempt to achieve an ideal trade-off between the rights of society and the rights of the individual. In this latter respect, it is important to stress that the concept of human rights also includes the rights of society. As Meier and Geis note in their 1997 book, the opposite side of the “crimes without victims” coin includes the concept of “victims without crimes” (Meier & Geis, 1997: pp. 4-10). In many instances, these victims result from the actions of rich and powerful elements of society, and are not criminalized because their perpetrators have sufficient power to prevent their criminalization.

Finally, we are ready to start discussing the actual criteria to be used in the human rights approach to defining deviance. Of course, there really is no such thing as an *ideal* trade-off between societal and individual rights because someone will always argue that the criteria fail to include an important aspect of human interaction. However, it is possible to develop a set of criteria that avoid some of the biases and weaknesses inherent in the criminal laws of many societies. Thus, the following criteria can be considered an ideal definition only insofar as they attempt to promote tolerance and diversity, while limiting the influence of elite groups on the definitions of deviance incorporated in our criminal law.

Significant Social Harm

In order to be considered deviant, an activity must create a *significant social harm*. This criterion may be satisfied if the activity accomplishes any of the following: 1) causes direct harm to individual or group; 2) causes an immediate threat to a society's way of life, or 3) constitutes a threat to the existence of the human race. The concept of “direct harm to an individual or group” is the easiest to operationalize. Clearly, such behaviors as theft or assault fit into this category. However, the second concept is less easily defined. For example, does homosexuality or prostitution threaten a society whose culture is based on a heterosexual model of family relationships? Certainly, many religious scholars and conservative theorists have argued this point. Although such a threat is logically possible, it cannot be that “immediate”, since prostitution is the “world's oldest profession” and homosexuality has existed since at least the time of Socrates. Finally, the concept of “a threat to the existence of the human race” incorporates unbridled aggression that might lead to a nuclear holocaust or unchecked pollution that could render the earth uninhabitable. This threat has not disappeared with the end of the Cold War, and may even be increasing due to the terrorism that has resulted from religious and ethnic rivalries in many parts of the world.

Basic Human Rights

All people are entitled to basic human rights to protect their physical and emotional well being. *Physical* rights include,

¹⁰It should be noted that other socio-legal theorists would add additional categories to this typology. For example, Hagan adds the category of “social diversions” and distinguishes between “consensus” and “conflict” crimes. Criminologists also commonly use a typology that includes “deviant and criminal”, “deviant but not criminal”, “criminal but not deviant” and “neither deviant nor criminal” (Hagan, 1977).

among other things, personal safety and the protection of property, and this criterion would consider theft and assault as deviant behavior. *Emotional* rights would guarantee all people dignity and respect, and attitudes and activities that offend people's dignity and self-respect, such as racism, chauvinism and homophobia, would be considered deviant.

The protection of physical rights is usually well enshrined in the laws of most societies, insofar as most societies have passed laws against theft, assault, and murder, as well as many other violent and economic crimes. However, emotional rights are less well protected, and racist, chauvinist or homophobic activities are rarely subject to criminal sanctions unless they also include violence. It is only recently that many western societies have introduced the concept of “hate crimes” which provide for harsher penalties in cases where offences were motivated by intolerance towards certain protected groups. In all other cases, intolerant attitudes and activities are either ignored or subject to civil sanctions only. This distinction is important insofar as it serves to indicate that society places less importance on such offences.

Avoidance of Hypocrisy

Definitions of deviance (and particularly laws) must avoid hypocrisy and apply equally to all people and similar activities. Thus, a society should not have one set of rules for whites and another for non-whites. Similarly, the rules and laws must apply equally to all social classes. On a formal basis, most contemporary societies enshrine the notion of *formal legal equality* in their constitutions. However, this guarantee of equality before the law frequently constitutes a legal fiction because the application of the laws is biased by factors such as race, gender and social class. Without getting too deep into clichés, the case of O. J. Simpson provides an excellent example of these phenomena. Although Simpson was charged with the murder of his wife and her male friend, Simpson was acquitted of the charges because his great wealth enabled him to assemble a “dream team” composed of the top criminal lawyers in the United States. In this case, Simpson's social class was more important than his racial status as an African American. Considering the evidence weighed against him, it seems very clear that Simpson would have been convicted if he had been a “poor black man” rather than a rich one.

Another area in which the laws discriminate involves situations in which similar activities are treated differently. For example, it is legal for adults to consume alcohol as long as certain restriction on age and location are met. Marijuana, on the other hand, is generally illegal despite the fact that they are both psychoactive drugs, and most researchers would agree that alcohol is the more dangerous of the two. This distinction seems illogical and significantly affects the way in which users of the two drugs are treated. Further, the hypocrisy represented by such unequal treatment also promotes disrespect for the law that extends beyond the specific activities that are subjected to unequal treatment.

Social Diversity

Definitions of deviance and the laws should allow for maximum individuality and promote social diversity. Unless an activity constitutes a significant social harm, no activity or behavior should be proscribed simply because it offends the moral

sensibilities of other people. Activities such as prostitution and homosexuality have been stigmatized and frequently subjected to harsh penalties because they were deemed immoral. Such a state of affairs imposes the moral values of dominant groups on other groups, and thus seriously infringes on the basic human rights of the subordinate group. This is particularly true in multi-cultural societies such as the United States and Canada, which incorporate many different ethnic cultures in their populations. It also applies to other groups such as homosexuals, who have long argued that they are denied basic human rights that the heterosexual majority enjoys as a matter of course.

The Test of Relative Usefulness

This final criterion relates more specifically to the question of formal social control, and is perhaps the most important of all the criteria. Criminal Laws must pass the test of relative usefulness which asks three questions:

- Will the law be effective?
- Will the law create undesirable side-effects?
- Can the problem be handled through other means?

Thus, even in cases where an activity meets all of the other criteria for deviance, it should not be prohibited by criminal laws unless it is clear that such laws will be effective and will not cause other undesirable side-effects. Further, the criminal law should only be used as a last resort, in cases where other means of handling the problem are not feasible. The issue of drug use can be used to exemplify these criteria. Many legal analysts have argued that the laws against drug use and trafficking are almost completely ineffective, while also resulting in official corruption and the growth of organized crime. At the same time, research on drug use indicates that education and treatment are far more effective ways of discouraging drug use (Gray, 2001).

Conclusion

In concluding this introduction to the topic of deviance, it is important to reiterate several important considerations. First, deviance is a relative concept that is rooted in the core values of a society. For this reason, it is impossible to outline a set of definitive criteria that will adequately apply to all societies. Any attempt to develop a prescriptive definition of deviance, whether it is liberal or conservative, will ultimately tread too close to the absolutist sentiments embedded in early positivist approaches. For this reason, the criteria outlined above are intended as a “methodology” for integrating human rights considerations into the social control process, while allowing the exact definition of deviance to be socially constructed within a particular society. For example, although social harm is a necessary aspect of deviance, the exact definition of social harm,

and the specific activities that constitute social harm, will vary from society to society. Thus, it is entirely possible that the more liberal approaches towards drugs and pornography employed in Holland may not work in the United States and Canada; or that consensual homosexuality might disrupt the social order of small-scale, traditional societies. It is important to understand that societies are enormously complex and that a single “one size fits all” approach to deviance will not work across diverse societies. It is also important that the criteria used to define deviance be flexible to accommodate the fact that society’s core values change over time¹¹. Ultimately, social control represents the outcome of social, cultural and political negotiations, and legal and political decisions should reflect, and sometimes lead, public opinion. In this respect, the current debate over same-sex marriages in the United States illustrates both processes. In some cases, court decisions appear to be leading public opinion by legalizing same-sex marriage in areas where such actions are unpopular. In other cases, “grassroots” propositions are placed before the voters in an attempt to have the law reflect public opinion by limiting marriage to unions between opposite sex couples. At present, this debate is far from settled and it is unclear how the definition of marriage will evolve.

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¹¹The 2003 *Lawrence* decision by the United States Supreme Court affirming gay rights (*Lawrence v. Texas*, 2003), and the decision by the Canadian government to respect a 2003 Ontario Court of Appeal decision that excluding same-sex marriages violated s. 15(1) of the Canadian *Charter of Rights and Freedoms* (*Halpern v. Canada*, 2003), both attest to the manner in which legal decisions interact with political processes to reflect, and sometimes lead, public opinion.