

# RESISTANCE TO CONVENTIONALITY IN THE SOCIOLOGY OF LAW: A REJOINDER TO HORWITZ

DAVID F. GREENBERG

Allan Horwitz and I are in full agreement about the value of studying the extralegal sources of statutory law (such as vagrancy legislation) or of governmental social control (whether or not it is identified as law). A good deal of my own work has concerned just this (Greenberg, 1977; 1980; forthcoming; Humphries and Greenberg, 1981; forthcoming; Loftin *et al.*, 1981).

To study these extralegal sources of law, one need not exclude *a priori* conventional, commonsensical or naive explanations, for common sense and naiveté are not always wrong, nor are they excluded by the fact that other sorts of explanations may also be enlightening. It is for theory and research to determine the relative importance of competing explanations under different conditions. Arbitrarily to exclude a set of plausible variables from consideration, as Horwitz does when he asserts that "legal rules . . . are not themselves what explains law,"<sup>1</sup> is to restrict the range of what science can tell us. If we are concerned with the administration of vagrancy law, I would expect legal rules to have fairly low explanatory power (Foote, 1956); in other contexts, I might expect more.<sup>2</sup>

The distinction Horwitz makes between independent and dependent variables can be pushed too far. As I noted in my critique, when variables mutually influence one another,

---

<sup>1</sup> Elsewhere in his reply, Horwitz suggests that, when legal rules are used as independent variables, they often generate theoretically trivial, if not logically circular, answers. I do not understand how something can simultaneously be false and trivial, much less circular.

<sup>2</sup> As an example, no one convicted of burglary in the U.S. today is sentenced to death. I doubt that this can be predicted from Black's variables and assert that it follows instead from the absence of statutory provision for this penalty in a society whose judges generally try to abide by statutory provisions when they impose sentences. Is this circular or naive? I am more concerned with its being correct. Predictions that can be tested in societies which have statutory provisions for capital punishment in burglary cases or where judges make no effort to conform to statute can be derived from the proposition. It may be, of course, that Black's variables help us to predict the statutory penalty, but that is a different question.

statistical theory based on this distinction breaks down. That is why econometricians have developed methods for handling systems of simultaneous equations. Failure to utilize these methods when they are called for can have disastrous results in data interpretation (Greenberg, 1979: 36-41).

Horwitz's comments persuade me that this distinction can also be theoretically pernicious. Complex reciprocal relationships between law and other social variables are consistent with several theoretical traditions. Models incorporating these theoretical explanations cannot be easily examined if they are cut down the middle, with one half reserved for the sociology of law and the remainder left for other subfields like social stratification.<sup>3</sup> Indeed, under these conditions, impermeable boundaries between different subfields cannot be drawn.

Horwitz is correct in his claim that I cite only evidence that runs counter to Black's propositions. I do not doubt that there is supportive evidence; readers of Black's book will find numerous references. A full assessment of the propositions requires an examination of this evidence, and this in turn entails not merely a counting of citations pro and con but a careful evaluation of the methods used in each study. My stated aim was neither to conduct such an evaluation nor to argue that the propositions were invalid; it was to show that support for Black's propositions is not as consistent in the literature as one might conclude from reading Black's book, which cites no conflicting evidence at all. As Horwitz notes, conflicting evidence leads one to inquire about the conditions under which a proposition is valid or invalid. This is not an inquiry that can be conducted when existing negative evidence is systematically ignored. Black's discussion would have been more satisfying had he acknowledged some of the findings that are apparently inconsistent with his propositions and explored their implications for the generality of his theory.

Horwitz is also correct in noting that some of the counter-evidence I cite consists of zero-order relationships and in suggesting the possibility that some other of Black's propositions, involving other predictor variables, might explain a facially inconsistent observation.

---

<sup>3</sup> Horwitz's exclusion of the study of the consequences of law from the sociology of law is arbitrary and, to the best of my knowledge, novel. Certainly many who see themselves as sociologists of law see the effort to understand how laws come to have their effects as a core concern of law and social science.

Yet Black repeatedly cites similar zero-order relationships in support of his propositions. Horwitz's comments, therefore, cut both ways. If some of my counter-evidence is discounted by his argument, then much of Black's supportive evidence must be discounted as well. A full test of Black's theory, whether it ultimately supports or demolishes it, must consider the range of variables implied by Black's propositions as well as rival explanatory variables that Black's work omits.

The question of levels of analysis (physics/chemistry, psychology/sociology) is a complex one and can only be touched on here. There are two distinct ways in which levels of analysis cannot be kept entirely distinct; for convenience I will call them the conceptual and the dynamic. In chemistry, some fundamental concepts derive from physics. Thus, Pauling (1958: 32) defines a molecule as a discrete group of atoms. *Atom* is a concept in physics. Secondly, physical forces may give rise to chemical phenomena (e.g., electrolysis). At times, one may be able to ignore the physical processes that underlie a chemical reaction. But not always.<sup>4</sup>

Similarly, many sociological concepts are meaningless except in terms of psychology. I doubt, for example, that "material resources" can be defined except in terms of the meanings that materials have for people. The distinction between government and nongovernment, which is critical to Black's definition of law, is conceptual. For this reason one cannot entirely escape cognitive psychology;<sup>5</sup> the variables themselves presuppose it. In addition, psychological processes can have consequences in the social realm. A rigid barrier between the sociology of law and the psychology of law, such as Horwitz erects, forecloses the study of these effects. In writing *Suicide*, Durkheim may have thought it necessary to counterpose a purely sociological explanation of suicide rates to psychological explanations so as to legitimate the discipline he was trying to introduce into the French universities. His attempt, however, rested on faulty logic (Pope, 1976; Lukes, 1972: 18, 220-22). To perpetuate Durkheim's error would only hold us back.

---

<sup>4</sup> I frame the discussion in terms of the movement from physics to chemistry, rather than from chemistry to physics, to facilitate comparison with psychology and sociology, but in terms of dynamic considerations, one could also go in the other direction.

<sup>5</sup> When the attempt is made to do so through a strict behaviorism, it almost invariably entails the imputation of meanings by the researcher to those studied. The success of this strategy depends on the researcher knowing the meanings employed by those studied (Blum, 1970; Hindess, 1973).

Horwitz rightly notes my preference for causal explanations. Observing the world, one sees patterns. Assuming they did not arise by chance, one seeks an explanation of how they arose. To show that an individual pattern is a special instance of a more general one (the Black-Horwitz strategy) is not, in my view, to present a full explanation. It is only to restate the observation at a more abstract level, without specifying the processes that brought about the pattern.<sup>6</sup> Newton's law of gravity, to take a familiar example, organizes a large amount of astronomical data and so is extremely useful. But it does not tell us why the gravitational force varies as the reciprocal of the squared distance between two objects, rather than in some other way. A theory of gravitation should answer this question. Similarly, to identify generalizations regarding law (Black's project) is unquestionably worthwhile. Even more worthwhile is to explain why these generalizations hold.

The alternative I advocate is implicit in these comments: it is thinking. This means conceptualizing variables (which Black does),<sup>7</sup> reasoning about the connections expected between these variables (which Black doesn't do), and revising, qualifying, and elaborating this reasoning in the light of observation (Black allows for the revision of his propositions in light of new information, but there is no reasoning to revise). One hopes in doing this to explain more and more, but the requirement of a logically coherent conceptual framework distinguishes the approach I advocate from a purely empiricist one.<sup>8</sup> Disciplinary boundaries between fields like sociology, economics, and psychology may be crossed at will as reasoning requires.<sup>9</sup>

---

<sup>6</sup> Specification of these processes is especially important if the theory is to be used for purposes of social engineering; this cannot always be done from a statement of functional relationships.

<sup>7</sup> The way in which he does this—ransacking various theoretical traditions to extract single variables—is not in my view a promising way to proceed. One does not take Marxism seriously by borrowing from it the single variable of unequal distribution of resources.

<sup>8</sup> An empiricist approach, for example, may use a dependent variable to predict an independent variable. A causal modeling approach does not. Indeed, a purely empiricist approach to causal modeling is not possible. Some theoretical assumptions are always needed to estimate causal models from nonexperimental data.

<sup>9</sup> Black's book, one recalls, is entitled *The Behavior of Law*, not *The Sociology of Law*. It is not necessary that a theory of how law behaves should draw only on sociology. Horwitz's acknowledgment that there are some aspects of law not understood in exclusively sociological terms is a welcome qualification of the position Black takes in his book.

A few odds and ends: I do not state that Black's proposition (that law is greater when people go to sleep) is invalid because the way people conduct themselves influences their chances of being arrested. I state that it is invalid because there are fewer arrests at this time. Black has stated explicitly that the number of arrests is a measure of law. The common-sense view is my explanation of the observation. Black's proposition does not explain it.

Horwitz reconciles the disagreement by interpreting Black's proposition as conditional on the occurrence of a disturbance. Let us suppose he is correct in holding that law is invoked more readily when most people are asleep than when most are awake. If so, he would have to explain the decline in the absolute number of arrests at night as a consequence of the fact that there are fewer disturbances at that time. This is an explanation of law in terms of rule violation or offender behavior—the sort of explanation Black and Horwitz have rejected as commonsensical and naive. Properly understood, Horwitz's argument must be considered a major concession.

Finally, I do not think that there are immanent essences that force a definition of law on us. This is one respect in which natural law theory is ideological. I argue for the usefulness of my definition because it facilitates the analysis of features of law other than its quantity or its coerciveness—features that are important in some theories of law (e.g., Marxism) and in the understandings of lay persons. Black has himself conceded that law has qualitative features which warrant study.

If one begins to pay attention to the way the word "law" is used in common parlance, it is evident that the word has multiple meanings and is used differently in different contexts. Identifying these different meanings seems to me to be quite useful; choosing one of them and singling it out as the sole distinguishing feature of law is much less useful.

## REFERENCES

- BLUM, Alan F. (1970) "The Sociology of Mental Illness," in Jack D. Douglas (ed.), *Deviance and Respectability*. New York: Basic.
- FOOTE, Caleb (1956) "Vagrancy Type Law and Its Administration," 104 *University of Pennsylvania Law Review* 603.
- GREENBERG, David F. (1977) "The Dynamics of Oscillatory Punishment Processes," 68 *Journal of Criminal Law and Criminology* 643.
- (1979) *Mathematical Criminology*. New Brunswick, N.J.: Rutgers University Press.

- (1980) "Penal Sanctions in Poland: A Test of Alternative Hypotheses," 28 *Social Problems* 194.
- (forthcoming) "Christian Intolerance of Homosexuality," 88 *American Journal of Sociology*.
- HINDESS, Barry (1973) *The Use of Official Statistics in Sociology*. London: Macmillan.
- HUMPHRIES, Drew and David GREENBERG (1981) "The Dialectics of Crime Control," in David F. Greenberg (ed.), *Crime and Capitalism*. Palo Alto: Mayfield.
- (forthcoming) "Social Control and Social Formation: A Marxian Analysis," in Donald Black (ed.), *Toward a General Theory of Social Control*. New York: Academic Press.
- LOFTIN, Colin, Ronald KESSLER and David GREENBERG (1981) "Income Inequality, Crime and Crime Control." Paper presented to the American Society of Criminology.
- LUKES, Steven (1972) *Emile Durkheim: His Life and Work*. New York: Harper and Row.
- PAULING, Linus (1958) *General Chemistry*. San Francisco: W. H. Freeman.
- POPE, Whitney (1976) *Durkheim's Suicide: A Classic Analyzed*. Chicago: University of Chicago Press.