DONALD BLACK'S SOCIOLOGY OF LAW: A CRITIQUE

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The paper examines the theoretical and empirical adequacy of Donald Black's (1976) *The Behavior of Law*. The work is found to be logically incoherent and its operationalization of variables problematic. The evidence that bears on its propositions does not consistently support them.

I. THE REQUIREMENTS OF A THEORY OF LAW

At a minimum, a theory of law must meet three criteria. First, it must be a theory, that is, a collection of logically connected propositions linking law and other variables.[1] To say that the propositions should be connected logically is to require that they be deduced from assumptions. The propositions may have any source whatsoever (dreams, drug-induced hallucinations, etc.), but they become a theory only when they are given this logical structure.

Second, the variables must, in some way, be measurable. The theory should state how they are to be measured. This requirement means that it is possible, at least in principle, to check the propositions of a theory empirically.

Third, the theory must state what sort of evidence is admissible to test its validity and what the implications of different kinds of evidence are. It is of particular interest in this connection to know whether a theory is formally deterministic or stochastic. A deterministic theory is regarded as complete. Specification of some variables fully determines

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[1] The logical coherence of propositions is a common requirement of theories (Gibbs, 1972: 27-28). It serves the very useful function of reducing the large number of possible propositions connecting variables to those that we have some reason to think valid and that are not mutually contradictory. This renders the research enterprise much more manageable.

the others. Within the limits of measurement error, predictions are expected to hold in every case. A single wrong prediction either refutes the theory or establishes its limits of validity.

By contrast, a stochastic, or probabilistic, theory does not claim to be complete. Instead, it is assumed that some variables, perhaps many, have been omitted from the theory. Consequently, the predictions of the theory are not expected to hold exactly in every case. With appropriate assumptions about the omitted variables, however, predictions can be derived about tendencies. An empirical assessment of these predictions requires the examination of many cases, and individual exceptions are not necessarily evidence against the theory. Thus, in regression analysis we do not expect every observation to lie exactly on the regression line.

These three criteria are no doubt easier to state than to meet. Here we will examine how they have been handled in one recent contribution to the sociology of law, Donald Black's (1976) *The Behavior of Law*. Black's work is chosen for special attention because its systematic formulation makes the formal structure of the theory especially clear. Thus, features which might be ambiguous in other works can be highlighted more readily here. Since the issues to be addressed arise quite generally in the sociology of law, the analysis will by inference carry implications for theoretical efforts in the field as a whole.

In addition, researchers have begun to test Black's propositions against empirical evidence (Gottfredson and Hindelang, 1979a; 1979b; Braithwaite and Biles, 1980; Myers, 1980; Kruttschnitt, 1980-81), and Black (1980) has attempted to clarify and reformulate his earlier arguments. Yet the empirical studies have given little attention to the nature of the theory being tested. In examining this question, I will consider some of the theoretical and evidentiary problems posed by Black's work. I hope to show that some of these problems are so severe as to vitiate many of the claims Black makes for his work.

II. BLACK'S THEORY OF THE BEHAVIOR OF LAW

Black's aim in *The Behavior of Law* is to contribute to the development of a theory that will account for variation in the behavior of law in social terms.[2] Toward this end, Black states

[2] In a private communication to the author, Black takes exception to the characterization of his work as "a theory," pointing out that he regards his work as open-ended, "forever ready for additions or deletions . . . only a beginning, illustrating a kind of discourse that seems to me worthy of further

a large number of propositions that concern the way law varies in relation to five variables: stratification (a characteristic of the distribution of wealth), morphology (division of labor), culture (the symbolic aspect of society), social organization (capacity for collective action), and social control (the definition of deviant behavior). However, the nature of this theory needs to be clarified.

Black's "theory" consists of logically unrelated propositions asserting a relationship between pairs of variables. For example, one proposition is, "law varies directly with stratification." Another is, "the relationship between law and relational distance is curvilinear" (pp. 13, 41). These rules permit us to "predict and explain" law in terms of stratification or relational distance (p. ix). A wide range of empirical examples illustrative of these and the other propositions is presented.

Rules of this sort permit predictions to be made about law on the basis of stratification or relational distance, but they "explain" the behavior of law only in the special sense in which statisticians use the word. This usage is, in fact, identical with prediction. If you tell me that the correlation between x and y is .50, then I can predict y from a knowledge of x with 25 percent greater accuracy than I can without knowing x. The information, however, does not provide me with a reason why this should be so—that is, why a relationship between x and y exists.

It is a truism in statistics that a correlation can arise in a number of ways. Does x influence y? Does y influence x? Do x and y reciprocally influence each other? Are both influenced by other variables? All these possibilities are compatible with the observed pattern. Black never tells us which of these

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pursuit. Accordingly I speak of *the* theory of law rather than *a* theory of law" (Letter dated July 23, 1981; emphasis in original). Although I sympathize with Black's view of theorizing as open-ended, I nevertheless prefer the indefinite article. The definite article implies an exclusiveness that is not appropriate here because it suggests that there are no viable alternative theoretical approaches to the understanding of law. In addition, I will be concerned with the theory as originally formulated (Black, 1976). Black's reformulation severely restricts the scope of the theory, undercutting the original claim of generality and thus eliminating one of the features of the original work that has attracted particular interest. Since Black has given no theoretical arguments for the superiority of the reformulation, and since it is the original version of the theory that holds the attention of empirical researchers, it will be worthwhile to examine this original version. The theoretical portion of our critique, however, will apply equally well to the reformulation. References in the text to Black (1976) will be given by means of a page number only, e.g., p. 137, without the identifying date. "Law" in this section is used as Black uses the term. In the next section I will deal specifically with Black's conceptualization.

possibilities accounts for the relationships he posits between law and other variables; in fact, he studiously avoids formulating any causal relationships. He never says "stratification is a cause of law," only that the two variables are directly related.

Despite this reticence, Black's introduction suggests that he views these relationships as causal. In discussing the value of his theory, he asserts that its propositions will not only enable predictions to be made but will also permit social engineering. Using the theory, the reader will be able "to engineer a legal outcome in or out of the courtroom, to reform a legal system, or even to design a community with little or no law at all" (p. x). Black here implies that I can change law by changing the various social variables that enter the theory. This can only be true if in some sense these variables cause law.

A further and more problematic assumption is also implied: that the five nonlegal variables of the theory are all exogenous to law. For social engineering of the sort that Black describes to be possible, the nonlegal variables of the theory must be manipulable; that is, they cannot be completely determined among themselves or by the "dependent" variable, law. This appears to be Black's view. He does not assume that law stabilizes or harmonizes society, contributes to the welfare of society or some of its members (p. 8), or serves any other social function.

Black's claim that law can be fully explained without references to its consequences is quite remarkable. While it may be true of some variables that they have no consequences for their causes, it is not plausible that this is true of law. Tax laws, for example, surely have some effect on stratification. Black's position implies that if law has unanticipated undesirable consequences, these consequences will have no bearing on future changes in the law. This seems unlikely. However, if law does have consequences for the independent variables of the theory, then it may not be possible to manipulate those variables at will. This raises obvious difficulties for attempts at social engineering.

The likelihood of mutual interdependence also has implications for the testing of propositions in the theory. In the language of multivariate analysis, Black models the relationships among law and the other variables of the theory in terms of single equations. Yet if relationships among the variables are reciprocal, a simultaneous equation approach is

more appropriate. Indeed, single equation parameter estimates will in general be biased.

Black's theory is formulated entirely at the social level. No attempt is made to derive relationships among social variables (such as stratification or law) from assumptions about individuals, their motivations (such as utility maximization), or the way they experience reality (p. 7). No assumptions are made about the existence of conflict or cooperation in society.

If the behavior of law could, in fact, be explained entirely by social variables, this would be an attractive feature of Black's formulation, since it would mean that the theory does not rest on motivational and other assumptions that are shaky if not unverifiable. I will argue below, though, that the claim may not be entirely valid. For the moment, however, I merely note that the absence of individual-level variables does not mean that the relationships among the social variables are derived from considerations about the properties of groups. Rather, they are not derived at all. In fact, the processes which underlie Black's propositions are not specified. As a result, Black's theory contrasts with others seen in the sociology of law. Thus, when Galanter (1974) observes that in litigation the "haves" usually come out ahead of the "have-nots," he offers numerous reasons why this should be so—reasons having to do, for example, with the relative resources and information available to the parties. For this reason, when Galanter explains the observed pattern, he is doing more than merely predicting it. He is saying something about the mediations between economic status and judicial outcomes.

In many instances it will be easy enough to think of reasons why Black's propositions should be true. Quite a few are commonplaces of the sociological literature on law, though other authors usually phrase them in a slightly different vocabulary and in less sweeping terms. But these *ad hoc* explanations do not add up to what is conventionally meant by a theory, since they lack a logical structure.

In the absence of arguments supporting the validity of Black's propositions, we must take them for empirical generalizations. When there is no theory, such generalizations can be well worth having. Within their range of validity, they can be used for purposes of prediction. If Black's work enables us to predict law with accuracy from the five social variables of his theory, his accomplishment is by no means trivial. Moreover, generalizations can stimulate theorizing. Thus, Kepler's three laws of planetary motion provoked Newton to

develop a law of gravitation from which they could be derived, and Balmer's empirical formula for the spectrum of the hydrogen atom stimulated the development of the Bohr model.

Nevertheless, the limitations of the sort of "theory" Black gives us cannot be overstated. When Black tells us that his theory explains certain facts, he only means that these facts are consistent with his generalizations. Since the generalizations were presumably derived from these very facts, we can hardly herald the agreement as a theoretical triumph. We have nothing that will help us extend the theory and no basis for knowing the theory's limits of validity. That Black is able to provide illustrations drawn from many different settings suggests that these limits may be wide. But the significance we accord these examples will depend on the determinism and generality of Black's theory.

Black does not state explicitly whether he regards the propositions of his theory as stochastic or deterministic. Since he has not objected to empirical tests that seem to interpret the theory as stochastic, one might suppose that he concurs with this interpretation. If so, it becomes relevant to know whether the examples Black cites in support of his theory are representative of the universe of possible examples, and if not, whether there was systematic bias in the selection procedure. These issues are no less relevant if we regard Black's theoretical strategy as inductive, that is, as resting on empirical generalizations that will be tested later with other data. The propositions developed through such a strategy can only be as good as the data from which they are drawn.

On the other hand, perhaps Black's theory should be interpreted as deterministic. If this is so, and the use of illustrative examples suggests this possibility, then single counter-examples will suffice to refute each proposition, provided the theory is intended to be general, or valid in every setting. Many passages in Black's work suggest that they are intended to be universally applicable. None of the propositions involves a qualifier, and since the examples concern many different kinds of societies, past and present, we can legitimately suppose that they are meant to be universal. Since counter-examples can be readily produced for a number of the propositions (see Part V below), it follows that much of the theory must be dismissed as wrong, or at least as being in need of qualification or specification.

III. BLACK'S OPERATIONALIZATION OF VARIABLES

The second of our three criteria for a theory of law was the specification of how variables are to be measured, or operationalized. It is through this specification that theories are given empirical reference. Black does specify how some of the variables of his theory are to be measured, but his specifications are problematic.

Black's Conception of Law

The meaning of Black's propositions about law hinges on the definition of law itself. Law is defined as "governmental social control" (p. 2). Social control consists of defining and responding to deviant behavior (p. 9) and is to be regarded as law when carried out by a government. Since deviance is defined as conduct that is subject to social control (p. 30), there is an element of circularity in this definition, but Black's explanation that control includes prohibitions, accusations, punishments, and compensation (p. 1) helps us to get a sense of what he means.

Apart from the question of circularity, there are problems of both exclusion and inclusion in Black's definition. These questions do not bear on whether Black's work is a theory, but they do bear on its scope and significance.

Black's definition of law excludes some things that are conventionally included. For example, constitutional provisions establishing the branches of government and delineating their powers are excluded. Some types of legislation are included, but not all: appropriations bills and legislation that defines personal status, rights, or privileges are excluded because they do not prohibit anything. Thus, statutes that give categories of individuals the right to vote or specify eligibility to hold public office are, for Black, not law because they do not define anyone as deviant. They may implicitly handicap some people (e.g., those defined as unable to vote or hold office) but they do not stigmatize or punish. A court decision to grant an uncontested divorce is not law. Neither are marriages, even though they create legal obligations and may be performed by government officials. Also excluded from the definition are actions by which lay people (those who are not government officials) create obligations for themselves—obligations that the courts will uphold, such as contracts.[3]

[3] Although Black does not consider a contract between private parties to be law, he does consider a court decision in a breach of contract case to be law.

Thus, at best, Black's theory predicts only a part of what sociologists of law collectively strive to explain.

Black's definition of law also includes some things that are conventionally excluded. In defining law to be governmental social control, Black precludes the possibility that the government could do something illegal. No distinction is made between an arrest and a kidnapping, between an execution and a murder, so long as these are governmental actions and involve social control.

It is not in itself an objection to a scientific definition that it fails to coincide exactly with popular usage; this is often true of scientific definitions. In the present case, though, Black's failure to spell out fully the ways in which his definition of law differs from conventional usage runs the risk of confusion. It is only too easy to forget that Black's propositions involve law *as Black defines it* and not law as the word is commonly understood. Since the propositions of Black's theory can as readily be phrased in terms of "governmental social control" as in terms of "law," there is no obvious advantage gained from the use of unconventional terminology.

Black's unconventional definition of law incurs additional costs. First, people are likely to act on the basis of their own definitions, not those of the sociologist. If lay people distinguish between an arrest and a kidnapping by government agencies on the basis of whether the government conforms to its own substantive and procedural rules, then this distinction is likely to have consequences for the way they respond when a government employee forcibly seizes someone. These consequences, ordinarily discussed under the heading of "legitimation," are not easily encompassed within the framework of Black's approach because he deprives us of the vocabulary needed for theorizing.

In addition, a theory that defines law as governmental social control has no place for the question of why governments sometimes conform to their own rules and at other times do not. This is an important issue in political sociology and the sociology of law, but since Black's theory does not in any way refer to rules, it provides no resources for addressing it.

One can sympathize with Black's decision to define law independently of rules. Since it is not always easy to decide whether a rule has been broken, normative definitions of law can be difficult to apply in research. At times coders using a normative definition of law will be forced to make subjective and, to some extent, arbitrary judgments about whether a given

action is or is not illegal. These ambiguities in legal interpretation can make the legal realist's dictum that

> A legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law (Holmes, 1897: 458),

or that "what these officials do about disputes is, to my mind, the law itself" (Llewellyn, 1951: 12) quite appealing. Black's adoption of this approach offers the seeming advantage of permitting an objective determination of whether something is law.

One might argue further that it is irrelevant to the goals of a social science whether the government acts according to its rules. The purpose of a sociology of law is arguably to account for the behavior of legislators, police, and judges. If they disregard rules but are instead influenced by the social backgrounds of parties to disputes, so be it. From this point of view it is immaterial whether law enforcement officials follow the rules of due process prescribed in the constitution, in statutes, and in Supreme Court decisions. What counts is whether someone has been arrested, convicted, sentenced, or killed, and how well these events can be predicted.

It could also be argued that people do not follow rules but interpret them or give them meaning. This meaning resides not in the rules but in the interpretation. A perception that one governmental action is an arrest while another is a kidnapping, or that one death is an execution and another a murder, is itself an interpretation that must be explained by the variables of a theory like Black's—rather than a reflection of an underlying objective reality. In other words, there is no such thing as a true kidnapping, true murder, true rule violation; there are only beliefs that certain behaviors are properly called kidnappings, murders, or rule violations.

These arguments are substantial, but they are not necessarily decisive. Interpretive ambiguity is not always so extreme as to permit observers to adopt any interpretation whatsoever. Interpretations may well be influenced by the variables Black singles out, but I believe that they are also influenced by the provisions of rules (as found in constitutions, statutes, and case law), as well as by government conduct in

relation to those rules.[4]

This can be seen most clearly in those cases in which the government itself decides that a government official has violated a rule. Thus, criminal cases may be dropped because a judge—not the sociologist—decides that evidence has been gathered illegally. The federal judge who, during the Vietnam War, said to a defendant charged with violating the Selective Service law, "The law gives me no choice but to acquit you. Personally, though, I hope you get hit by a truck as you leave the court,"[5] clearly felt constrained by the law. President Eisenhower's comment in the Little Rock school desegregation case that it was his responsibility as President to carry out the decision of the Supreme Court whether or not he agreed with it echoed a sentiment that many decision-makers have expressed. In fact, decision-makers often refer to rules when they decide cases. It would be foolish to dismiss these assertions as mere mystifications. In some societies the socialization of governmental social control agents encourages them to recognize the distinction between what the law is and what they think it ought to be. Nor is it just government agents who are concerned with law as the lawyers conceive it. As Galanter (1974) points out, private parties in courts and through legislation often play for the rules.

Consider two jurisdictions whose social characteristics are the same on all of Black's explanatory variables (and any other relevant dimensions). In one there are written statutes, and

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[4] A related issue arises in Black's work with regard to the importance of offender behavior in determining law enforcement activity. Critics have taxed Black for maintaining that offender behavior is irrelevant to the legal response (Gottfredson and Hindelang, 1979a; 1979b). Black has rightly responded that assessments of the seriousness of an infraction, and even the mental classification of an act as a crime, can be influenced by the social status and relationships of the individuals involved. While his critics do not necessarily quarrel with this proposition, they emphasize that, above and beyond the impact of these "background variables," offender behavior still influences legal control (Gottfredson and Hindelang, 1979b; Myers, 1980; Kruttschnitt, 1980-81). The easiest way to see that this is so is to note that, when comparing episodes in which the social backgrounds of all those involved are the same, behavioral differences of the parties will influence law enforcement. For example, assaults between family members are more likely to result in the police being called when someone dies immediately after the assault than when no one dies. In response to these criticisms, Black (1979: 25) has conceded that under given conditions, features of the conduct itself will influence responses to it, but without indicating that one of these features is the illegality of the behavior (in the conventional sense). Black's (1971) earlier work on the police found that one of the factors influencing police response to an incident was whether someone's action was a felony or a misdemeanor according to legal criteria. His more recent work disregards this finding.

[5] The name of the judge, who sat in the Northern District of Illinois, is withheld as irrelevant here. The remarks were reported by several observers of the trial but are not quoted verbatim.

cases are supposed to be decided with reference to these statutes and to precedent. In the other there are no written laws, and precedent is not binding. If Black is correct, individual decisions should coincide for like cases in the two jurisdictions, and the variability of decisions should also be the same. This claim is simply not credible in the face of the common experience that the promulgation of written rules is an effective way to reduce behavioral variability.

Black's position gains its credibility from the many studies documenting the exercise of discretion in police decisions regarding arrest, in prosecutorial decisions about charges, and in judicial decisions on sentencing. That these decisions are not *completely determined* by written rules is well-established. The attributes of the individuals involved, their relationship to one another, and organizational variables unquestionably influence outcomes. Yet, it does not follow that rules are totally irrelevant. If a man climbs in my window and leaves carrying my television set, a prosecutor may, for reasons unrelated to the thief's conduct, decide to charge him with breaking and entering or possession of burglary tools instead of with burglary. But the prosecutor is exceedingly unlikely to charge the man with price-fixing or prostitution. The extent to which written laws determine outcomes, one hastens to add, surely varies across jurisdictions and in different kinds of disputes. The identification of the sources of this variability is one, but by no means the only, task of the sociology of law.

If, as I have argued, written rules to some extent guide and constrain police and judges, a theory of law that ignores these rules leaves out a critical variable unless the rules themselves are totally determined by the variables already included in the theory. Although this is not logically impossible, it is not a position that Black argues for or musters evidence to support. And even if it should be true at the societal level that law is reducible to other social variables, rules may still be important in the handling of individual cases. Thus, legal definitions specifying some kinds of homicides as illegal and others as lawful may be influenced by the kinds of people who commit, or are victimized by, each kind of killing. But once those rules are formulated, they may very well be enforced without regard to the personal traits of particular individuals.

I believe that natural law philosophy suggests an alternative approach to the theory of law, one which incorporates Black's insights without incurring the costs of his approach. One need not accept all of natural law philosophy,

much of which is ideological, to see in its treatment of the definition of law (Fuller, 1964; Skolnick, 1966; Selznick, 1968) a suggestive alternative to legal realism. When discussing natural phenomena, we describe them as law-like if they conform to rules. Kepler's Second Law, that "the orbit of every planet is an ellipse with the sun at one of its foci," asserts a uniformity in the behavior of the planets. If the law is valid, it excludes as possibilities all non-elliptical orbits. It also tells us that all planets have the same type of orbit. Similarly, to say that government officials act in a law-like manner is to say that their actions are not arbitrary but follow rules—the same rules for all whose conduct is covered by the law.

This conception of legality was a familiar one in seventeenth- and eighteenth-century England, and in the eighteenth-century American colonies. Thus, Thomas Hutchinson, the Chief Justice of colonial Massachusetts, insisted in his remarks to a grand jury in 1767,

> 'Tis necessary that Laws should be established, else Judges and Juries must go according to their Reason, that is, their Will; and this is in the strictest Sense arbitrary. On this Reason, I take to be grounded that well-known Maxim, that the *Judge* should never be the *Legislator* (quoted in Reid, 1980: 946; emphasis in original).

Similarly, the Massachusetts Constitution of 1780 provided for the establishment of distinct branches of government "to the end that it may be a government of laws, and not of men" (quoted in Reid, 1980: 931). Black's positivist conception of law did not gain wide acceptance until the nineteenth century.

From this perspective, law is not an all-or-nothing affair. The actions of police or judges can be more or less legal. The more these officials attend to the provisions of statute or case law, the more legal their behavior is. The more they are influenced by considerations not specified in the law, such as the social status of suspects, the less legal their behavior is. To adopt this way of thinking about law implies no value judgment on whether it is desirable or undesirable for the "positive law"—the decisions of judges or other decision-makers—to be legal in character, and imposes almost no constraints on the substantive content of law.

One advantage of this approach becomes evident when one considers how Black's definition of law might be operationalized. To determine whether a given action constitutes governmental social control, we need to be able to tell not only whether it is an instance of social control but also

whether those who carry out the action are part of the government. Is anyone who dons a black robe to be recognized as a judge? Hardly. We decide (as citizens, and equally as sociologists) by referring to the rules that govern the election or appointment of judges. It is this criterion that we use to distinguish genuine members of the bench from actors who play the role of judges in fictional films.

IV. THE QUANTIFICATION OF VARIABLES

Black treats each of his variables as ordinal-level. There can be more or less law, more or less stratification, more or less culture. Black's theory concerns patterns of covariation of pairs of these ordinal variables, or the direction of law in relation to these variables. For example,

> law may have a direction in vertical space. It may move from a higher toward a lower rank, or downward, as well as from a lower to a higher rank, or upward. A complaint by a wealthy man against a poor man has a downward direction . . . Correlatively, a complaint has an upward direction whenever it is against someone wealthier than the complainant (p. 21).

Black's treatment of all variables as ordinal does not carry any particular implications for the theoretical status of his work (i.e., its consistency with the criteria for a set of propositions being a theory), but it does carry serious consequences for the content of the theory.

The Quantity and Quality of Law

Black (1976) treats law only in relation to its volume. Law is measured by the number of prohibitions, arrests, convictions, sentences. Since there can be more or less of these, this way of measuring law does indeed give us an ordinal-level variable. However, as Black (1979) has recently conceded, his theory says nothing about the content, form, or procedures of law. There is nothing in Black's analysis to tell us why statutes prohibit some behaviors and not others.[6] Indeed, we might wonder why any specific behaviors are prohibited. Why is it that the police are not authorized to arrest and the courts to sentence regardless of the criminal code or any procedure? Black's failure to consider these questions is not a mere

[6] In a clarification of his earlier work, Black (1979) asserts that the law tends to single out for prohibition the sorts of things that lower-class and lower-status persons do. What they do is not important, he indicates; what matters is who does it. Even if this extreme statement is true, it still leaves a great deal of latitude.

oversight but is dictated by a conception of law that excludes rules and by a metatheoretical distaste for qualitative variation.

This distaste stems from Black's assumption that "a science of this subject matter [i.e., law] should be—like older sciences—quantitative, predictive, and general in scope" (p. x). However, Black is mistaken in this characterization of the "older sciences." Qualitative distinctions (nominal variables) do appear in these sciences; moreover, there are well-developed mathematical tools for handling them. In addition, not all propositions in the older sciences are general in scope; some hold only in specific circumstances or in a given range of conditions. For example, the Pauli exclusion principle applies only to fermions, not to bosons. There is no agreement in sociology that the social sciences should be patterned on the natural sciences, but even if one accepts the position that they should, one needn't accept Black's view of the restrictions this entails.

Although Black's focus on a quantifiable dimension of law—its volume—seems to offer the advantages of precision, there are ambiguities in its operationalization that Black does not resolve. If we are interested in prohibitions, do we count statutes? If a complex statute contains a number of prohibitions, is each section to be counted? How are penalties of different types to be compared? For example, is a fine more or less severe than a jail sentence? According to Black,

> In Imperial Rome, . . . execution of an upper-class offender was never more severe than decapitation, the gentlest method. A lower-class offender, however, was subject to such methods as exposure to wild beasts, burning, and crucifixion (p. 26).

But Black fails to tell us how he decided that decapitation was less severe than burning.

Empirical researchers have followed Black's lead in scaling variables intuitively. For example, Myers (1980) and Kruttschnitt (1980-81) assume that a jail or prison sentence is a more severe disposition than sentences not involving incarceration, but they do not indicate how they determined this. That the researcher's intuition may not correspond to the scaling others would offer is suggested by Needleman's (1981) finding that juvenile probation officers in a large suburban jurisdiction in New York state regarded the referral of a juvenile case to the court as a more lenient disposition than informal supervision, and by a recent news story (Pearl and Kalech, 1982) that reported on a defendant who, when convicted, expressed a preference for a short jail sentence over

a three-year probation period. Jack D. Foster (personal communication) has reported similar findings for young males. Sociologists have almost invariably assumed that probation, however long, is a more lenient disposition than a jail sentence, however short.

Although Black (1979) has reminded us that "seriousness" of offense is a matter of subjective evaluation, not an objective feature of conduct, he has seemingly forgotten that severity of punishment is also a matter of opinion. In an earlier work, Black (1972) argues that it is desirable to avoid tainting analyses with the value judgments of the sociologist. Thus, one might expect him to refer to the assessments of the members of the society being studied. Though these assessments are subjective, they can be scaled objectively. In fact, Black unreflectively uses his own common-sense scaling, and empirical researchers testing Black's propositions have done the same.

The same issue arises in classifying law as to type. Black suggests that there are different styles of law: penal, compensatory, therapeutic, and conciliatory (p. 4). Yet he does not tell us how it is to be decided whether a given disposition is penal or therapeutic; thus, the concepts lack empirical reference. One possibility would be to refer to the motives of those who impose the law; another is to be governed by the perceptions of those on whom the law is imposed. Or one might refer to the consequences of law. These seem to be the only options, and they need not agree. A masochist might enjoy being whipped; a prison sentence imposed as punishment might cure. Black provides no basis for carrying out the classification by means of "objective" features of law and fails to tell us how to proceed. Until this is done, the classification system is meaningless, and the propositions that involve types of law cannot be considered a theory.

In light of these considerations, it is puzzling that Black states that his theory "has nothing to do with how an individual experiences reality" (p. 7). This claim implies that a sociologist is able to determine the severity of punishments in an objective way, independently of the way individuals experience or view severity. Nothing in Black's work indicates how this can be done, and it may well be that it cannot be done.

In a more recent work, Black (1980: 215-16) addresses the question of scaling procedures by proposing that people could be asked how much they would avoid different legal events. This is an intriguing possibility, though it presents a number of

problems (and is at odds with the thrust of Black's earlier work). One problem is that people may not agree. Black himself suggests that people in different social locations might disagree about the relative ranking of different penalties. Since a fine of a given amount represents less of a loss to someone who has a great deal of wealth than to someone who has little, one would expect this to be the case. Black suggests that where there are differences of this kind, responses can be averaged. An averaging procedure, however, implies that people of different statuses are equally influential in determining the objective features of law, and this is unlikely. Moreover, there are objective constraints on law that operate independently of people's subjective evaluations. For these reasons subjective indicators may not be appropriate for testing propositions involving the relationship between law and other variables.

The Quantity and Quality of Other Variables

What is true for law is equally true for other variables in Black's theory. The social status of an individual cannot be determined independently of subjective evaluations. Although Black refers to an individual's radial distance in society (an individual can be at the center or toward the periphery), he does not propose a method for operationalizing this spatial metaphor. However, social differentiation can be assessed only in relation to categories that are phenomenologically meaningful to social members or that have been chosen by the investigator. Black glosses over these difficult issues. Where he must scale variables, his intuition seems to be his only guide. But no matter how well-educated the sociologist's intuitions, subjective characterizations are inevitably problematic.

Consider Black's discussion of culture. In arguing that it is possible to count culture, Black asks us to compare "a modern to a tribal society, a scientific laboratory to a bus station, a professor to his wife or children" (p. 63). He does not consider the fact that members of a tribal society are likely to know many things not known by members of a modern society. Presumably the wife is not also a professor, and we are supposed to infer that she has less culture than her husband. One wonders whether the professor's wife might not have as much specialized knowledge as her husband. Assuming that the once traditional division of labor has led the wife to become an expert on cooking, housekeeping, and child care, does it

follow that she has less culture than her husband, whose job has made him an expert on the sex life of caterpillars or, for that matter, on William Shakespeare? In general, Black does not consider the possibility that there can be equal amounts of different kinds of culture and that these qualitative differences have implications for law. What is worse, Black offers no instructions about how to determine whether one person or society has more culture than another. The point is not that his (or anyone else's) intuitions about amounts of culture are wrong; it is that the correctness of such intuitions cannot be established without some explicit standard. And unless this can be done, those propositions of the theory involving culture cannot be meaningfully tested.

What is true of culture is also true of the other explanatory variables in Black's theory. When it comes to stratification, Black notes that there can be different kinds of wealth in a society, so that a person or group may have different ranks, or vertical statuses, corresponding to these different kinds of wealth. Nevertheless,

> no matter how many ranks a person or group has, in any given setting it is always possible to combine these, so that each has a general rank in relation to everyone else (p. 16).

Black not only neglects the possibility that the positions of some individuals relative to others are indeterminate (Friedell, 1967), but he ignores the difficult question of how the different ranks are to be combined into a single scale. Unless we can do this in some meaningful way, the theory can be neither applied nor tested. While there are no doubt clear differences of stratification on which most people would agree, where social structures are complicated, arbitrariness in combining ranks seems unavoidable. Thus, the theory can be expected to give little guidance in those settings where theoretical insights are most badly needed.

Black asserts that stratification is relevant to law not only in terms of the amount of law applied to different individuals in a single society, but also in terms of the amount of law found in different societies: "the more stratification a society has, the more law it has" (p. 13). To test this theory we must be able to measure the amount of stratification a society has. A number of quantitative indices (e.g., the Gini coefficient, the standard deviation, etc.) can be employed for this purpose. [See Schwartz and Winship (1979) for a review of the definitions and properties of these different indices.] However, different indices are sensitive to different parts of the income

distribution. Thus, it can happen that one society will be found to have more inequality than another according to one index, but less according to a second index. This being so, it is critical in testing propositions regarding inequality to know what the appropriate index is. A substantive theory specifying the processes by which inequality influences the amount of law a society has might help us to decide this question by directing us to those features of the income distribution that are especially critical. Since Black's theory does not deal with these mediating processes, it cannot provide guidance in selecting an appropriate index.

By treating each of the explanatory variables of his theory as ordinal, Black can examine only the sorts of relations between law and these variables that involve quantity and direction. That different types of stratification systems might lead to different kinds of law is thus, *a priori*, excluded. Such exclusions greatly restrict Black's theory. He is not able to ask why trials formerly took the form of ordeals or of combat between the parties but then came to involve witness testimony and written evidence. He is not able, as are Rusche and Kirchheimer (1939), to discuss the substitution in England of imprisonment for transportation to America or Australia and New Zealand in the late eighteenth and early nineteenth centuries. He is not able, as are Weber and Pashukanis, to examine variability in the formal properties of law. The conceptual apparatus for treating these issues—issues which are of major importance for other sociological theorists concerned with law—lies entirely outside of Black's framework.

V. EVIDENCE

Throughout his book, Black offers numerous empirical examples that seem consistent with his propositions.[7] His work's persuasive power stems largely from this demonstrable consistency. Here I will discuss the kind of evidence that is appropriate for testing Black's propositions. Then I will try to show that the propositions are not as consistently supported as Black's texts suggest.

[7] At times Black uses rhetorical devices to create the impression that there is evidence to support his theory when none exists. He does this by phrasing his predictions as if they were established facts. Thus, he asserts that "in an American city, an Italian official is more likely to be lenient with an Italian, a Puerto Rican with a Puerto Rican, a Jew with a Jew" (p. 77) yet cites no study that reports such a finding. To my knowledge none exists. I am aware of only one study of the effect on sentences of the ethnicity of judges and defendants (Castberry, 1971), and it did not study Italians, Puerto Ricans, or Jews.

It is not clear what sort of evidence Black thinks appropriate for testing the propositions of his theory. The propositions are stated in the form of bivariate associations between an attribute of law (volume, direction) and an explanatory variable, suggesting that they should be tested by examining the zero-order correlations among the variables. However, if the relationships are due to a causal process, structural equation coefficients that control for the other relevant variables would be more appropriate. At times, Black (pp. 28, 47, 114) asserts that the propositions of his theory hold when other explanatory variables are held constant, but usually he says nothing one way or another.

Most of the empirical tests of Black's ideas have examined partial regression coefficients (Gottfredson and Hindelang, 1979a; Myers, 1980; Kruttschnitt, 1980-81), but some have examined zero-order relationships (Braithwaite and Biles, 1980). Black has not commented on these different approaches, but his own illustrative examples almost invariably concern bivariate relationships that ignore the pattern of associations among the predictor variables. For example, Black points out that bands and simple tribes have little or no stratification and also little law (p. 13). He also points out that nomadic bands and herdsmen have a very low division of labor and consequently little law (p. 39). We are not told, though, whether bands would still have less law than societies with a more extended division of labor once their stratification, culture, social organization, and informal social control are taken into account.

Given the difficulties of operationalizing some of Black's variables, as well as the limited aims of this paper, a systematic testing of every one of Black's propositions will not be undertaken. Instead, selective pieces of evidence that conflict with Black's propositions will be offered. My purpose is not to argue that the propositions have no validity at all but to demonstrate that there is a body of negative evidence that must be taken into account in evaluating the propositions of the theory.

Some of the evidence I will present, like the evidence Black presents, concerns zero-order correlations, while other evidence controls for some variables. I will rely on my own common-sense understanding to scale the variables, as Black does. This procedure, of course, leaves my examples vulnerable to the same criticisms regarding arbitrariness of scaling that I have directed to Black's procedures.

A. Proposition 1

"Law varies directly with stratification" (p. 13).

If this is so, a society that has more inequality should also have more law. Since the distribution of wealth in England is considerably more unequal than in the United States (Kriesberg, 1979: 95), we should expect more law in England. Yet the United States has far more arrests, convictions, and imprisonments than England, even when adjustment is made for the differences in population.[8]

Black's proposition leads us to expect that, if the distribution of wealth within a society remains constant, the amount of law should remain constant as well. In U.S. cities with a population of 50,000 or more in 1960 or 1970, the mean Gini coefficient for income in a city was .3497 in 1960 and .3478 in 1970. The minimum Gini coefficients in these two years were .2329 and .2452 respectively; and the corresponding maximum coefficients were .5371 and .5984.[9] It is evident that very little change in the distribution of income occurred in the 1960-1970 decade. During this period, law, as measured by crimes reported, arrests, and convictions, rose very substantially. To be sure, this rise could have been occasioned by a change in one of the other of Black's explanatory variables, but it is difficult to imagine which it could have been. Moreover, another indicator of law, prison population per capita, fell during this decade. The fact that one indicator of law fell while others rose tells us empirically what ought to be obvious theoretically: law is not unidimensional. Propositions relating law to other variables must specify what aspect of law is meant.[10]

My own research (Greenberg *et al.*, 1979) assesses the cross-sectional association between inequality and crime rates. In a sample of 98 U.S. cities selected through a stratified random process, a negative correlation (Pearson's r) of approximately $-.20$ was found between the number of F.B.I. index offenses reported to the police and an indicator of

[8] If the comparison is done on the basis of income rather than wealth, England still has a higher level of inequality (as measured by the Gini coefficient) than the United States (Kriesberg, 1979: 93).

[9] I am grateful to Colin Loftin for supplying these figures. To be sure, Black's proposition concerns wealth, not income. But if the distribution of income did not change materially, it seems likely that the distribution of wealth did not either.

[10] The importance of this observation is illustrated by a cross-national study of the relationship between crime and income inequality which found that homicide is positively related to inequality but that property crime is negatively related to inequality (Krohn, 1976).

inequality (the ratio of the standard deviation of income to the median income). The official crime rate is not an inappropriate indicator here because Black considers a complaint to the police to be a form of law. The more complaints, the more law. The observed correlation, it should be stressed, indicates that there is less law the greater the stratification. This is the opposite of what Black's first proposition predicts.

B. Proposition 2

"Downward law is greater than upward law" (p. 21).

Black interprets this proposition to mean that when the rank of the victim is fixed, higher rank persons will be arrested, prosecuted, and punished less often and less harshly than those of lower rank "independently of the actual conduct of the lower ranks" (p. 31). Although some evidence supporting this proposition can be found for particular times and places (in addition to the sources cited by Black, see Bowers and Pierce, 1980; Zeisel, 1981), there is also an impressive body of evidence regarding contemporary American criminal justice dispositions that does not support this proposition (Hindelang, 1969; Levin, 1972; Hagan, 1974; Burke and Turk, 1975; Chiricos and Waldo, 1975; Bernstein *et al.*, 1977; Kleck, 1981; Radelet, 1981). These studies indicate that in at least some jurisdictions, criminal justice dispositions are not directly influenced by the race or socio-economic status of defendants.

Other research finds support for this proposition in some indicators of law but not in others. LaFree (1980), for example, reports that in the rape cases he examined the defendant's race did not influence decisions regarding guilt but did influence the disposition of those perceived to be guilty. Thus, at different stages of criminal justice processing, different variables became relevant. Bailey (1981) found that the effect of inequality on the certainty of imprisonment was different for different offenses. In addition, Booth *et al.* (1977) found that percent black was positively related to robbery and burglary rates in U.S. cities when those rates were measured by crimes reported to the police and recorded by them, but was negatively related to the same rates when they were measured by responses to victimization surveys.[11]

[11] It is worth noting that Black cites some sources in support of this proposition (e.g., Hagan, 1974) even though the sources themselves call the proposition into question. Similarly, Black points out that the Salem witchcraft epidemic was halted when extremely prominent figures in the state of Massachusetts were accused (p. 22), without noting that the accusations (including those that resulted in prosecution, conviction, and execution)

Additional research has found that the effects of such status variables as race or education vary from time to time or from jurisdiction to jurisdiction. In a well-known study of two cities with differing styles of policing, Wilson (1968) found that in one city an arrest or citation was a more likely outcome when police encountered a black juvenile than when they encountered a white juvenile. In a second city, however, no such difference was observed. Hagan and Bernstein (1979) found that blacks sentenced for draft refusal were treated more harshly than whites in the years 1963-68, but whites were treated more harshly than blacks in the years 1969-76. When differences like these turn up, scholars generally ask why they occur. Both Wilson (1968) and Hagan and Bernstein (1979) suggest reasons for the differences they uncovered. However, Black's *a priori* decision to rule out contingent relationships precludes his asking why differences such as these should exist.

Results inconsistent with Black's second proposition are also reported by researchers who have looked at settings far removed from the American criminal justice system. In the Soviet purges of the 1930s, Communist Party members were more likely than non-party members to be arrested (Conquest, 1973). In Renaissance Venice the nobility was disproportionately represented and workers much under-represented among the officially designated criminal population (dispositions of those designated criminal were, however, generally in line with Black's suggestions) (Ruggiero, 1980). Statutory law among the early Khmers and the Aztecs specified higher penalties for nobles who committed infractions than for commoners who committed the same offenses (Sedov, 1978; Kurtz, 1978). And penances imposed on sinners by the Roman Catholic Church in medieval Europe were not only generally higher for clergy than for laity, but they escalated in severity the higher the rank of the clergy (McNeill and Gamer, 1938).

C. Proposition 3

"Upward law varies inversely with vertical distance" (p. 25).

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predominantly involved persons of lower rank naming their social superiors as witches, contrary to Black's theory (Boyer and Nissenbaum, 1974).

This proposition implies that when the offender's rank is held constant, "Law varies directly with the rank of the victim" (p. 26).

A number of studies have examined this proposition in relation to criminal sentencing. The proposition leads us to expect that blacks whose victims are white will receive heavier penalties than blacks whose victims are black. With the exception of sentencing for rape in the South and the possible exception of the imposition of death for homicide, the evidence largely disconfirms this proposition (Hindelang, 1969; Farrell and Swigert, 1978; and in part, LaFree, 1980 and Radelet, 1981).

D. Proposition 4

"Law is greater in a direction toward less culture than toward more culture" (p. 65).

Since Black takes education as an indicator of culture, we can compare the sentences given to college-educated criminals and to less well-educated criminals. Using the data provided by Hagan *et al.* (1980), we find that in one district, 82 percent of college-educated defendants were convicted, compared to 76 percent of high-school educated defendants (without regard to the offense charged); for the other nine districts, the aggregate figures are, respectively, 71 percent and 72 percent. These patterns do not change substantially when the type of offense is controlled. Moreover, the regressions reported by Hagan *et al.* do not show college-educated defendants receiving consistently lower sentences than less-educated defendants within offense categories.

In the Soviet purges of the 1930s, educated persons (students, teachers, writers) were more likely to be arrested than the less-educated. The educated were also singled out as victims in the executions performed when the Khmer Rouge established the Democratic Republic of Kampuchea in what had previously been known as Cambodia and when the Congolese People's Republic was established in the northern and eastern parts of the Congo in 1964 (Schoek, 1969: 345-46).

E. Proposition 5

"Law is greater in a direction toward less conventionality than toward more conventionality" (p. 69).

Since Black measures conventionality by frequency of appearance, we can test this proposition by comparing the penalties received by minority and majority groups in a given society. In the Union of South Africa, blacks are a substantial

majority, and hence by Black's standard more conventional than whites. Black's theory predicts that law would be directed more against whites than blacks, but it is well known that blacks are disproportionately arrested, convicted, and imprisoned. Of course, in this instance, the observed pattern can be subsumed readily under Black's propositions about the direction of law in stratified social systems. The trouble is that more than one proposition seems to apply, and they lead to contradictory predictions.

The situation of Jews in twentieth-century Germany also bears on this proposition. Black notes that during part of this century, "Jews were prohibited." In a statistical sense, Jews were more unconventional at the end of World War II than at its beginning. Yet Jews were less the targets of law just after the war than at its beginning.

These examples, however, may speak more to the deficiencies of Black's operationalization of conventionality as frequency of appearance (pp. 67-69) than they do to the hypothesis itself. South Africa is, arguably, an exceptional case, and while there were fewer Jews after World War II than before, those that survived may have been more like their Christian neighbors, and in this sense more conventional, than they and their coreligionists were before the war.

Yet even if conventionality is defined by similarity to the dominant group rather than by some numerical standard, one may still identify situations that are inconsistent with Black's fifth proposition. The Supreme Court has ruled that the names of contributors to electoral campaigns conducted by political parties need not be disclosed, when to do so would interfere with the exercise of First Amendment Rights[12] (*Buckley* v. *Valeo*, 71, 74). This ruling exempts advocates of unconventional ideas from penalties that would be imposed for comparable conduct by those whose political views are more conventional. Significantly, the ruling did not exempt all minority parties but only those that could show that disclosure would impose First Amendment burdens. Similarly, the Supreme Court has decided that the Old Order Amish need not send their children to public schools after the eighth grade despite state law to the contrary (*Wisconsin* v. *Yoder*). If a member of the conventional majority tried to withdraw her

[12] In Civil Action #74-1338, Jan. 5, 1979, the U.S. District Court for the District of Columbia explicitly exempted the Socialist Workers Party from the disclosure requirement on this basis.

children from school at this point, she could be criminally sanctioned.

F. Proposition 6

"Law varies inversely with other social control" (p. 107).

According to Black, "when people go to sleep . . . most social control relaxes as well, and law increases" (p. 110). The difficulties in measuring informal social control are formidable, but for the sake of argument let us assume that informal social control does decline when people go to sleep. Far from increasing, law decreases at this time. Late at night there are fewer complaints to police, fewer arrests, fewer police on duty, and hardly any convictions at all (since most courts are closed at night). The observed temporal pattern is readily predictable on the basis of the conventional, common-sense view that the way people conduct themselves influences their chances of being arrested. While sleeping, they are not behaving in ways that elicit arrest.

More generally, law is expected on theoretical grounds to vary inversely with other types of social control only if the total amount of social control is constant. Yet the overall level of social control in a society or in a group can certainly vary. Once this variation is permitted, the proposition quoted does not follow and need not hold.

VI. CONCLUDING REMARKS

Although Black describes his collection of propositions as a theory, the absence of any argument linking these propositions means that they lack the logical coherence expected of a theory. His claim to have developed a theory that is independent of all psychological assumptions about individuals is valid only in part. We noted earlier that Black implicitly assumes that people are capable of cognition and evaluation. Were this not true, his theory would be equally applicable to plants, animals, or even inanimate objects. However, it is only because Black does not explain why the propositions of his theory should hold that he is able to dispense with psychology. Were he to attempt to devise such explanations, he would surely need to draw on psychology. Furthermore, even if every one of Black's propositions were to be confirmed, it might still be the case that some additional variation, in sentencing for instance, could be explained by examining judges' motives or purposes (Hogarth, 1971). Black has not demonstrated, even in

principle, the empirical adequacy of a theory that allows no room for psychological variables.

Black claims that his theory can account for the same phenomena and make the same predictions as other theories. Even when two theories predict the same overall relationship between cause and consequence, they can often be distinguished from one another on the basis of differences in the causal processes they postulate.[13] For example, many theories of delinquency predict that lower-class youths should be more delinquent than middle- and upper-class youths. Since they suggest different reasons for this, they can be distinguished empirically. However, Black's failure to specify the reasons why his propositions should hold leaves us unable to confront his theories with others that make similar predictions.

In fact, Black's claim to predict the same relationships as other theories is at times misleading because Black does not define his variables the same way other theorists do. Thus, if Black operationalizes delinquency in terms of arrests while another theorist defines it in terms of responses that young people give to questions about their conduct ("Did you smoke marijuana last year?"), the predicted relationships are not the same in the two theories even if both refer to delinquency.

Black's work is fundamentally crippled by its *a priori* assumptions that a theory of law must be general and cannot involve nominal (qualitative) variables. The testing of his theory is rendered difficult by ambiguities in the statement of the theory and in the operationalizing of variables. When we follow Black's lead and use common-sense intuition to operationalize variables, we find that the evidence does not consistently support the theory. However, this intuitive approach to scaling is far from satisfactory. In the absence of a theoretical approach to the measurement of variables, all empirical tests of the theory are likely to prove problematic.

That some of Black's propositions are called into question when confronted with empirical evidence does not in itself reflect on the value of his approach. The progress of science is due in no small measure to ideas that have been found to be

[13] When this cannot be done—that is, when two theories make exactly the same predictions—then there is no basis for choosing between them. In that case it can sometimes be demonstrated that the two theories are really different formulations of the same theory. Heisenberg's matrix mechanics and Schroedinger's wave mechanics, for example, were both eventually shown to be different but completely equivalent formulations of nonrelativistic quantum mechanics.

wrong as initially stated. When contrary evidence is adduced, the original formulation is modified, qualified, or restricted in the range of its applicability. The initial formulation, even when wrong, may have stimulated important empirical research.

Black's approach to this process is ultra-empiricist. Rather than derive hypotheses from a coherent set of ideas about social processes, he appears to draw, in an *ad hoc* way, on earlier empirical work to formulate discrete propositions that are unconnected to any larger theory. This is a terribly inefficient way to generate the elements of a theory. It stands in the way of working out the implications of contrary findings for an entire structure of ideas. It likewise offers no help in the operationalization of variables, as a more rational or conceptual approach would. That is why Black so consistently falls back on common sense when operationalizing his independent variables despite his own fervent strictures against common-sense reasoning in sociology (Black, 1979).

These comments should not be interpreted as a total rejection of an inductive approach to theory development. They do suggest that this approach is likely to be most fruitful when taken in conjunction with an attempt to conceptualize the subject under study. In addition, when an inductive approach to theory generation is taken, it is essential that the findings which are being generalized truly represent the state of affairs. To the extent that they do not, the generalization will be in error. Although Black can hardly be faulted for failing to take into account conflicting findings published after his work was completed, some of the empirical studies I have cited were done early enough to have been taken into account, and other pieces of conflicting evidence could have been discovered with little effort. The consequence is propositions that do not stand up very well when confronted with evidence. Black's propositions are not trustworthy guides to the behavior of even that small portion of law his theory concerns.

Black's work must be taken, then, as a set of empirical generalizations of uncertain meaning, whose range of validity is unknown, and that in some instances appear to be wrong. These generalizations may provide a stimulus to empirical research, but they do not provide a secure theory or even a foundation for building a theory. These deficiencies seem to me to be less a product of inadequacies on the part of the theorist than a consequence of deficiencies in the approach itself. Approaches that pay more attention to conceptualization

are far more likely to yield insights about the social character of law.

Given these very serious weaknesses, the reception accorded *The Behavior of Law* is quite striking. It has received favorable reviews from leading figures in the field (e.g., Nader, 1976; Sherman, 1978) and has been the focus of a good deal of empirical research. Part of the explanation may lie in the theoretical malaise of the sociology of law. Classical social theory is so undeveloped that it offers only limited help to the contemporary sociologist. Symbolic interactionists, whose writings have had a major influence on criminal justice research in the past two decades, have tended to prefer the identification of "sensitizing concepts" to the development of formal propositions (Schur, 1975). Other recent theory (Unger, 1976; Nonet and Selznick, 1978) is concerned primarily with more macro-relationships than those that are the focus of most contemporary research in law and social science.

Given the state of modern theoretical efforts in the sociology of law, one can easily understand why Braithwaite and Biles (1980) exclaimed in response to a work which promises a genuine theoretical advance, "at last the sociology of law had a genuine theory which could be a focus for formerly directionless empirical work." The explicit propositional formulation of the theory must have been especially welcome to students writing empirical dissertations, as they are often compelled by their advisors to state hypotheses explicitly and then test them.

The ambitiousness of Black's effort makes his promise of a theory potentially relevant to virtually everyone in the field. His work is not advertised as an attempt to deal with a particular aspect of law but rather as a *general* theory of law. As we have seen, this claim is exaggerated. Nevertheless, the level of abstraction at which the theory is formulated does permit a great deal of material to be integrated. The macrosociologist who compares law in different societies and the ethnographer who observes courtroom interaction or police-civilian encounters will both find something in Black's work. This potential breadth of application is made explicit by Black's wide-ranging scholarship, which yields illustrative materials concerning law in many different settings. Since current scholarship in law has become fragmented and specialized to the point where there are few common concerns or ideas to unify the field, a work which promises the possibility of unification is inevitably welcomed.

At the same time, the fragmentation of the field reduces the ability of practitioners to evaluate a work of broad scope. Familiarity with the literature beyond one's own particular specialty is often limited. Consequently, it is not easy for the reader to determine how adequately Black's illustrative materials represent the literature that bears on his propositions.

A further factor is that many practitioners of the sociology of law have only a limited knowledge of law. Most lack law degrees. Many have come to law by way of criminology and are familiar primarily with criminal law. The over-representation of criminal law and criminal justice administration in texts and courses concerned with the sociology of law reflects this background.[14] It is a background that tends to emphasize the social control functions of law and to de-emphasize other functions. This background means that many sociologists have been ill-prepared to see the limitations inherent in Black's conceptualization of law.

Black's conception of law may also have a special intuitive appeal to the generation of sociologists that shared, whether directly or vicariously, the experience of the political protestors and long-haired hippies of the late 1960s. They often experienced law in its repressive aspects, rather than as a facilitator, as a protector of rights, or as providing a framework within which private individuals could negotiate their own social arrangements. In this period, as in many other periods of American history, law sometimes responded to people on the political or cultural "left" without close attention to what they did or to legal rules.

Finally, the fetishism of numbers to which many sociologists are prone leaves its victims vulnerable to a work that seems to offer the possibility of quantifying material that earlier seemed to resist mathematical representation. At the same time, *The Behavior of Law* avoids statistical modeling, making it accessible to all readers, including those who are untrained in quantitative methods. Moreover, since Black does not himself use his formulations to carry out quantitative research, the problems inherent in the operationalization of these formulations are not revealed.

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[14] Quinney's (1973) study illustrates my point. It is entitled *Critique of Legal Order* but deals only with crime control, as if branches of law that do not deal with crime (e.g., torts, contracts, constitutional law, family law, labor law) did not exist.

The large gap between aspiration and attainment does not negate Black's accomplishment in abstracting from an impressive range of materials. At the same time it underscores how difficult it is to achieve a grand theory of law. This critique of Black's work is intended to help us come closer to our theoretical goals by showing us some of the obstacles we need to overcome. Indirectly, then, it is a challenge as well as a critique.

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