Evidence as Partisanship

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This article analyzes the social origins of evidence. Applying Black's theory of partisan behavior to a variety of empirical materials indicates that the ability to attract supporting evidence is differentially distributed across social life. Thus, the amount of investigative effort legal officials put into a case, the willingness of people to testify, and the supportiveness of witness testimony all increase with the social status of the principal parties and the number of intimate ties they have. In addition, the quality, or credibility, of the evidence parties attract varies directly with their social status and the number of distant ties they have. Far from creating a factual component divorced from the social dimension of the case as is often believed, the evidentiary process helps to transform the attributes of high status and social ties into successful legal claims.

Demonstrating the importance of the social characteristics of the parties is the central theme—and achievement—of the microsociology of law (see especially Black 1976, 1989). Work at this level has undermined the traditional idea that law is concerned only with what people do, and not who they are. An imposing body of literature establishes that the way cases are handled varies systematically with, for example, the intimacy (e.g., Lundsgaarde 1977), social standing (e.g., Farrell & Swigert 1978), organizational status (e.g., Wanner 1974, 1975), race (e.g, Baldus, Woodworth, & Pulaski 1990), gender (e.g., Daly 1987), integration (e.g., Engel 1984), and moral reputation (e.g., Holmstrom & Burgess 1983) of the parties.

Yet there are also limits to what has been accomplished. Sociological factors can explain only so much of the variation in case outcomes. Some portion must be attributed to the components

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emphasized by traditional legal thought. Evidence, in particular, clearly matters. The party with the most and the most credible evidentiary support generally wins (see, e.g., Myers & Hagan 1979; Reskin & Visher 1986). Oddly, though, relatively little of a scientific nature is known about evidence. Legal scholars have argued for some time that fact-finding is an uncertain human process (e.g., Frank 1949; Posner 1990:203–19), but they have not elaborated this insight into a body of data or an explanatory theory. Social scientists have investigated the important issue of the social biases inherent in the evaluation of testimony (Stanko 1981–82; O'Barr 1982; Wolf & Bugaj 1990), but neither they nor any other group have looked in depth at where evidence comes from in the first place.

I seek here to advance the microsociological understanding of law by exploring the social origins of evidence. The argument presented assumes that the same empirical events can give rise to very different amounts and types of evidence. But the social process by which events are transformed into legally relevant information is neither random nor inscrutable. Litigants vary systematically in their ability to attract evidence, a pattern that manifests itself at several stages of the legal process: the investigation of the facts by lawyers and police officers, the willingness of citizens to involve themselves as witnesses, and the presentation of evidence by citizens and legal officials alike. All this conduct can be considered a form of support or partisan behavior for one party to a dispute. As such, it falls within the jurisdiction of a theory of partisanship recently formulated by Black (1993) to predict and explain the amount of support that people attract from others in times of conflict. Applying this theory to a diverse set of empirical materials yields my central empirical claim: that people with extensive social ties and people with elevated social status have advantages in attracting the evidence necessary to sustain their legal cases.

This discussion represents an initial attempt to identify some of the major social patterns in the production of evidence. Its purpose is to open up an area of inquiry, not to provide a definitive overview of a well-researched subject. It therefore neither surveys all relevant explanatory variables nor presents quantitative estimates of the effects reviewed. Incomplete though the data presented are, they nonetheless indicate that sociological effects are deeply embedded within the legal process. Not only do people's social characteristics and ties affect their chances of winning once their case is presented to legal officials, but they also help to explain the evidentiary strength of the cases themselves. In this way, a kind of double disadvantage operates against low status and socially isolated litigants.

The Sociology of Evidence

Evidence Scholarship

Though often considered a narrow and technical subject, the law of evidence in fact generates a diverse set of scholarly perspectives. Much of the scholarship is doctrinal, focusing on the interpretation of cases and statutes (e.g., Carlson, Imwinkelried, & Kionka 1991; Kaplan, Waltz, & Park 1992). But there is also a tradition of philosophical work analyzing the ultimate bases of evidence law: its foundations in logic, its rational justifiability, its social purposes (e.g., Bentham 1978 [1827]; Gulson 1990 [1905]; Twining 1983; Twining & Stein 1992). In recent years, this jurisprudential perspective has generated analyses of the interpretation of legal facts (Scheppele 1988:ch. 5; 1991) and a debate about the nature and role of probability theory and mathematics in establishing legal proof (e.g., Cohen 1977; Eggleston 1978; Tillers & Green 1988).

Evidence scholarship also has a well-developed empirical dimension. Social psychologists work on various aspects of evidence (e.g., Kassin & Wrightsman 1985) and have devoted particular attention to investigating experimentally the trustworthiness of eyewitness identification (e.g., Loftus 1979; Wells & Loftus 1984; for a review of the literature, see Williams, Loftus, & Deffenbacher 1992). A second issue addressed by social scientists is the related question of witness credibility—how it varies with, for instance, the social characteristics (Stanko 1981–82; Wolf & Bugaj 1990) and speech patterns (O'Barr 1982; Morrill & Facciola 1992) of those giving testimony. A third is the manner in which legal officials construct legal truth (e.g., Frank 1949; Cicourel 1968; McBarnet 1981; Ericson 1981, 1982; Rosen 1980–81:219–27; 1989:20–38; Geertz 1983; Sanders 1987; McConville, Sanders, & Leng 1991). Finally, scholars from a number of disciplines have analyzed the features of historical and cross-cultural settings responsible for variation in the means of obtaining evidence—ordeals, trial by battle, torture, oaths, witness cross-examination, etc. (e.g., Lea 1971; Roberts 1965; Brown 1975; Langbein 1977; Bartlett 1986; Caenegem 1991).

Broad though it is, all this work begins from the evidence presented in the case. While scholars have analyzed the second phase of fact-finding—the evaluation of evidence—they have rarely explored the prior stage—the production of evidence—though it is extremely important in the practice of law (e.g., Jeans 1992:v. 1, 191–269).

Black's Theory of Partisanship

Scholars have long been interested in the role third parties play in conflict (e.g., Barton 1969:87–88; Evans-Pritchard 1940:152–76; Colson 1953; Eckhoff 1967; Caplow 1968; Merry 1982; Lewicki, Weiss, & Lewin 1992). There seem to be two major third-party orientations (Black & Baumgartner 1983; see further Black 1993:138–39). First, third parties may seek to settle disputes through mediation, arbitration, adjudication, or some other process. Second, third parties may seek to advance the cause of one of the principal parties in a partisan manner. Although the former have received more scholarly attention, the latter can also profoundly affect the way conflict is handled. For instance, cross-cultural evidence suggests that the structure of partisan support enjoyed by spouses shapes the amount and severity of domestic conflict, including the willingness of men to use violence against their wives (Baumgartner 1993).

A theory of partisanship would explain variation in the amount of support people generate in times of conflict. To that end, Black (1993) treats partisanship as a form of "social gravitation" by which one social actor is attracted to another. Consistent with his earlier theoretical work on law (1976) and other subjects (1979), Black conceives of social gravitation in general and structural terms. Thus, his theory does not address the subjective dimensions of why disputants attract support in particular situations but concentrates on the underlying social conditions that explain attraction, regardless of whether it occurs in a remote New Guinea jungle or in a 21st-century urban agglomeration. Just as gravitational attraction in physical space is a function of the mass of objects and the distance between them, so for Black gravitation in social space is a function of status and social distance. His theory of partisanship therefore reduces to a single proposition (1993:127): "Partisanship is a joint function of the social closeness and superiority of one side [of a conflict] and the social remoteness and inferiority of the other" (emphasis omitted).

For present purposes, this proposition encapsulates three main ideas. First, the status and relational characteristics of both parties predict the behavior of partisans. Second, partisans tend to gravitate toward the higher status party and the party with whom they are more intimate. Third, the degree of support that a partisan provides increases with the status difference between the parties, as well as the closeness of one party minus the distance of the other (e.g., people give more support when they are close to one party and distant from the other than when they are close to or distant from both).[1] In general, then, higher status

[1] "Social remoteness" also includes a variable not discussed here—the cultural distance (as defined in Black 1976:65, 70, 74) between party and partisan.

parties ought to attract more support than lower status parties, and parties with extensive ties of intimacy ought to attract more than social isolates.

The Production of Evidence

The production of evidence is one type of support behavior (Black & Baumgartner 1983:111–12; Moore 1992:36–38). In most legal disputes, the testimony of the principal parties appears to be the largest and most partisan source of evidence. This is consistent with the above hypothesis because people are most intimate with themselves (Cooney 1988:41–46; compare Black 1993:142 n.16). This essay, however, concentrates on the more problematic role played by individuals other than the principals. (Hence, in this article the term "witness" refers to a third party who provides testimony.) Black's theory predicts that the amount of evidentiary support the parties attract from third parties in civil and criminal cases increases with their social status and the number and intimacy of their social ties. "Social status" is defined broadly, referring to matters such as the wealth, organization, and respectability (i.e., lack of a record of deviance) of a social actor. These elements are assumed to have independent and cumulative effects (e.g., a wealthy and respectable individual is more advantaged than one who is wealthy but unrespectable).[2] "Intimacy" or relational distance refers to the frequency and intensity of contact between people, the degree to which their lives are entangled.

Evidence varies not just in quantity but also in quality, or credibility. Credibility depends, in part, on the social source of the evidence, on who presents it. The evidence of high-status and relationally distant witnesses tends to carry more weight than that of witnesses with the opposite characteristics (Stanko 1981–82; O'Barr 1982; Black 1983b; Wolf & Bugaj 1990). Since support is predicted to flow upward rather than downward, high-status litigants ought to be advantaged in attracting high-status witnesses. I also propose that litigants with extensive distant social ties attract more support from relationally distant witnesses.[3]

[2] A task for the future is to assess the relative strength of the component dimensions of social status. For further details on both social status and intimacy, see Black (1993a:126–27; 1976:chs. 2–6).

[3] Perhaps a number of clarifications about the ultimate scope of the argument might be useful. First, although the theory applies both to direct support that buttresses a litigant's story and to indirect support that implicates the other litigant in wrongdoing, only the former is addressed here. I do not consider, therefore, how the social characteristics of the parties explain variation in the attraction of hostile evidence. Second, I emphasize oral testimony, often the most common form of evidence (see, e.g., Ericson 1981:92; Simon 1991:16), but my argument extends to legal evidence in general and thus embraces cases, for instance, in which documentary evidence dominates (e.g., intercorporate litigation). Third, because evidence affects each procedural stage, from the initial statement of a grievance to its final resolution, the analysis is pertinent whenever officials (including jurors) take legal action.

The following sections illustrate these principles at work in three areas of the evidentiary process: the factual investigation of cases by legal officials, the provision of evidence by citizens, and the variable content of evidence presented by legal officials and by citizens.[4]

Investigation

Ties to the Police

The amount of evidence available to legal officials varies greatly. In some cases, there is an enormous volume of information about the parties and the alleged offense; in others, virtually none. The events in dispute do not determine how much evidence there is. One reason for this is that the effort legal officials put into generating evidence through the investigation of facts is not constant across cases (Black 1980:14–18; see also Sanders 1977:95–96). As one legal sociologist has noted:

> Both officials and nonofficials often think of evidence as a fixed commodity attached to the case. Thus, attorneys routinely speak about "how much evidence" there is in a particular case or suggest that "the evidence shows" something. In actual practice, evidence is not a fixed commodity but a purposefully constructed set of documents, testimony, and material objects. In no case is only one set of evidence possible. Moreover, evidence does not create itself. Its generation requires human labor and interpretation and, usually, economic resources. Because evidence must be generated, officials create more or less of it depending on their conceptions of cases. Cases that they are less interested in winning, for whatever reasons, generally receive less work and thus generate less evidence. Conversely, more evidence can also be generated. (LaFree 1989:105–6)

The theory applied here suggests that the generation of evidence increases with the status of the principal parties and their intimacy with the investigators. The limited amount of available information supports this. Consider, first, police investigation.

Although even small amounts of intimacy appear to increase partisan behavior, a point elaborated later, close relationships produce the strongest effects. Thus, when police officers are vic-

[4] Indeed, although no data are presented on the point, the theory should, in principle, also explain patterns of evidence presentation in nonlegal conflicts, such as disputes among family members, friends, neighbors, and co-workers. Note, however, that the more informal (i.e., the less reliance placed on explicit rules) the setting, the less important evidence appears to be. Nader (1969:84–88) reports, e.g., that courts handling disputes between low-status Mexican Indians are more concerned with reconciling the parties than with establishing clearly what happened in the past. Thus, in some nonlegal conflict (e.g., formal hearings within an organization) evidence may play a central role, while in others (e.g., peacemaking within families), it may be largely irrelevant.

tims[5] of crimes, their ties to police detectives (whether based on personal acquaintance or, more indirectly, on common organizational membership) generally ensure that the case will be vigorously investigated (e.g., Simon 1991:127–50). The clearest example is the killing of an officer by an unknown assailant (e.g., Matthiessen 1991:192–218; McAlary 1992:79–164; Adams, Hoffer, & Hoffer 1991:12–14). An ethnographer of the police comments:

> Policemen take the death of colleagues seriously. . . . [They] want . . . killers of policemen caught, and the department makes extraordinary efforts to achieve their capture. . . . [The] captain . . . orders the men to go out and "bring everyone walkin' around with a swinging pair" in for investigation. . . . Patrolmen, detectives, special-unit officers, everyone [goes] out doing the job, closing up the bars and clubs, hitting the speaks, pinching the junkies, the gamblers, the prostitutes, closing down the area, "squeezing them for information." (Rubinstein 1974:335–36)

The killing of a police officer may be thought an extreme illustration, but, as many police researchers have noted, the police take seriously all offenses against their authority (e.g., Piliavin & Briar 1964:210; Chevigny 1969:ch. 3; Black 1971: 1097–1101, 1102–4, 1108–9; 1980:36–40). In a modern English case, for example, a defendant let the air out of a police car tire. Observers note that the police "went to great lengths to secure evidence," including obtaining "a written report from their maintenance department" in order to sustain a charge of attempted criminal damage (McConville et al. 1991:159).

Big Cases

Investigation also varies with the social characteristics of civilian victims (e.g., Simon 1991:19–20). The police treat some cases as "big" or important and investigate them in considerable detail. Crimes committed against high-status victims are especially likely to be treated this way (e.g., Skolnick 1966:176–77). A clear example is the assassination of a political leader or a media celebrity. Here investigation by police and others may continue for decades or even centuries. But the same principle applies, less dramatically, in crimes against ordinary citizens. When wealthy, respectable people are victimized, police are likely to

[5] This section focuses on victims, but the theory predicts that were information available, the amount of supporting evidence defendants attract would increase with their status and ties. For instance, English researchers have found that West Indians (who are disproportionately of low income) are more likely than whites to be sentenced without a Social Inquiry Report, a document used by defense lawyers in making pleas of mitigation at sentencing hearings (Hood with Cordovil 1992:150–56).

> seek physical evidence such as fingerprints, tire tracks, and hair samples at the scene of the crime, interview large numbers of potential witnesses and informants, and conduct extensive interrogations, polygraph ("lie detector") tests, and "line ups" (sessions at which suspects are viewed by victims or witnesses through a one-way mirror). (Black 1980:16)

As the victim's social status declines, the probability that these investigatory measures will be undertaken decreases. Thus, in cases where the victims are of decidedly low status, even the most obvious investigative leads may not be pursued, regardless of the legal seriousness of the incident. A study of homicide in a rural Mexican community, where the victims are poor farmers, reports: "There is never any questioning of suspects or attempt to solve the crime by officials" (Nash 1967:461). Similarly, minimal investigation also appears to follow homicides committed on American Indian reservations (Matthiessen 1991:193) and skid row (Black 1989:6–7). In a Georgia case I observed,[6] a young black man, whom the police strongly suspected of being a drug dealer, shot and killed a close friend, another young black male also believed to be in the drug business. The killer turned himself in to the local jail the day after the shooting, and told the authorities he was prepared to make a statement to the police. Seven months later, when the case came up for trial the prosecuting attorney complained that the investigating officer had still not taken a statement from the defendant. Busy with other cases, the killing of one street-level drug dealer by another was simply not high on the detective's list of priorities.

That evidence is uncovered is no guarantee that it will be useful or important. A considerable amount of legal strategy revolves around excluding or suppressing information that is available to at least one party (see, e.g., Mann 1985). However, without investigation legal actions are difficult to sustain. In the above case, for instance, the lack of evidence resulted in the assistant district attorney accepting a plea of involuntary manslaughter instead of pursuing the murder conviction he had initially sought.

Another aspect of social status affecting the thoroughness with which cases are investigated is the victim's respectability. One student of police homicide investigators has noted that "nothing deflates a detective more than going back to the office, punching a victim's name into the admin office terminal and pulling out five or six computer pages of misbehavior, a criminal history that reaches from eye level to the office floor" (Simon 1991:177). But any deviation from conventional standards of be-

[6] This case comes from my observation of a prosecutor's office in a medium-sized Georgia town (population 80,000). I spent some 120 hours observing the seven prosecutors preparing their felony cases and presenting them in court, paying particular attention to evidence collection and the testimonial behavior of witnesses.

havior can weaken a victim's claim. A study of Canadian detectives cites the following two cases to illustrate this point.

In the first, an alleged rape, the detectives "spent five hours trying to talk the victim into following through with her complaint and giving a written statement on it. . . . [They] willingly worked a continuous 16 hour period on this case, on behalf of a victim they characterized as 'naive' and 'respectable' and in need of police assistance to develop and sustain the case" (Ericson 1981:106). In the second, an alleged assault, a young man got into a fight while attending a party, receiving injuries which necessitated him spending four days in hospital. The detectives spent a total of 15 minutes on the case. After visiting the victim in his disheveled apartment a detective commented, "Did you see the way he lives? He's probably glad he got hurt so that he had an excuse not to be working." Although the case was one of the most violent encountered during the research, the detectives filed the case without ever contacting the two eyewitnesses or the suspect. The reason they cited: lack of evidence (Ericson 1981:106–7).

Legal officials often cite lack of evidence as a reason for the attrition of criminal cases. Examples such as these demonstrate that the designation has an evaluative component linked to the social status of the parties, and that statistical presentations which employ it tend to contain embedded partisan effects (see, e.g., Boland, Mahanna, & Sones 1992:35–48).

Defense Attorneys

Applying Black's theory of partisan behavior to defense attorneys yields the prediction that those who represent family members and friends will, all else the same, investigate in more depth than those who represent strangers. Though plausible, this claim awaits empirical confirmation. Some data exist, however, to support the second hypothesis: that the status of the defendant is correlated with the depth of the attorney's investigation.[7] Thus, a survey of 60 death penalty attorneys (whose clients are virtually all low income) in six states found that 25% reported that they did not have enough time to prepare adequately for the trial, 27% did not call character or expert witnesses at the penalty phase, and 54% felt that the court provided insufficient funds for investigation of the facts and for expert witnesses (Coyle, Strasser, & Lavelle 1990:40). This is not confined to death penalty cases. A number of writers have noted that attorneys who usually represent low-income people tend not to engage in extensive searches for evidence favorable to their clients (e.g., Car-

[7] This observation does not apply to civil law jurisdictions (e.g., the countries of continental Europe)—where state officials, not the party's lawyer, gather defense evidence.

lin & Howard 1965:416). Regardless of whether this is caused by lack of time or lack of interest on the attorney's part, it can result in considerable disadvantages to the client, as illustrated by a case heard by a lower court in Scotland:

> McD. had been so adamant he was innocent that he and his mother had hired a lawyer at their own expense. And in their view, "it was the easiest £30 I ever saw anyone earning." There *was* a witness, a stranger, who, according to the defendant, had in fact been committing the offense, and had been prepared to give evidence that McD. had arrived *after* the event. He had pleaded guilty, but recognized that McD. was not and gave a statement to that effect to the lawyer. Summoning him was left to the defendant's mother. Neither she nor the witness had a phone. She sent her seven-year-old son with a note.
>
> The witness's father took it at the door. She never knew if the witness himself received it. He certainly did not turn up. In court, the defense lawyer merely noted, "I had hoped to have some supporting evidence but unfortunately for one reason or another it is not available." The magistrate, not surprisingly, saw "no reason why I should doubt the evidence given by the policeman." And the family even less surprisingly concluded: "People like us don't have rights." (McBarnet 1981:151; emphasis in original)

By contrast, attorneys who represent high-status defendants typically explore the facts in considerable detail, perhaps even employing their own investigators, a point documented by Mann's (1985) ethnographic study of the elite New York white-collar defense bar.[8] In one case Mann discusses, for example, an attorney representing a client suspected of land fraud stated that he undertook the following steps:

> "First of all, I had to learn the land business from A to Z—selling, buying, and investing. I had to go there and see the land with my own eyes, study what they had been doing, what the geography was like, what representations were being made to people; was there really egregious misrepresentation or really nothing at all? I had to interview salesmen, buyers, talk to state and federal regulators. It was a tremendous operation. . . . I sent my associate to their main office with instructions that he be given access to all records—memoranda, drafts, plans, letters, interim reports . . . whatever. . . . Then I later had him interview salesmen; there were over 50 of them." (Mann 1985:68)

The depth of this investigation was not exceptional:

> Attorneys repeatedly stated that it was very hard to convey the complexity, length, and detailed nature of an examination of records in a case that involved substantial business transactions.

[8] The higher fees paid by high-status clients appears to explain some, but not all, of the differential investigatory effort of lawyers. To test this, one could compare, e.g., the effort exerted on behalf of a sample of wealthy drug dealers with that exerted on behalf of a sample of wealthy conventional businesspeople.

> Some attorneys described the physical quantity of records delivered to their offices by clients—"They had three large filing cabinets sent here" or "We had one room in the office devoted completely to housing the corporate records, and they were worked on in that room by us." Other attorneys detailed the number of people and hours used for examining the records—"Three associates worked on the accounts for over two months" or "We billed over 150 hours in three months on that case, all in the investigative stage." And still others searched for superlatives to emphasize the obstacles—"It was absolutely impossible to handle all the records in the sixty-day period we had to comply with the subpoena." (Ibid., pp. 68–69)

Despite being on opposite sides, then, officials working for the defense and for the state broadly similar patterns of differential attraction to cases.[9] In this they are not alone. As the next section indicates, ordinary citizens also appear to gravitate to some parties more than others, and the principles that underlie their behavior appear to be largely the same as those that govern the partisanship of legal professionals.

Coming Forward

Just because an incident occurs in the presence of onlookers is no guarantee that it will generate witnesses. People are not always willing to come forward and give evidence to legal officials. One study of detectives, for instance, describes a homicide in which a person was shot to death in a crowded bar in the presence of a hundred people. Not a single person voluntarily came forward to testify (Waegel 1981:269–70). In a study of homicide I conducted in Virginia, the failure of witnesses to appear was a common theme in interviews conducted with defendants, relatives, and law enforcement officials.[10] In one case, for instance, the killing took place in a crowded public park on a Saturday afternoon during a festival. The defendant estimated that about a hundred people witnessed the killing. Of these, only one was willing to testify in court.

The willingness of witnesses to come forward appears to increase with the status of the litigant. Thus, people at the top of corporations faced with allegations of white-collar criminal viola-

[9] If the theory is correct, lawyers should also put varying degrees of effort into other aspects of the case (e.g., researching the legal doctrine).

[10] In 1989–90 I conducted lengthy face-to-face interviews with 75 randomly selected people incarcerated for homicide in Virginia in 1988. The interviews focused on the background and context of the killing and the legal and informal social control to which it gave rise. I asked the defendants about their statements to the police, the identity of any eyewitnesses, the people who gave testimony and for which side they gave it, and the substance of the factual arguments on both sides. To supplement the information obtained, I read the available presentence investigation reports (n=50), interviewed 42 members of some of the defendants' families by telephone, and conducted in-depth face-to-face interviews in Richmond with three homicide detectives and one homicide prosecutor. For further details, see Cooney 1991:19–27.

tions can usually rely on receiving evidentiary assistance from their subordinates (Mann 1985:67, 73). When Claus von Bulow, a wealthy European well known in East Coast high-society circles, was charged with the attempted murder of his wife, the defense received unsolicited offers from several people who offered to testify about anything that would help the defendant (Dershowitz 1986:225). Conversely, those with low social standing, such as the morally unrespectable, find it more difficult to attract witnesses. In a California case, for example, the owner of a restaurant that employed topless female dancers was threatened with closure. Seeking the support of customers and friends, he found that people were unwilling to testify on his behalf, citing the negative impact it would have on their own affairs (Feynman 1985:273–74). Likewise, when people are killed in low-income communities, their cases often generate little evidence (see, e.g., Simon 1991:147). The same is true when prison inmates are assaulted or killed (see, e.g., Porter 1982:16; Shakur 1993:309–10).[11]

Witnesses will also come forward to support their intimates. Indeed, intimates usually do not have to be persuaded to testify; they volunteer. In the Virginia case mentioned above, for instance, of the hundred people who, the defendant estimated, witnessed the killing, the only one prepared to testify in court was the victim's girlfriend. Social isolates will therefore often be at a disadvantage in modern society, as they were in earlier settings in which people ("compurgators") swore oaths to the truth of their kinfolk's legal claims (e.g., Pollock & Maitland 1968:v. 2, 600–601; Black 1993:143 n.21).

Though intimates will not always provide support, they are typically easier to attract to the case than strangers. A legal anthropologist has noted that among the Tiv of Nigeria, people are slow to intervene in the disputes of unacquainted others, with the result that litigants have "trouble in getting witnesses of this sort, even though the number of people who have seen an act is legion" (Bohannan 1957:39). The same is true in America today. Although strangers sometimes volunteer their services, more typically the party or the attorney must first locate and then appeal to the witness's sense of justice or civic duty. If persuasion fails, the witness may have to be coerced. But coercion can harm as much as it helps. Many lawyers operate with the rule-of-thumb that "reluctant witnesses make bad witnesses" (Vera Institute of Justice 1977:69).

When witnesses have ties to both sides, the relative strength of their ties helps to determine whether they are willing to come forward and, if so, on whose behalf. To demonstrate this rigorously requires more detailed information than I can present, but

[11] An additional factor that may serve to suppress evidence in prison and in low-income communities is witness intimidation (see, e.g., Graham, 1985:ch. 1). See further note 14 below.

a number of examples from my Virginia study suggest that it is a factor of some importance. Thus, witnesses with ties to both sides that are of unequal strength tend to come forward to support the litigant to whom they are more closely tied. In one case, for instance, a witness who was intimate with the victim and merely acquainted with the defendant provided central evidence for the state. By contrast, witnesses who have ties of approximately equal strength to both sides are more likely to stay back. In two other Virginia cases, witnesses who found themselves in this position refused to get involved: As one defendant said, evoking a pattern of neutrality familiar to students of extralegal conflict (e.g., Senechal 1990:146–47), "it wasn't their beef; they didn't want nothing to do with it." Moreover, the willingness of witnesses to come forward may change as their ties to the litigants evolve. In a Virginia child custody case, for instance, a friend agreed to testify to seeing the wife with bruises during the marriage. After the wife moved to another town, the friend and her husband began socializing with the divorcing husband. Caught more squarely in the middle, the friend became reluctant to testify on the wife's behalf.

The Content of Evidence

The Weakness of Strong Ties

When witnesses do provide evidence, its content will typically vary in its degree of partisanship. Although sensitive measures have yet to be devised, the principal elements of evidentiary partisanship are clear. Some witnesses give evidence that advances neither cause very much; others testify to matters that clearly support one side rather than the other. And some witnesses base their evidence squarely on empirical events, while others fabricate it. The least partisan evidence is truthful and neutral; the most partisan is false and supportive of only one side.

Given the same set of facts, the partisanship of testimony and other evidence ought to increase with the status of the party attracting it. Consistent with this, anthropologist Max Gluckman (1967:111) notes that among the Lozi, a tribal group resident in present-day Zambia, judges "believe that witnesses are liable to favour the powerful against the weak." Though it has never been investigated, this observation seems to apply to modern societies as well. Recall the "witnesses" who wanted to appear for Claus von Bulow—it is difficult to see what they could have said in support of his defense without telling outright lies. Equally difficult to imagine is a case in which a low-status person—an unemployed drug addict, for instance—accused of attempting to murder his wife would generate similar testimony from total strangers.

The Lozi also "believe that people will distort their evidence, and even commit perjury, to favour their kin, though it is wrong to do so" (Gluckman 1967:110; see also Just 1986:48). This belief is common today. A number of European countries prohibit close relatives from testifying on each other's behalf because of the likelihood of bias (see Beckstrom 1989:23). In the United States, testimony by close relatives is generally allowed, but legal professionals commonly assert that witnesses typically frame their testimony to favor their intimates, consciously or not. The defendant's intimates thus tend to emphasize mitigating circumstances and to deemphasize aggravating circumstances. Appearing for a person accused of murder, for example, they will ensure that the legal officials know that the victim initiated the fight that resulted in his or her death. They will readily agree to appear as character witnesses, drawing attention to commendable features of the defendant's biography. And should the defendant fabricate a defense, they are the most likely people to support it. Only one defendant in my Virginia sample admitted that he lied to the police, prosecutor, and court, but it is noteworthy that the people who were prepared to back up his story were his younger brother and closest friend (see also, e.g., Shakur 1993:27).

Conversely, the more intimate a witness is with the victim, the more supportive of the victim's case, and the more damaging to the defendant's case, the testimony tends to be. The victim's intimates typically move aggravating circumstances to center stage and mitigating circumstances to the wings. They will emphasize any predatory elements in the homicide, for instance, and downplay any involvement the victim had in his or her own demise. Note, however, that strongly partisan testimony for one or both principals tends to be found only when the witnesses are close to one side and distant from the other. When the witnesses have strong ties to both sides, the testimony is typically more guarded, less clear-cut.

A Georgia case I observed exemplifies some of these patterns:

> The defendant, Ben, is a young man accused of murdering a friend, Victor. Ben maintains that he killed in self-defense. A number of witnesses are called, each of whom has a different relationship to the parties. The most intimate with the victim is his girlfriend, Joy, who volunteers that the defendant started the fight. The most intimate with the defendant is his brother who, though he did not himself witness the killing, tells the court that Ben came to him after the event and told him that he shot Victor after Victor had choked him and stomped him in the face. Caught in the middle is Ben's ex-girlfriend, Sally, who is a close friend of Joy. Sally appears to be very uncomfortable on the witness stand, turning the chair to the side where she is able to look away from Ben. Her responses are brief and lack detail, but she does say that Victor slammed Ben to the ground in the fight.

To combat the effects of intimacy, lawyers on the other side often point to the relationship between litigant and witness as a reason for disbelieving testimony (see, e.g., Allen 1978:121). The following exchange (reconstructed from my notes) took place after the defendant's brother attempted to repudiate an earlier statement he had made to the police that was more damaging to the defendant's case than his court testimony:

> Prosecutor: "You don't want your brother to go to jail, do you"?
> Witness: "No."
> Prosecutor: "And you certainly don't want him to go on your testimony, do you?"
> Witness: "No."
> Prosecutor: "No further questions."

Thus, while intimates tend to be reliable witnesses, they are not especially effective ones. Although their testimony can be crucial if none other is available, it can be discredited by that of more distant witnesses: strong ties have their weaknesses. Legal success therefore often depends on attracting strangers and other credible witnesses to the case. Litigants differ in their ability to do this. But before I take up this issue, I must briefly address two further points.

Types and Amounts of Intimacy

Testimonial partisanship based on intimacy is not confined to family members and close friends. Police officers, for instance, almost invariably support one another's testimony (e.g., Hunt & Manning 1991:61–62). Moreover, they often distrust outsiders because of their uncertainty about how citizens might perceive and report events. In one incident, for example, detectives were unwilling to allow a social scientist to undertake an observation study of them at work because they were concerned, among other things, about any court testimony the researcher might be required to give. A senior detective told a researcher seeking research access that "[the detectives] just don't know who you're going to support in a situation like that. I'm not saying that they lie, but they want someone on their side. You're not a policeman" (Ericson 1981:32). A second detective, who was willing to allow the researcher full access to his professional activities on condition that the researcher participate and not just observe, said to him: "Of course, I would expect any good partner to be—you know what I mean—he would have to tell my version of what happened in court" (Ericson 1981:33; see also Smith & Gray 1985:355).

Whatever its basis, a relatively small amount of intimacy can begin to increase the partisanship of testimony.[12] In common law

[12] This appears to be true of helping behavior more generally (see Black 1993:142 n.6).

countries, such as England and most of its former colonies (including the United States), witnesses are called by the parties rather than by the court. Jerome Frank (1949:19)—himself a judge—endorsed the observation of a number of legal writers who argued that one of the most pervasive sources of "unconscious partisanship" is the honest witness who repays the confidence placed in him by the person calling him with supporting testimony. Expert witnesses may be subject to the same tendency (e.g., Haward 1982:61). Even a small amount of pretrial contact with a lawyer may increase partisanship. Again, in common law countries the parties or their lawyers must find and interview their own witnesses. Experimental evidence suggests that witnesses with no previous tie to a litigant who are interviewed by a lawyer prior to the trial may, without being aware of it, articulate their evidence in a manner supportive of the lawyer's client (Sheppard & Vidmar 1980).[13] Thus, although strongly partisan evidence, such as lying, requires a high degrees of intimacy, relatively small magnitudes of the variable can serve to increase the supportiveness with which testimony is proffered.

Attracting Credible Evidence

Evidence varies in quality as well as quantity. The quality of evidence has a social dimension: all else being the same, the testimony of high-status witnesses is more credible and has a greater impact on the outcome of the case than that of low-status witnesses (Stanko 1981–82; O'Barr 1982; Black 1983b; Wolf & Bugaj 1990:8–10). The same appears to be true of relationally distant witnesses (Black 1983b). The observation that "an unrelated witness is regarded as more valuable and objective than a close relative of either of the litigants" (Pospisil 1971:237) is as true of legal actors in modern America as it is of their counterparts among the Kapauku of New Guinea, the people about whom it was made.

Witnesses for the State

Litigants differ in their ability to attract the kind of high-quality evidence that helps to make a strong legal case. High-status litigants, individual and organizational, seem to be particularly advantaged in this respect. The state, a party to every criminal action, is an example of a high-status litigant by virtue of its wealth and degree of organization. Researchers have noted that its agents, especially the police, rely heavily on the community for

[13] It is thus an advantage for a lawyer to interview a witness before the opposing attorney does: "he who arrives first gets a better interpretation of the facts" (Mann 1985:162).

information about crime.[14] They routinely receive intelligence from the owners of businesses, people who manage apartment complexes, school principals, former victims, and the like (Ericson 1981:117–27).[15] Typically, these people have no relationship to the victim the state presently represents and have good standing in the community. If called on to testify, they tend to be highly effective witnesses. The state also enjoys ready access to professional evidence. Both police and prosecutors often employ their own investigators, have access to forensic laboratories and large bodies of computer-stored information, and are connected to a network of expert witnesses (e.g., firearms specialists, pathologists).

The net result is that in the typical criminal case the prosecution has five witnesses and the defense two (Kalven & Zeisel 1966:136).[16] This makes a difference. Experimental research shows that both sides' chance of success increases with the number of witnesses they call (Calder, Insko, & Yandell 1974; Wolf & Bugaj 1990). Moreover, the prosecution has higher quality witnesses: police appear for the state in three out of every four trials and experts in one out of every four. By contrast, the typical defense witnesses are the defendant (82%) and his or her family and friends (47%). Experts appear for the defense in only 6% of cases (Kalven & Zeisel 1966:137–40). Thus, by comparison with the defense attorney, the prosecutor generally "does not face a problem of credibility with respect to his evidence since most of his witnesses are agents who are higher in the hierarchy of credibility" (Ericson & Baranek 1982:206). Nine out of every ten felony defendants facing a trial therefore plead guilty (Boland et al. 1992:3). Of those who do not, three out of four lose at trial anyway (ibid., p. 6). Having credible witnesses can even affect the sentence imposed. In Georgia, a significant factor in predicting the imposition of the death penalty in homicide cases, even after controlling for some 230 other variables, is whether the prosecu-

[14] The state is sometimes at a disadvantage in recruiting evidence from groups with less influence, such as the young, the poor, minorities, and prisoners. Observers have noted, e.g., that members of ethnic and racial minorities in societies as diverse as the United States, Finland, and Israel are reluctant to provide legal officials with accurate information about crimes (see Simon 1991:34, 399–400; Gronfors 1986:108; Ginat 1987:120). Though the authorities often consider this behavior to indicate a lack of civic responsibility, to the people themselves it appears to represent an ongoing attempt to retain control over their own conflicts (see generally Black 1983a).

[15] Consequently, the backing of state officials can be of help to anybody seeking evidence. An investigator working for a civil rights group, e.g., reports that he received significantly more cooperation from legal officials and citizens after he was issued an identification card by his local police department (Stanton 1991:152–53).

[16] It might be argued that the reason the state typically has more witnesses than the defense in criminal cases is that the state bears the burden of proof. However, there are two weaknesses with this argument. First, if the state's cases is at all strong, the defense will need witnesses to answer the state's points. Second, the defense can call character witnesses, whereas the state cannot.

tion's principal witness is a police officer or a citizen with no credibility problems (Baldus et al. 1990:625).[17]

Witnesses for Individuals

Individuals also differ among themselves in their ability to attract high-quality evidence. Since research shows that "people develop relations with people like themselves" (Burt 1992:12), high-status people will tend to have high-status family members and friends who may be of assistance when disputes arise. Wealthy people convicted of white-collar crimes, for instance, can usually evoke character and other mitigating testimony from affluent and law-abiding colleagues and associates (Mann 1985:204, 220–22). But even without a prior relationship, their strong gravitational attraction makes their cases more appealing, enabling them to mobilize high-status and relationally distant partisans, such as respected attorneys and experienced expert witnesses.

These advantages will not be available in the ordinary course of things to, say, an unemployed manual worker. The pool of potential witnesses available to this litigant will typically be considerably less effective in fighting legal battles. Many of them are likely to be handicapped by low status characteristics, such as poverty and low levels of education. Some may themselves be unemployed or tainted by a criminal record. Even if they are of high status, they are unlikely to "go to bat" for the litigant to the same degree as they would for a more socially exalted friend. The result is that in a factual dispute with a high-status adversary, the chance that this litigant will prevail is low; his version of events will almost invariably appear less convincing.[18]

A Georgia case illustrates some of these patterns. The defendant, a wealthy businessman well known in his community, was charged with child molestation. He called ten character witnesses. They included an assistant district attorney, a clergyman, a school administrator, a businessman, a police officer, a school teacher, a librarian, and an elderly neighbor with deep roots in the community. Though low-status defendants can sometimes attract the support of one, or maybe two, high-status individuals, support of this standing and volume is largely confined to those

[17] Similarly, the typical civil case in the United States involves an organizational plaintiff and an individual defendant (Wanner 1974), a case structure that should work to the advantage of the plaintiff in attracting evidence and thereby help to explain the greater success rate in civil litigation of organizations (Wanner 1975).

[18] Wealthy and respectable individuals are not only able to attract high-quality witnesses to their cause, they can also rely on their own intrinsic credibility. Analogous to the Matthew effect in science under which eminent scientists get disproportionate recognition for their achievements (Merton 1968), a double advantage operates in these situations when the testimony of those viewed as influential is reinforced by the influential testimony of others. (The Matthew effect is named after a passage in Saint Matthew's gospel: "For unto every one that hath shall be given, and he shall have abundance: but from he that hath not shall be taken away even that which he hath.")

who enjoy the twin advantages of high social stature and many strong connections.

Another benefit individuals may have, independent of social status, is an extensive network of more distant social relationships consisting of acquaintances and associates. As argued above, people with a wide circle of family and friends have a reservoir of support from which they can draw, and this can be extremely effective in fighting legal battles. But because intimate witnesses carry less weight than distant witnesses, it also pays litigants to have less intimate ties. These relationships are valuable for a number of reasons. However tenuous and indirect they might appear, they can make the difference between the witness appearing and not appearing; they seem, as noted above, to have subtle but advantageous effects on the partisanship of testimony; and they generate inherently convincing evidence because of the greater relational distance involved. Most important, though, distant relationships may create a bridge to individuals outside the party's immediate circle, such as those in specialized fields of knowledge or even strangers (Granovetter 1973). To have lots of contacts, however superficial, is itself an advantage in the evidentiary process.[19]

When both parties are wealthy, respectable, and connected to distant others, they can each attract evidence from elevated and distant regions of social space. Under these circumstances, cases tend to become more complex as each side tenders large quantities of plausible evidence. Experts or other high-quality witnesses present credible but conflicting testimony on different issues for each party. For example, in the von Bulow case—described earlier—the defendant and his wife were each of very high social status. After the defendant was charged with the attempted murder of his spouse, eminent doctors appeared for both the prosecution and the defense to support sharply conflicting medical theories of the facts (Dershowitz 1986:225–29, 234–37). Cases such as this demonstrate that the complexity of the evidence is not simply a product of the events in dispute but is also a function of the social characteristics of the parties (see also McBarnet 1981:147–48; Green 1989:114).

Conclusion

Evidence is the currency in which legal cases are transacted. The amount and quality of evidence helps to determine whether crimes will be cleared, prosecutions brought, the gravity of the charges levied, the decision to plead or go to trial, the likelihood of a conviction, and the length of any sentence imposed. The

[19] One resource lawyers bring to cases are their own ties. These ties can prove useful in attracting relationally distant evidence to their client's cases (e.g., Dees with Fiffer 1991:171, 174).

same is true of civil cases: Issues of evidence are central to the making and winning of complaints at all stages of the process. Despite its importance, surprisingly little is known about the social origins of evidence. I have attempted to address this lacuna, citing data from a number of sources indicating that people have varying capacities to mount a strong evidentiary case. Thus, individuals possessing the advantages of high status and strong social ties tend to generate more supporting evidence. Furthermore, high-status parties and those with extensive weak ties have the additional advantage of being able to attract more credible supporting evidence. More specifically, it can be said that holding constant the disputed behavior, in legal cases *the quantity of supporting evidence increases with the principal parties' social status and the number of intimate ties they have*, and *the quality of supporting evidence increases with the principal parties' social status and the number of distant ties they have.*[20]

These propositions, themselves implied by Black's more general theory of partisanship, do not assume that evidence is wholly social. But neither do they exhaust the range of social patterns in the production of evidence. For example, membership in large and dispersed professional groups often generates strong partisanship, even though the individual members are relationally distant from one another.[21] Likewise, nonintimate dependent relationships (e.g., suspect-prosecutor) are often a source of highly partisan testimony. More tellingly, the poor and socially isolated are not always disadvantaged. Sometimes they act (to borrow a term from chaos theory; see Gleick 1987:119–54) as "strange attractors" obtaining support from high-status individual or organizations. Quirks of witness mobilization may therefore explain why low-status parties sometimes prevail against high-status parties (Baumgartner 1992:148–49). These are among the many areas in which more information is needed.

Though they are far from being the final word, the propositions nonetheless indicate the weakness of the distinction sometimes drawn between the legal and the social dimension of cases (see, e.g., Hagan 1974; Lizotte 1978; Nagel 1983). Useful though this dichotomy may have been in establishing the legitimacy of sociological analyses of legal phenomena, it assigns too modest a role to sociological factors. The diverse data presented here, unsystematic though they are, combine to demonstrate that the evidence in a case is not a straightforward reflection of what hap-

[20] Since these propositions require the underlying events to be held constant, they are best tested experimentally, although other methods may also be appropriate.

[21] To cite one example: In a modern English case, a baby born with Down syndrome, not wanted by its parents, died as a result of overdosing with an analgesic drug and subsequent contraction of bronchopneumonia (Smith 1989:81–84). The pediatrician treating the baby was charged with murder but acquitted after the prosecutor "found every specialist pediatric facility in Britain closed to inquiries, and that no pediatrician was prepared to appear as a prosecution expert witness" (ibid., p. 82).

pened but is mediated by the parties' relationships and social standing. Consequently, quantitative analyses of legal decisions that apportion legal outcomes to the strength of the evidence or the seriousness of the defendant's conduct, on the one hand, and the social characteristics of the parties, on the other, systematically underestimate the social dimension of law. Evidentiary strength and offense seriousness are themselves at least partially explained by the social composition of the case. Legal cases do not have an asocial legal core.

The propositions suggest as well that the relationship between evidence and the outcome of cases based on the social characteristics of the litigants ("discrimination") requires reevaluation. As O'Barr (1982) and others have shown, the credibility of testimony depends not just on what is alleged but also on who alleges it. I have argued that whether and how evidence is presented in the first place is itself a function of the status and ties of the parties. Together, these two lines of attack suggest that far from eliminating the role of social variables, as is traditionally believed, evidence provides the medium through which these variables permeate the factual center of legal disputes. This is not to deny that evidence may reduce discrimination in this sense. A legal system that paid much less attention to evidence might be a lot more concerned with who the parties are (though there are no data on the point). Even so, the idea that evidence is external to any discrimination in legal decisionmaking is insupportable. The relationship between the two is more complex and subtle than is conventionally allowed. In important ways, evidence facilitates legal discrimination.

One explanation of why relatively little attention has been devoted to the discriminatory role of evidence is that its social bases are often difficult to detect, especially after the case has concluded. There is a dearth of first-hand information about the early stages of legal disputes. And the official documents on which researchers often rely rarely reveal that a case was not investigated in much depth, that important witnesses did not come forward, or that crucial testimony might have been presented in a very different manner. Thus, some partisan effects operate before the empirical events harden into legal facts; others take root beyond the gaze of legal officials; many leave no trace. Evidence is therefore something of a veiled source of discrimination for particular categories of litigants. Legal sociologists have long been aware of the principal social mechanisms by which the "haves come out ahead": they are repeat players, have better lawyers, can exploit institutional passivity, and because the rules favor them (Galanter 1974). But if the two propositions presented here are correct, high-status and well-connected litigants in addition enjoy the considerable advantage of being able

to able to put together a convincing story. They shape legal reality itself.

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