

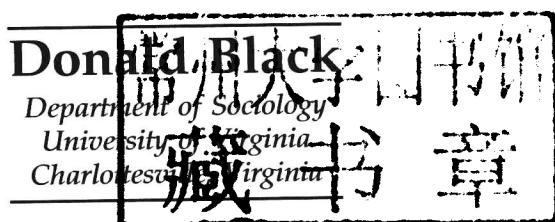


THE
BEHAVIOR
OF
LAW
SPECIAL EDITION

DONALD BLACK

THE BEHAVIOR OF LAW

SPECIAL EDITION



United Kingdom – North America – Japan
India – Malaysia – China

Emerald Group Publishing Limited
Howard House, Wagon Lane, Bingley BD16 1WA, UK

First edition 1976
Special edition 2010

Copyright © 2010 Emerald Group Publishing Limited

Reprints and permission service
Contact: booksandseries@emeraldinsight.com

No part of this book may be reproduced, stored in a retrieval system, transmitted in any form or by any means electronic, mechanical, photocopying, recording or otherwise without either the prior written permission of the publisher or a licence permitting restricted copying issued in the UK by The Copyright Licensing Agency and in the USA by The Copyright Clearance Center. No responsibility is accepted for the accuracy of information contained in the text, illustrations or advertisements. The opinions expressed in these chapters are not necessarily those of the author or the publisher.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

ISBN: 978-0-85724-341-6



Emerald Group Publishing Limited, Howard House, Environmental Management System has been certified by ISOQAR to ISO 14001:2004 standards



Awarded in recognition of Emerald's production department's adherence to quality systems and processes when preparing scholarly journals for print



INVESTOR IN PEOPLE



Faculty of the Department of Sociology, Yale University, April 1975

Seated (from left to right): Donald Black, Jerome Myers, Stanton Wheeler, Wendell Bell, August Hollingshead, Albert Reiss, Burton Clark, Kai Erikson, Juan Linz

Standing (from left to right): Bernard Gustin, Faruk Birttek, John Fernandez, Joyce Kozuch, Michael Mann, Patricia Jette, Paul Burstein, Eustace Theodore, George Farkas, James Rosenbaum, Barbara Anderson, Donald Wheeler, Jonathan Kelley

I went from Berkeley to Yale to teach in 1974, where I was fortunate to meet a very exceptional person: Donald Black. My abiding memory of Donald is his ability to combine rigor, logic, geometry, and sociological theory to such an extent that I felt pleasantly reassured in my Kantianism in a time of unnecessary confusion. Donald was not only Wittgensteinian in his manners but also in his mind: morally most upright, most civil in his ways, and most impatient with any lapse of logic. He advocated the kind of sociological theory I cherished, and have since made it the focus of my sociological efforts. His cottage at Woodbridge became my Magic Mountain. It was as if the Vienna Circle had been brought to the woods of Connecticut. Going there for an evening of pure intellectual feast was the height of my time at Yale, and is now a fond memory.

Donald taught me that the poetic aesthetics of theory was in its rigor and logic, a poetry that would recall Eliot's *Wasteland*. Donald was a poet and theoretician in one, a tremendous delight to discuss, disagree, and converse with!

Faruk Birttek

Professor of Sociology, Bogazici University, Turkey

Foreword

The Behavior of Law is an extraordinary and audacious book. Extraordinary because it proposes a radically new theory of a subject that scholars have written about for over 2,000 years. Audacious because its author, Donald Black, a young sociologist with no formal training in law, ignores the conventional focus of legal writing (the rules governing conduct). Instead, he proposes that legal behavior—in every society, at every time, no less—can be explained by the social characteristics of the parties or, more abstractly, by its location and direction in social space (later known as its “social geometry”).

On its publication in 1976, *The Behavior of Law* immediately became the most important book ever published in the sociology of law. It still is. The book contains what remains the only general sociological theory of law. There had been—and still are—many theoretical works in legal sociology. But no other theory sets out a body of testable propositions predicting and explaining what legal actors actually do—call the police, make arrests, hand down indictments, file charges, pass judgment, and impose sentences or award damages of varying magnitudes. Testable statements are crucial because only they allow us to discover and discard false ideas and allow knowledge to grow and progress. Black’s theory has progressed. In later work, he extended the theory in several directions—incorporating third parties (lawyers, witnesses, judges, and jurors), suggesting innovative ways to equalize outcomes across cases,

showing how lawyers can use his theory to win cases, and discussing the implications of his profound discovery that “the law” (of homicide, contract, or anything else) does not exist but varies geometrically, from case to case (Black, 1989; 2002; 2007).

The central propositions in *The Behavior of Law* are testable, but are they true? Unfortunately, basic errors mar many of the purported tests of the propositions, including a lack of information on some or all of the parties to the case and a failure to hold constant the conduct that forms the basis of the complaint. The most comprehensive assessment of the theory to date appears in my book, *Is Killing Wrong? A Study in Pure Sociology*. The book assembles any and all information I could find on the handling of homicides in human societies, from the simplest to the most complex, to see whether they can be explained by the social location, direction, and distance of the killer, victim, and third parties. Not wanting to spoil anybody’s enjoyment of the book, suffice it to say that social geometry turned out to explain an enormous diversity of facts.

The Behavior of Law thus contains a valid and general scientific theory. But the work has several other admirable qualities as well. It is startlingly original (see Baumgartner, 2002). The book is filled with memorable new words, phrases, and imagery (e.g., “centrifugal law,” “vertical location,” “organizational direction,” and “the quantity of anarchy”). It is inclusive. Positing five dimensions of social space, the book synthesizes the key variables of previous sociological theories as well as a broad range of cross-disciplinary empirical findings into a single theoretical system. It is concise: With its short, declarative sentences, masterly, succinct summaries of earlier works, elimination of footnotes, and vivid but terse presentation of evidence, the book packs an enormous amount of information between its slim covers. And it is clear: The book consists of precise definitions, lucid presentations of evidence, exact citations, and, most important, sharp, testable propositions. The world of *The Behavior of Law* is bigger, brighter, more intelligible—like standing at the top of a mountain and gazing down at the valley in which one has lived one’s entire life, seeing for the first time all its myriad details and how they combine into a splendid whole.

Science and art come together in this concise book. But there is more, something even more valuable. For *The Behavior of Law* introduces a new system of thought, a theoretical paradigm capable of being applied far beyond law, to any and all social behavior. The

book does not name the paradigm, but Black (1979) subsequently called it "pure sociology." "Pure" because it explains social life without invoking psychology. "Pure" because it eschews a second unobservable feature found in other theoretical paradigms: individual or group purposes. And "pure" because it posits that social life behaves, not people. Law, for instance, behaves through the actions of litigants and lawyers, police officers and witnesses, and judges and jurors. Every form of social life behaves—war, travel, sex, religion, laughter, money, sport, conversation, and music—and the task of pure sociology is to discover the principles according to which it does. Black and others have since set about that task, applying pure sociology to subjects beyond law, such as avoidance, lynching, genocide, art, medicine, and ideas (Baumgartner, 1988; Black, 1979; 2000; Senechal de la Roche, 1997; Campbell, 2009). By removing the three P's (psychology, purposes, and people), Black has devised a paradigm that can range more widely, employ fewer concepts, and explain more facts. The strengths of pure sociology are thus scientific: a more powerful and parsimonious way of predicting and explaining variation within that broad and separate realm of reality we create through human interaction (Black, 1995).

You, dear reader, are in for an intellectual treat. You have in your hands the most original account of law ever written. And you are about to encounter a novel way of thinking about the most fascinating subject of all: ourselves.

Mark Cooney
University of Georgia

REFERENCES

- Baumgartner, M. P.
 1988 *The Moral Order of a Suburb*. New York: Oxford University Press.
 2002 "The Behavior of Law, or how to sociologize with a hammer." *Contemporary Sociology* 31:644–649. (Part of "A continuities symposium on Donald Black's *The Behavior of Law*.")
- Black, Donald
 1979 "A strategy of pure sociology." Pages 149–168 in *Theoretical Perspectives in Sociology*, edited by Scott G. McNall. New York: St. Martin's Press.
 1989 *Sociological Justice*. New York: Oxford University Press.
 1995 "The epistemology of pure sociology." *Law and Social Inquiry* 20:829–879.
 2000 "Dreams of pure sociology." *Sociological Theory* 18:343–367.

- 2002 "Pure sociology and the geometry of discovery." *Contemporary Sociology* 31:668–674. (Part of "A continuities symposium on Donald Black's *The Behavior of Law*.")
- 2007 "Legal relativity." Pages 1292–1294 in *Encyclopedia of Law and Society: American and Global Perspectives*, edited by David S. Clark, Volume 3. Thousand Oaks, CA: Sage Publications.
- Campbell, Bradley
- 2009 "Genocide as social control." *Sociological Theory* 27:150–172.
- Cooney, Mark
- 2009 *Is Killing Wrong? A Study in Pure Sociology*. Charlottesville: University of Virginia Press.
- Senechal de la Roche, Roberta
- 1997 "The sociogenesis of lynching." Pages 48–76 in *Under Sentence of Death: Lynching in the New South*, edited by W. Fitzhugh Brundage. Chapel Hill: University of North Carolina Press.

Preface

This book contains a number of propositions about the variation of law across social space. The purpose of these propositions is to predict and explain this variation, and so to contribute to a scientific theory of law. Theory of this kind has practical applications, and also applications to the study of other social life.

The propositions address a wide range of legal variation, including, for example, variation in what is defined as illegal, who calls the police or brings a lawsuit, who wins in court, who appeals or wins a reversal, who is handled by what procedure, and—across time and place—how much law, if any, appears in social life. By implication, these propositions also predict and explain many facts usually addressed by theories of deviant behavior, and, reformulated, they predict and explain other kinds of social control. Finally, by implication they specify the conditions for anarchy—social life without law—and, applied to existing trends, they forecast the future of law.

It may be assumed that theory of this kind is valuable for its own sake, and in the following pages no effort is made to justify this work on other grounds. Nevertheless, the contents of this book may be of interest to those who would act upon the world. For instance, with these propositions it is possible to calculate legal risks and advantages from one case to another, 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. But this book does not judge the variation of law, nor does it recommend policy of any kind. Rather, it is merely an effort to understand law as a natural phenomenon.

The formulations in this book also illustrate a theoretical strategy with applications beyond the study of law. The strategy assumes that social life is a subject matter in its own right, apart from individuals as such. It assumes that a science of this subject matter should be—like older sciences—quantitative, predictive, and general in scope. It incorporates earlier theoretical traditions to some degree, but includes other elements as well, such as its own imagery, concepts, and framework of analysis. Accordingly, it might be said that the theory of law is an example, and not the ultimate concern of this work.

Acknowledgments

Over a period of years, I have received financial and other support from several research and training programs: the Russell Sage Program in Law and Social Science and the Law and Modernization Program, both of Yale Law School, and the Program in Deviant Behavior, Social Control, and Law of the Department of Sociology, Yale University. In addition, a committee of Yale College awarded me a Junior Faculty Fellowship for the academic year 1973–1974, allowing me to devote all of my time to this book. I am grateful to the people who made this support possible.

For reading and commenting upon the manuscript, I thank M. P. Baumgartner, Maureen Mileski, Laura Nader, and Guy E. Swanson. M. P. Baumgartner helped with every draft I wrote, and made other contributions too numerous to acknowledge.

I also thank Mary Markiza for typing the manuscript, and I thank the people at Academic Press for their commitment and craftsmanship.

Contents

<i>Foreword</i>	xi
<i>Preface</i>	xv
<i>Acknowledgments</i>	xvii

1

Introduction 1

Law	2
The Theory of Law	6
Deviant Behavior	9
The Behavior of Social Control	10

2

Stratification 11

The Quantity of Stratification	13
Vertical Location	16
Vertical Direction	21

Deprivation and Deviant Behavior	30
The Behavior and Social Control	31

3

Morphology 37

The Quantity of Differentiation	38
Relational Distance	40
Radial Location	48
Radial Direction	49
Marginality and Deviant Behavior	54
The Behavior of Social Control	55

4

Culture 61

The Quantity of Culture	63
Cultural Direction: Type I	65
Cultural Location	67
Cultural Direction: Type II	69
Cultural Distance	73
Subcultures and Deviant Behavior	79
The Behavior of Social Control	80

5

Organization 85

The Quantity of Organization	86
Organizational Direction	92
Organization and Deviant Behavior	99
The Behavior of Social Control	101

6

Social Control 105

The Quantity of Social Control	107
Normative Location	111
Normative Direction	113
Labeling and Deviant Behavior	117
The Behavior of Social Control	118

7

Anarchy 123

Two Kinds of Anarchy	125
Social Control in Anarchic Settings	126
The Evolution of Law	131
The Return of Anarchy	132

<i>References</i>	139
<i>Author Index</i>	165
<i>Subject Index</i>	170
<i>How Law Behaves: An Interview with Donald Black</i>	177
<i>Author Profile</i>	189
<i>Testimonial Authors</i>	191
<i>Testimonials</i>	193
<i>Quote by Donald Black</i>	203

1

INTRODUCTION

Behavior is the variable aspect of reality. Everything behaves, living or not, whether molecules, organisms, planets, or personalities. This applies to social life as well, to families, organizations, and cities, to friendship, conversation, government, and revolution. Social life behaves. It is possible to speak of the behavior of art or ideas, the behavior of music, literature, medicine, or science.

* * *

Social life has several variable aspects, including stratification, morphology, culture, organization, and social control. Stratification is the vertical aspect of social life, or any uneven distribution of the conditions of existence, such as food, access to land or water, and money. Morphology is the horizontal aspect, or the distribution of people in relation to each other, including their division of labor, integration, and intimacy. Culture is the symbolic aspect, such as religion, decoration, and folklore. Organization is the corporate aspect, or the capacity for collective action. Finally, social control is the

normative aspect of social life, or the definition of deviant behavior and the response to it, such as prohibitions, accusations, punishment, and compensation.

Every aspect of social life has many expressions, then, and all of these vary as well, increasing and decreasing from one time and place to another. It is possible to formulate propositions that predict the quantity of each from one setting to another, and to explain the behavior of each accordingly (see Braithwaite, 1953; Hempel, 1965). Every aspect of social life may even be used as a strategy of explanation: Stratification thus explains social life of other kinds (e.g., Tocqueville, 1840; Marx and Engels, 1888; Bendix and Lipset, 1953), and the same applies to morphology (e.g., Durkheim, 1893; Parsons, 1966; Bott, 1971) and to culture (e.g., Weber, 1904–1905; Sorokin, 1937; Merton, 1938b), organization (e.g., Michels, 1911; Swanson, 1971; Smith, 1974), and social control (e.g., Ross, 1901; Etzioni, 1961; Goffman, 1963). Moreover, each of these strategies is independent of the others, and it is possible to apply all of them, at once, to the behavior of social life of every kind. Consider, for example, the behavior of law.

LAW

Law is governmental social control (Black, 1972:1096; see also Radcliffe-Brown, 1933; Pound, 1939:3–9; Redfield, 1964). It is, in other words, the normative life of a state and its citizens, such as legislation, litigation, and adjudication. By contrast, it does not include social control in the everyday life of a government service, such as a post office or fire department, since this is the social control of employees, not of citizens as such. Nor does it include discipline in a government school, prison, or in the military, since this is not the social control of citizens—as such—either. By this definition, then, law is only one kind of social control. Furthermore, in this sense many societies have been anarchic, that is, without law (see pages 123–124; compare Malinowski, 1926:15; Hoebel, 1940:45–48; 1954: 18–28; Pospisil, 1958:257–278). In this sense, in fact, much social life in every society is anarchic.

* * *

Law is a quantitative variable. It increases and decreases, and one setting has more than another. It is possible to measure the quantity of law in many ways. A complaint to a legal official, for example, is more law than no complaint, whether it is a call to the police, a visit to a regulatory agency, or a lawsuit. Each is an increase in the quantity of law. So is the recognition of a complaint, whether this is simply an official record, an investigation, or a preliminary hearing of some kind. In criminal matters, an arrest is more law than no arrest, and so is a search or an interrogation. An indictment is more law than none, as is a prosecution, and a serious charge is more than a minor charge. Any initiation, invocation, or application of law increases its quantity, even when someone brings law against himself, as in a voluntary surrender, confession, or plea of guilty. Detention before trial is more law than release, a bail bond more than none, and a higher bail bond more than one that is lower. A trial or other hearing is itself an increase of law, and some outcomes are more law than others: A decision in behalf of the plaintiff is more law than a decision in behalf of the defendant, and conviction is more than acquittal. The more compensation awarded, the more law. And the same applies to the severity of punishment as defined in each setting: the greater a fine, the longer a prison term, the more pain, mutilation, humiliation, or deprivation inflicted, the more law. A court order or command of any kind, by any legal official, is more law as well. A pardon, commutation, or parole is less law, but a revocation of parole is more. If a government provides treatment for a deviant, such as hospitalization or rehabilitation, this is also more law. The same applies to mediation or arbitration of a dispute. If a decision is against the plaintiff and he appeals, this is more law, and a reversal in his behalf is more as well. But if a defendant wins a reversal, this is less law. More generally, the quantity of law is known by the number and scope of prohibitions, obligations, and other standards to which people are subject, and by the rate of legislation, litigation, and adjudication. As a quantitative variable, law is all of this and more.

The quantity of law varies in time and space. It varies across the centuries, decades and years, months and days, even the hours of a day. It varies across societies, regions, communities, neighborhoods, families, and relationships of every kind. It varies with who