SOCIOLOGICAL JUSTICE

DONALD BLACK

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Preface

A new branch of legal sociology addresses how the social structure of cases predicts the way they are handled. Who has a complaint against whom? Who supports each side? Who decides the result? We can specify the social elevation of each party, the social distance between them, whether they are individual or corporate beings, and so on. These considerations are fateful. They tell us, for example, who is likely to win.

The following pages explore the significance of this field—the sociology of the case—for law itself. Sociological knowledge has applications in the practice of law, in legal reform, and in jurisprudence and social policy. Lawyers can use it to advance their interests (such as their chances of winning cases), reformers to reduce discrimination (such as by socially homogenizing the cases), and legal scholars and policymakers to assess the reality and morality of law (such as the ideal of universalistic treatment).

Law is more than rules and logic. It is also people. It cannot be understood in a social vacuum. Even so, recent developments in legal sociology are largely unknown and unexploited.

The title of this book, *Sociological Justice,* refers to the self-conscious application of sociology to legal action. This is now beginning, and it may change law forever.

The ideas here were largely conceived and developed at Harvard Law School during the years 1979–1985, and delivered in lectures

for my course called "Sociology of Law." A number of students offered helpful suggestions and elaborations. Their response encouraged me to seek a wider audience.

Administrative support was provided by Harvard Law School's Center for Criminal Justice, directed over the years by James Vorenberg (now Dean), Lloyd E. Ohlin, Philip Heymann, the late Alden D. Miller (Associate Director), and Daniel McGillis (Deputy Director). I completed the book at the University of Virginia's Department of Sociology. Financial support was partially provided by the National Science Foundation Program in Law and Social Science.

M. P. Baumgartner contributed to this book in many ways during years of discussion and commented extensively on an earlier draft. Others also improved the manuscript: Valerie Aubry, Piers Beirne, Theodore Caplow, Mark Cooney, John Herrmann (who prepared the index as well), Allan Horwitz, Calvin Morrill, Marion Osmun, Roberta Senechal, James Tucker, Rosemary Wellner, and Eliot Werner. Joan Snapp expertly typed every draft.

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Introduction

In 1972, the *Yale Law Journal* published a manifesto called "The Boundaries of Legal Sociology."[1] It contained an indictment of sociologists for confusing facts and values in the study of law—what *is* and what *ought* to be—and argued for a reconstruction of the field as a branch of science: a pure sociology of law. Such a field would address legal reality alone—the facts—and pass over in silence all matters of a critical nature. At the time, many legal scholars regarded this proposal as peculiar if not incomprehensible. Some believed that a purely scientific sociology of law was impossible, while others granted that it might be possible but wondered why such a project would be important or interesting. What could it accomplish? Why bother?

The field known as legal sociology had long been preoccupied with the *effectiveness* of law, a comparison of legal reality to a standard of some kind, whether a statute, constitutional doctrine, judicial decision, or vaguer ideal such as the rule of law, due process, or fairness. These inquiries virtually always discovered a gap between the standard and the reality, the law in theory and the law in action, and so the legal process was continually exposed as ineffective and in need of reform.[2] Such conclusions were presented in the language and style of science and were meant as a scientific critique of law. "The Boundaries of Legal Sociology," however, suggested that a concern with legal effectiveness obscures the difference between science and policy. How

law should operate is a question of value, not fact, and since sociology—like any science—can deal only with facts, it cannot assess the effectiveness of law or anything else. A scientific critique of law is illogical and impossible, a contradiction in terms. The reigning version of legal sociology was therefore doomed to failure. But another approach seemed feasible.

The sociology of law could be truly scientific in spirit and method, unconcerned with policy and uncontaminated by practical considerations.[3] Law could be studied as a natural phenomenon. The goal could be a general theory capable of predicting and explaining legal behavior of every kind. This could be done for its own sake, and nothing more. Pure science.

Now all of this has changed. A scientific version of legal sociology has emerged and flourished, and this has happened more rapidly and dramatically than anyone could have imagined in the early 1970s. The field has a new paradigm and a growing inventory of findings and formulations. It is spreading into universities and research centers throughout the world, even into American law schools, sanctuaries of conventionality in legal scholarship.

This book explores the significance of sociological knowledge about law for law itself. As this knowledge expands, legal life will inevitably change. Legal sociology has applications in the practice of law, in the reform of the legal process, and in jurisprudence and social policy. Law is entering an age of sociology.

The Sociology of the Case

Much of legal sociology focuses on a subject that has long preoccupied lawyers: cases. Only this part of the field—the microsociology of law—will be featured here, since it alone has the peculiar practical and jurisprudential implications later chapters will address. The sociology of the case may be contrasted with the macrosociology of law, a broader inquiry into how legal doctrines and institutions reflect the society and culture in which they occur. The classical era of the field—before the study of legal effectiveness—was largely macrosociological in approach,[4] and this tradition still has many adherents, especially among those

influenced by Karl Marx.[5] The earlier approach also seems to be responsible for the popular conception of the field: How does law express cultural values and public opinion? How is it related to economic interests? Questions of this kind might seem obvious and important for any social scientist involved in the study of law, and they are. But only the sociology of the case is new.

Although the sociology of the case as a self-conscious field of research and theory is recent, its ancestry can be traced to earlier scholarship. This includes most notably the movement known as legal realism that began among turn-of-the-century American lawyers and continued for several decades.[6] The central claim of legal realism was that the doctrines of law—the rules and principles—do not by themselves adequately predict and explain how cases are decided. Judges and juries typically decide cases according to their personal beliefs and feelings, and only afterward turn to the written law for a justification. Thus, a famous adage of legal realism was that judicial decisions often have less to do with legal precedent than with what the judge had for breakfast. Although the legal realists engaged in little research and formulated little theory about the reality of law (the above "digestive theory of law" notwithstanding), they challenged conventional thinking about legal decisionmaking and took the first step that modern sociologists would later follow.[7]

A second development in the genealogy of the field has been the gradual accumulation of facts about how cases are actually handled in everyday life. Strangely enough, research on this subject began not in the modern courtrooms that inspired the legal realists, but rather in settings more familiar to explorers, missionaries, and anthropologists. For example, the first systematic study was based on the recollections of Cheyenne Indians interviewed by an anthropologist in collaboration with a lawyer who was prominent in the legal realism movement.[8] The handling of cases was first directly observed for scientific purposes by an anthropologist among the Barotse tribe in what is now the African nation of Zambia.[9] Numerous studies followed, not only in tribal and peasant societies throughout the world,[10] but also increasingly in modern settings, especially the United States. Much of the research in modern America has been concerned with criminal justice, including police work,[11] plea bargaining between

prosecutors and defense attorneys,[12] and court dispositions.[13] The handling of civil and regulatory cases has received attention as well.[14] Topics studied include the conditions under which residents of a government housing project resort to law,[15] those under which affluent suburbanites do so,[16] the handling of personal injuries in a small town,[17] the handling of homicides in a large city,[18] how urban dwellers express grievances against their neighbors,[19] how cattle ranchers do so,[20] and the handling of complaints by consumers in the marketplace.[21] Investigations in other societies have focused on such diverse topics as police work in Britain,[22] Holland,[23] and France,[24] dispute settlement in a Swedish fishing village[25] and in Bavaria,[26] Turkey,[27] and Lebanon,[28] popular tribunals in Cuba,[29] and criminal and civil justice in Japan.[30] Historical work has been rapidly accumulating as well, such as studies of legal life in Republican Rome,[31] Aztec Mexico,[32] fourteenth-century Venice,[33] sixteenth- and seventeenth-century Spain,[34] Manchu China,[35] early England,[36] and colonial and post-colonial America.[37] In short, knowledge about the handling of legal cases in societies throughout the world and across history has grown enormously. And we can now corroborate what the legal realists had always claimed: Generally speaking, legal doctrine alone cannot adequately predict or explain how cases are handled.

Countless studies such as those cited above demonstrate that technically identical cases—pertaining to the same issues and supported by the same evidence—are often handled differently. People may or may not call the police or a lawyer; if they do, a prosecution or lawsuit may or may not result; some defendants lose while others win; the sentence or civil remedy imposed changes from one case to another; some losers appeal and others do not; and so on. In other words, law is variable. It differs from one case to the next. It is situational. It is relative.

Consider, for example, murder. In modern America, the official reaction to cases that technically qualify as criminal homicide ranges along a continuum from almost no response at all to capital punishment. If the police find the body of a skid-row vagrant and the circumstances indicate that he died violently, such as by a beating or stabbing, the routine classification of the case in at least one American city is "death by misadventure."[38] It is not

handled as a crime. The matter is closed without further investigation and is not even recorded in the official crime rate. Sociologically speaking, the intentional and malicious killing of a skid-row vagrant is not a crime at all. In another city, grand juries refuse to indict over one-third of those arrested for killing a relative, friend, or other close associate, despite what seems to be overwhelmingly incriminating evidence.[39] Trial juries often refuse to convict homicide defendants under similar conditions, particularly when sexual jealousy is involved.[40] At the other extreme are those receiving capital punishment, and in between are all the other possibilities: those who plead guilty to a lesser charge, those convicted but released on probation, those sentenced to a brief period in prison, those sentenced to five years, ten years, twenty years, or life. This variation occurs among and between cases that the written law does not distinguish.

We can also observe differences of this sort in the handling of other crimes, in civil matters such as negligence and breach of contract cases, and in regulatory matters such as consumer- and environmental-protection cases. Citizens do not even notify the police or a lawyer in the vast majority of cases in which they have a legally relevant complaint, and, if they do, formal action by a police officer or lawyer is highly unlikely anyway.[41] In civil matters involving $1,000 or more, for example, individuals in the United States contact a lawyer in only about one-tenth of the cases that technically qualify for a trial in court.[42] When contacted, lawyers file a formal complaint in only about half of these cases.[43] If a lawyer files a complaint, the parties agree to an out-of-court settlement in over 90 percent of the cases.[44] Hence, of all the civil cases involving at least $1,000, including those where no lawyer is contacted and those where no formal complaint is filed, fewer than one percent result in a courtroom trial.[45] Finally, if a trial does occur, the range of outcomes varies from acquittal and token restitution to life-destroying punishment and millions of dollars in damages. Again, legal doctrine cannot adequately predict or explain any of this variation. What, then, does?

In addition to technical characteristics—how the doctrines of law apply to the facts—every case has social characteristics: Who has a complaint against whom? Who handles it? Who else is involved? Each case has at least two adversaries (a complainant or

victim and defendant), and it may also include supporters on one or both sides (such as lawyers and friendly witnesses) and a third party (such as a judge or jury). The social characteristics of these people constitute *the social structure of the case.* What is the social standing of each? How much social distance separates them? Each might be higher or lower in social status, for example, and more or less intimate with the others. The adversaries might be relatively wealthy or poor, or one might be wealthier than the other but less conventional or respectable. One might be an organization and the other an individual, one might be more or less integrated into the community, more or less educated, and closer or further from the other in ethnicity, religion, or lifestyle. The status of each supporter similarly contributes to the social structure of the case, as does the social distance between each supporter and everyone else. What, for instance, are the characteristics of the lawyers? Were they acquainted before the case arose? If so, how closely? The characteristics of each third party are variable as well. Does the judge represent a national or a local government? What is the judge's race, ethnicity, social background, and financial standing? Did the judge know any of the parties prior to the case at hand? Who are the jurors?

Every case is thus a complex structure of social positions and relationships. In recent years we have accumulated a great deal of evidence showing that this structure is crucial to understanding legal variation from one technically identical case to another. We have discovered that the social structure of a case predicts and explains how it is handled.

Law as a Quantitative Variable

The social structure of a case is relevant to every kind of legal behavior, including the likelihood of a telephone call to the police, a visit to a lawyer, an arrest, a prosecution, a lawsuit, a victory in court, the severity of a disposition, and the likelihood of a successful appeal. One phrase describes all of this: *variation in the quantity of law.*[46]

The quantity of law is the amount of governmental authority brought to bear on a person or group. Each legal action against

a defendant is an increment in the overall quantity of law that a case attracts. For example, an arrest is more law than no arrest, a conviction or other decision against a defendant is more law than a dismissal, a greater amount of punishment or compensation is more law than a lesser amount, and a successful appeal by a complainant is more law than a successful appeal by a defendant. We now possess a body of sociological theory that predicts and explains variation in the quantity of law in all these instances and more. This theory is still new and undoubtedly will need refinement and elaboration in the years to come. Even so, it indicates how the social structure of a case is relevant.

Adversary Effects

Who has a complaint against whom? In a modern society such as the United States, the social structure of the complaint itself may be the most important predictor of how a case will be handled. What, for example, is the *social status* of the adversaries?

Social status has a number of dimensions, such as wealth, education, respectability, integration into society (by employment, marriage, parenthood, community service, sociability, etc.), and conventionality (in religion, politics, lifestyle, etc.). Although each kind of social status is a factor in legal behavior,[47] for present purposes we can treat all of them together. In this general sense, social status has long been popularly regarded as a source of variation in legal life—often called discrimination—though this has been disputed by other observers. Some claim, for instance, that poor and black defendants in American courts receive more severe treatment than those who are wealthy and white, but others insist this is not true. What legal sociologists have learned, however, is that both of these popular views are wrong.

A sizable body of evidence from a number of societies and historical periods indicates that, by itself, the social status of a defendant tells us little or nothing about how a case will be handled. Instead, we must consider simultaneously each adversary's social status in relation to the other's. This will show that any advantage associated with high status arises primarily when it entails social superiority over an opposing party, while any disadvantage of low status arises primarily when it entails inferiority. In fact, a

high-status defendant accused of an offense against an equally high-status victim is likely to be handled more severely than a low-status defendant accused of an offense against an equally low-status victim. In modern America, for example, a white convicted of killing a white is more likely to receive capital punishment than a black convicted of killing a black.[48] During a five-year period in the 1970s—in Florida, Georgia, Texas, and Ohio—whites convicted of killing a white were about five times more likely to be sentenced to death than blacks convicted of killing a black.[49] Blacks convicted of killing a black were sentenced to death in fewer than one percent of the cases.[50] Moreover, all known legal systems tend to be relatively lenient when people of low status victimize their peers.[51] In other words: *Law varies directly with social status.*[52]

But when people offend a social superior or inferior, another pattern becomes evident. Those accused of offending someone *above* them in social status are likely to be handled more severely than those accused of offending someone *below* them. Those victimizing a social superior inhabit a legal space all their own, with a risk of severity vastly greater than anyone's. Thus, when a black is convicted of killing a white in the United States, the risk of capital punishment leaps far beyond every other racial combination. In Ohio, it is nearly 15 times higher than when a black is convicted of killing a fellow black; in Georgia, over 30 times higher; in Florida, nearly 40 times higher; in Texas, nearly 90 times higher.[53] Similarly, an experiment in jury behavior found that sentencing for negligent homicide with an automobile is by far the most severe when the victim's status is above the offender's.[54]

On the other hand, crimes against a social inferior receive unusually lenient treatment. When a white is convicted of killing a black, for example, the risk of capital punishment is approximately zero. In Ohio, none of the 47 whites convicted of killing a black received a capital sentence during the five years studied; in Georgia, two of 71; in Florida, none of 80; in Texas, one of 143.[55] The most striking comparison is thus between the extremely high likelihood of *downward* capital punishment (where the offender's social status is below the victim's) and the extremely low likelihood of *upward* capital punishment (where the offender's social status is above the victim's). This, too, illustrates