FOR JURISPRUDENTIAL SOCIOLOGY*

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Ten years ago, in the first issue of this review, Carl A. Auerbach criticized some early statements of an emerging "Berkeley perspective" in the sociology of law (Auerbach, 1966).[1] Selznick, Skolnick, Carlin, and I were chided for proposing in various terms that a central concern of the sociology of law should be to study the social foundations of the ideal of legality (Selznick, 1961; 1968; Skolnick, 1965; Carlin and Nonet, 1968).

In part, Auerbach was troubled by the seeming lapse of logic in an approach which appeared to claim evaluative conclusions (x is or is not "legal") could be reached by purely factual social scientific inquiry. Some of us at Berkeley had apparently forgotten the distinction between factual and normative statements. But that was not the main objection. Although he faulted our logic, Auerbach endorsed our larger program. Writing from the standpoint of the "reform-minded law professor" (1966: 104), he expressed strong agreement with a statement by Selznick to the effect that the objective of the sociology of law should be to establish "principles of criticism to be applied to existing positive law," principles based on "scientific generalizations, grounded in warranted assertions about men, about groups, about the effects of law itself" (Selznick, 1961; Auerbach, 1966: 93).

Auerbach's basic concern was that a focus on legality alone "would unnecessarily constrict social studies of law" (Auerbach, 1966: 91). It was premature, he feared, for sociology to impose stringent criteria of theoretical relevance, whatever these might be. A quest for orthodoxy could only narrow the scope, impoverish the sources, and reduce the promise of social inquiry. Intellectual growth required casting a wide net, setting aside issues of definition, crossing disciplinary boundaries, following multiple paths of inquiry, and (in practice, and therefore most important) facilitating an integration of legal and social research.

"PURE SOCIOLOGY"

Ten years (and countless hours of lecturing and discussion) later, the idea that sociology might properly seek to develop a normative theory of law remains unpopular. In fact, if we are to judge from its most recent manifestos, the opposition has hardened and escalated. In two recent essays (Black, 1972a; 1972b), Donald Black, who describes himself as "an uncompromising adherent of the positivist approach" (1972a: 709), reaffirms the doctrine that "value judgements cannot be discovered in the empirical world" (1972b: 1092). Hence, he argues, "value considerations are as irrelevant to a sociology of law as they are to any other scientific theory" (1972b: 1087), and "the quest for the . . . 'distinctively legal' is . . . inherently unscientific" (1972b: 1092). Black's point is not just to remind us of a problem of logic, or to warn us against a possible source of bias. Nor is it to urge a larger vision of the task of social science in the study of law. On the contrary, it is to define *limits* within which social inquiry must be confined, or lose its "purity."

According to Black, "a purely sociological approach to law should involve not an assessment of legal policy, but rather, a scientific analysis of legal life as a system of behavior" (1972b: 1087). When "sociologists move . . . beyond science and deal with questions of legal evaluation" (1972b: 1087), they "severely retard the development of their field. At best they offer an applied sociology of law—at worst, sheer ideology" (1972b: 1087). If research "relate[s] empirical findings to legal ideas which are clearly expressed in the written law" (1972b: 1089), then it constitutes applied sociology. But "when legal reality is compared to an ideal with no identifiable empirical referent, such as 'the rule of law' or 'due process,' the investigator may inadvertently implant his personal ideals as the society's legal ideals. At this point social science ceases and advocacy begins" (1972b: 1090). The investigator "leaves sociology and enters jurisprudence" (1972a: 712), which is inevitably "saturated with ideology and evaluation and interest" (1972a: 712).

At one point, Black concedes that "applied" sociology of law may be valuable to people interested in law reform (1972b: 1089). But eventually the concession is retracted, on the theory that "the quality of applied science depends upon the quality of pure science. . . . At present, applied sociology of law has little to apply. What more serious claim could be brought against it?" (1972b: 1100). Hence, the sociologist should return to his basic mission—the formulation of a "general theory of

law," i.e. a theory that "seeks to discover the principles and mechanisms that predict empirical patterns of law, whether these patterns occur in this day or the past, regardless of the substantive area of law involved and regardless of the society" (1972b: 1096).

It would be uncharitable to assess these ideas as a philosophical point of view. Although Black says he reasons from "basic positivist principles" (1972b: 1096 n.34) (which he regards as the unqualified orthodoxy of contemporary philosophy of science), his statements are less than a model of philosophical lucidity. They are loose, inconsistent, and uninformed by any criticism of the doctrine they purport to articulate. Unfortunately, it does not follow that the views Black advocates need not be taken seriously. They are widely shared. They express a mentality, and outline a program, which may shape future work in the sociology of law. It is necessary, and fair, that we ask what they promise. The answer, I believe, is intellectual sterility.

To say that the mentality of "pure sociology" is widely shared is not to claim that most, or even many, social scientists would subscribe precisely to the way Black formulates its tenets. In fact, I should expect most would prefer a more cautious and qualified version; few have Black's taste for dogmatic integrity. Nevertheless, Black articulates a prevailing orthodoxy of the social scientific enterprise, and it is to his credit that he does so without waffling. Only Glendon Schubert comes anywhere close to him in that respect (Schubert, 1975: 1-56 *passim*, and especially at 15). The core of that orthodoxy is a deep distrust towards evaluative elements in social scientific discourse, especially when evaluation is compounded with ambiguity (another mortal sin). This distrust is most clearly apparent in the canons that govern ritual social science writings, such as grant proposals for "basic" research, articles for professional journals, or the inevitable, methodological comments by which social scientists preface their own thoughts, and criticize their colleagues. Perhaps many social scientists, like Black, think these canons (*for* "general theory," "clearly defined" concepts, "objectively identifiable behavioral referents," etc. . . . .; *against* "normative" judgments, "biased and ethnocentric" concepts, "vague terms that require subjective or impressionistic judgments," etc. . . .) follow from logical positivism. More aptly, they are the result of a feverish rush to mold social knowledge after a grossly idealized model of the "hard" sciences. Unfortunately, the rush has meant only that a few selected, and highly formal, ends of science—

the quest for objectivity, the clarification of ideas—have, by edict, been transformed into *prerequisites* of social research. The outcome is a set of rules that proscribe work on the more obscure, elusive, and problematic aspects of human experience, and confine social science to (dis)confirming the obvious or the trivial.

As Black observes, "pure sociology" is deeply alien to the perspectives that have governed the growth of sociology. Even today, although the vast majority of social scientists sing and dance in ritual reaffirmation of its canons, in fact they all cheat constantly in their actual work. There, the focus (explicit or implicit) is on the clarification of values, the assessment of institutions, the evaluation of policy, the conditions that frustrate or facilitate aspirations. In that respect, the sociology of law does not differ from other fields in the discipline, e.g. stratification (read: distributive justice), or socialization (read: moral development). Obviously, sociology bears birthmarks of its origins in the normative study of politics, law, economics, culture. Furthermore, like it or not, the intellectual significance of sociological ideas remains largely derivative. In the absence of any autonomous (and persuasive) body of sociological theory, the conclusions of social inquiry continue to gain meaning and resonance primarily from what they contribute to political, legal, economic, and other branches of "normative" thought,—in other words, to our understanding of the conditions and costs of the pursuit of various human aspirations, such as democracy, fairness, efficiency, intimacy.

Judging from past experience, that situation is not likely to change. If we were to teach only "pure sociology," we would have to graduate illiterates; and research so limited would only add to an already over-great indulgence in intellectual onanism. Having law, politics, economics to think about, we manage to retain some facts, some history, and some ideas to teach, thus saving our students from radical ignorance. Furthermore, law, politics, economics are not just subjects of theory; they are also key contexts of action within which social experience accumulates. That is of course why they have been and remain foci for thought. In these contexts, experience organizes around the needs, interests, purposes, aspirations, that are the stuff of human life. And the lessons drawn from that experience naturally take the form of statements about the "adequacy," "effectiveness," "achievements," "limitations," "growth," "decline," of various social arrangements. Why this "normative"

manner of speaking should, in the eyes of some of our contemporaries, render these statements unworthy of scientific inquiry, is one of the more obscure mysteries of modern thought.

Given its past accomplishments, "pure sociology" would seem a high-risk and very speculative intellectual investment. We should of course tolerate, and even encourage, the few who may try it. But it does not follow we should allow it to become a program for the rest of us. On the contrary, experience recommends what has been a cardinal tenet of the "Berkeley program" in legal sociology: just as other branches of sociology need to be informed by the normative thought on which they comment, so *sociology of law must be jurisprudentially informed* (Principle I). Even if a "pure sociology of law were to develop, we should still want to invest most of our resources in more tangibly fruitful ventures. The reason for that is the relatively low yield of purely theoretical work of any kind, in all sociology and all philosophy, in jurisprudence as well as in sociology of law. Hence another tenet of the Berkeley program (also, regrettably, the least observed): *sociology of law must have redeeming value for policy.* Never let any project stand on its theoretical merits alone (Principle II).

PRESCRIBED IGNORANCE

Black does not deny the factual foundation of these principles. He deplores it, and urges instead that sociology sever its continuity with normative philosophy, and with its own history. Unfortunately, such a rupture entails serious and tangible intellectual costs, against which the speculative future of "pure" sociology cannot weigh heavily. The main cost is, of course, a severely impoverished education. In the event the point is not as obvious as I think it is, I shall let Black himself illustrate it. Our critic would have the sociology of law cut itself loose from its jurisprudential past. Thus he finds it regrettable that "normative" legal sociology "has become identified with debunkery and the unmasking of law." This orientation, he argues, "goes back to the legal realism movement . . . . Much legal sociology, then, is a new legal realism, appearing in the prudent garb of social science" (1972b: 1087 n.4). A "pure" sociology of law would liberate itself from this unfortunate history. In this purified approach, we are told, law is seen

> as a thing like any other in the empirical world. It is crucial to be clear that from a sociological standpoint, law consists in observable acts, not in rules as the concept of rule is employed in both the literature of jurisprudence and in every-

> day legal language. From a sociological point of view, *law is not what lawyers regard as binding or obligatory precepts, but rather*, for example, *the observable dispositions of judges, policemen, prosecutors, or administrative officials* (1972b: 1091. Italics mine).

Now it should be apparent that this allegedly "sociological" approach to law has its own jurisprudential pedigree: it was last, and most forcefully, advocated by some legal realists.[2] It should also be clear that familiarity with its jurisprudential history would help inform the sociologists of the powerful objections to which this approach is vulnerable. Specifically, a jurisprudentially informed social scientist would be more likely to understand, along with H.L.A. Hart, that the sentence quoted above in italics is internally contradictory (in that the office of judge, policeman, etc. . . . is constituted by, and hence, cannot even be identified without reference to, rules), and seriously misleading as a guide for an empirical account of legal phenomena (in that it disregards the element of authority in legal phenomena) (Hart, 1961: especially 79-88; 132-144). Hence, he could hardly agree with Black's statement that the "sociological approach" so defined "does not conflict with the rule-oriented jurisprudence of H.L.A. Hart" (Black, 1972b: 1091 n.15). Finally, he would be able to appreciate that, however "scientifically" inadequate, a focus on "the observable dispositions" of officials makes special sense if one's purpose is to expose the discrepancy between what officials do and what they ought to do. It presumes that very "debunking spirit" from which Black wants to rescue legal sociology.

If one agrees with Black (as I do) that debunking is too limited, too unpromising, and too easy a goal for sociological inquiry, perhaps the alternative is not to dismiss or ignore the role of values, rules, and other normative elements in legal phenomena, but rather to take them more seriously. This is part of the program H.L.A. Hart proposed for jurisprudence. It is also what Selznick proposed for legal sociology when, for similar reasons but in different words, he argued against the anti-formalist (read: rule-skeptical) mood that had pervaded the field and its immediate parents, i.e. legal realism and sociological jurisprudence (Selznick, 1968). Although Auerbach criticized a statement drawn from that argument (Auerbach, 1966: 92), it is not clear he understood, or even read,[3] the argument as a whole. But

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2. The realists were fascinated by Holmes: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (Oliver Wendell Holmes, 1897: 460-461).

3. He refers to it only as quoted in Skolnick (1965).

judging from what he advocates elsewhere in the paper, I cannot imagine that Auerbach could have disagreed with the main thrust of Selznick's essay, and with another basic tenet of the Berkeley program, which is: *the sociology of law must take legal ideas seriously.* (Principle III. Corollary: sociologists who want to study law should become legally literate.) Perhaps a difference between Auerbach and Selznick was that the former had greater confidence in the promise of legal realism, and the good sense of social science, than the latter could muster. In fact, legal realism was fraught with ambiguity in its posture towards legal ideas. On the one hand, it hoped to make legal thought more purposive, more policy-oriented, more aware of consequences, and hence, more informed by the problems of law in action. On the other hand, its impatience towards legal formalism suggested a more radical critique of the inherent impotence of any legal thought. It was inevitable that such a perspective appeal to social scientists bent on demystification. Besides, it is all too comforting for the student of sociology to think he can study "pure" legal "behavior" (without bothering to learn about the complicated and obscure arguments that occupy lawyers), and still hope to capture all that "really" matters about the legal order.

It would be perverse, though not unthinkable, to interpret Selznick's argument as urging, like Black, that sociology reject its jurisprudential heritage. The remedy to a simplistic reading of legal realism is not less but more study of jurisprudence. As Black demonstrates, a little bit of philosophy is inevitable, and inevitably vulnerable to serious blunders. It is obscure by what reasoning one might move from the premise that moral judgments are not amenable to scientific testing, to the conclusion that such judgments (i.e. the fact that some people under some conditions express some moral preferences) cannot be objects of scientific inquiry. But Black seems to think that his commitment to positivism requires him to rule normative statements out of factual existence: in his view, rules and other materials "lawyers regard as binding or obligatory precepts" (Black, 1972b: 1091)[4] are not facts the sociology of law can study. By now, it should be clear that Black's program for a "pure" sociology of law offers not just one, but two prescriptions for ignorance. Sociology should (1) ignore the problems, values, and doctrines of juris-

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4. See, however, Black, 1972a: 712, where he concedes that "science may tell us what others define as just or good," thus contradicting himself once more.

prudence; (2) ignore the rules, principles, and policies that constitute law, as understood by all but the pure sociologists.

Even the best intentioned and the strongest willed would find such vows of ignorance impossible to honor without breach. Black himself violates his religion in the very sermon he preaches. Thus he proposes that a definition of law as "governmental social control" (1972b: 1096) would satisfy the requirements of pure sociology. He finds that definition simple, as well as "consistent with a positivist strategy" (1972b: 1096). For example, it is obvious to Black that such a definition excludes from law "such forms of social control as . . . bureaucratic rules in private organizations" (1972b: 1096). Thus, it turns out, (a) rules are a "form of social control," and fall within the ambit of legal sociology if they are governmental; (b) the identification of the legal requires distinguishing between the "public" and the "private" sphere, a problem that has haunted jurisprudence and political theory, and which is the central preoccupation of the book Black rules out of sociology as an argument in jurisprudence (1972a).

Shortly thereafter, Black offers a "theoretical proposition" which, he thinks, exemplifies the kind of idea that pure sociology should aim to develop and test: "Law tends to become implicated in social life to the degree that other forms of social control are weak or unavailable" (1972b: 1099). It should be obvious that the conclusion that some form of social control is "weak or unavailable" presupposes the identification of some standard of need, or adequacy, or (might I venture) effectiveness, by which the control mechanism can be assessed. Thus, although pure sociology is barred from studying "legal effectiveness" (1972b: 1087) (because that involves unscientific evaluation), it appears it may, indeed must, evaluate the adequacy of non-legal forms of control. It is to Black's credit that his common sense is not always blinded by his positivist faith. One can hardly imagine a sensible study of social control that would not ask in one way or another: control to what end? by what means? with what results? at what cost? and other such evaluative questions. Black avoids the words, but does the job.

From this "theoretical proposition," Black argues, more specific generalizations can be "predicted and deduced" (1972b: 1099). He offers an example from a study he did of the conditions under which police resort to arrest: "The greater the relational distance between a complainant and a suspect, the greater the likelihood of arrest" (1971: 1107). Black explains

that the police (i.e. law, governmental social control) will likely refrain from arresting a son who (allegedly) assaulted his father, because the family (i.e. another "means of social pressure") can probably handle "the situation;" by contrast, if one (e.g. a stranger) assaults a more distantly related other (e.g. another stranger), the probability of arrest is higher. This highly schematic story summarizes a complicated cost-benefit analysis of alternative means of control. It is unclear whether that analysis is made only by the police (whose conduct Black is just describing), or also by Black (who might then be arguing that the police's cost-benefit analysis usually comes to the same conclusion as his own). But whoever does the analysis, it involves assessing a problematic situation (a family quarrel) in which (a) several ends must be taken into account (punishing the offender? restraining the participants to prevent further offenses? upholding parental authority? facilitating a reconciliation? reducing risks and costs for law enforcement?), and (b) alternative policies (to arrest or not to arrest?) must be evaluated in the light of these normative criteria. This evaluation may be more or less routinized, more or less sensitive, more or less prompt, more or less accurate; and we may want to assess the conditions under which the quality of the policeman's analysis varies. We would then be evaluating the evaluation. Furthermore, the practical conclusions one might draw from the evaluation would depend in part upon how the many relevant ends would be ordered in a priority ranking. Thus, a legal order that gave high priority to upholding the authority of the criminal law, allowed police considerable resources, and had little regard for the family as an institution, would give its policemen decision criteria quite different from the criteria that would prevail if the family were highly valued, the criminal law were held in contempt, and the police were kept stingily understaffed.

Thus understood, Black's story makes new sense. Clearly, it no longer supports his "theoretical proposition," that is, the "purely sociological" "prediction" that police will "behave" (after having done all the thinking Black would like to ignore) in accordance with the stated pattern. The proposition is far too general, and has to be restated to incorporate the major conditions under which the predicted pattern can plausibly be expected. Note that at least some of these conditions would refer, implicitly or explicitly, to values, principles, and policies of the legal order, e.g. to how the legal order ranks the various ends its police must consider in deciding whether or not to arrest.

Now it becomes apparent that Black's "theoretical proposition" is in fact the poorly disguised statement of a *principle of economy or restraint* by which some governments (or some officials of some governments, including the police Black studied) are sometimes guided.[5] The "prediction" is a norm which directs government officials to save their resources for situations in which no other agency can take responsibility. The norm may itself reflect considerations of economy (avoid wasting scarce resources), or a more affirmative principle of deference to "private" institutions, or a general preference for minimal government. One must then wonder whether Black's enthusiasm for his "theoretical proposition" (he finds it "exciting and encouraging") (1972b: 1100) might not be a manifestation of his ideological preference for "the philosophical tradition of anarchism" (1972b: 1092 n.23). For elsewhere in the paper he confesses that he finds "particularly objectionable" the policy proposals of legal sociologists that "increase the power of the government to intervene in citizens' lives" (1972b: 1092 n.23).

BIAS AND IDEOLOGY

I could not resist making this last point, not because I find it important, but because *to Black* the ultimate sin of evaluative sociology is that the investigator is given opportunities, perhaps encouraged, to "inadvertently implant his personal ideals" (1972b: 1090) and drift from science to ideology. The arch-enemy of "good science" is bias. That is why "good social science . . . requires a disciplined disengagement on the part of the investigator—so disciplined, in fact, that it may rarely be achieved" (1972b: 1093). Perhaps this principle of disengagement is the reason why Black urges upon us his program of willful ignorance. Of course, ignorance and impoverished education create their own risks of scientific error. In effect, we are asked to *prefer the risks of error by ignorance to the risks of error from bias.*

There may be reasons for preferring ignorance to bias (assuming the choice must be made), but they cannot be that the risks of error from bias are greater than the risks of error from ignorance. It does not matter much that the cause of Black's errors in arguing for his pure proposition might be his preference for anarchism. His argument is flawed not because of his preferences, but because of its faulty logic. With good

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5. Other examples of the normative propositions of "pure" sociology are discussed later pp. 539-540, 543.

reasoning, his preference for anarchism might have helped him produce a rigorous, insightful, and altogether compelling argument, say, to demonstrate that some legal policy will encourage intrusive government surveillance. As Black himself points out, we should not "confuse the origins and uses of a scientific statement with its validity" (1972b: 1095). In other words, from the standpoint of "scientific validity," a bias is bad when it causes a flawed argument; it is not bad *per se.* It is somewhat surprising then to find Black complaining that Selznick approves the growth of "due process" standards in private employment, at the same time as he gives evidence of the pattern and of the conditions that sustain it (Selznick, 1969). One can, of course, be persuaded by Selznick's evidence and reasoning (which Black does not criticize), and yet deplore the pattern on the (perhaps) equally true ground that "legalism" is now "creeping" into yet another sphere of social life (Black, 1972a: 714). (Hence, perhaps Black's disagreement is only with Selznick's values, not with his argument. But that is far from clear, because Black wrongly infers that the work reflects a "liberal jurisprudence," which "interprets the law in the interest of labor," and encourages "an ever greater involvement of the state and law in the private affairs of the citizenry" (Black, 1972a: 713-714). In fact, the argument points to the emergence of principles of industrial *self*-government, fashioned through collective bargaining and largely without the state, hence capable of taking account of the purposes and needs of management as well as labor. Any reasonably articulate socialist would protest such a thesis as anti-labor, anti-government, and perhaps smacking of a proto-fascist corporatism. Would Black have agreed with Selznick had he understood what the argument "advocates?")

    More important for the scientific enterprise is the fact that "biases"—interests, sympathies, sensibilities, tastes,—generate the energy that makes us think; on that ground, the more (the greater the number of) biases we have, the better science is served. The growth of knowledge may not be as well served when inquiry is more (more intensely) biased, that is, when it is blind to all values except for the one with which it is especially concerned. This single-minded regard for one end at the expense of all others is what we have in mind when we criticize ideology. Even then, the "scientific validity" of the conclusions of ideologically inspired inquiry may be unimpeachable; our objections to these conclusions is not that they are false (in which case we would not have to criticize them for being ideological) but that

they are partial. They ignore problems and considerations that might influence our judgment in a direction contrary to that which is advocated. Thus although Black might be factually correct in criticizing a policy that fosters intrusive surveillance, he would be ideological if he ignored that the same policy might help government design more just and more efficient social programs. Compared to bias, ignorance is far more damaging to the scientific enterprise. It diminishes the resources we have to analyze complex ideas, to make distinctions, to uncover hidden assumptions, briefly to correct faults in one's own as well as others' thinking. Furthermore, it reduces the chances that one will have many rather than few biases, and therefore none too strongly held, as each necessarily conflicts with some other. To prefer ignorance is to choose ideology as well as incompetence.

On close scrutiny, it turns out that ideology (in the sense just discussed) does not trouble Black too much. To assess police conduct *only* from the standpoint of its compliance with *Miranda* is to assume an ideological posture. But Black uses a study of this kind as an example of "applied" sociology (Black, 1972b: 1088), which he regards as scientifically legitimate. Two features seem to distinguish "applied" sociology from what Black regards as illegitimate evaluative sociology. First, the standard of evaluation has "a very plain and specific operational meaning" (1972b: 1088). To the extent criteria of evaluation are complex and obscure, the assessment loses its scientific integrity. Second, the standard is drawn from a source other than the researcher's own preferences (although it may be congruent with them). Thus, if the standard is "a statute whose purpose is rather clearly discernible or a judicial decision unambiguously declarative of a specific policy" (1972b: 1088), the research is "applied" science. It should be obvious that these two criteria are likely to conflict with one another. A standard of evaluation borrowed from *one* statute or decision may be clear; but the relevant law is likely to comprise many statutes and decisions, and hence to be confused and ambiguous. To select one of these many criteria is to assume a partial and partisan standpoint. Similarly, one can have a "plain and specific operational" standard of judgment only if one agrees to defend a highly partisan viewpoint. The more complex, multiple, and hence obscure, are one's evaluation criteria, the wider the array of interests and values (other than one's own or any party's) they are likely to take into account.

Because Black's two ways of distinguishing applied from

illegitimate evaluative sociology conflict with one another, I shall consider each separately. Let us begin with "clarity."

According to Black, clarity of meaning is what distinguishes narrow, specific policies (the kind of standards by which "applied" sociology evaluates legal behavior) from larger, more general ends (such as due-process, the Rule of Law, and other such standards which are the concern of jurisprudence, moral, and political philosophy, and by which illegitimate evaluative sociology assesses legal "reality"). To draw the line on that ground is to reduce scientific inquiry to the role of a bureaucratic investigation of compliance. As defined, "applied" legal sociology is perhaps less difficult than jurisprudential sociology. It is certainly not more scientific; on the contrary, it retreats from a major scientific responsibility of policy research, that is, the clarification of purpose. Whatever meaning a specific policy may have, it owes that meaning to some larger purpose(s) or interest(s) it helps achieve in a particular context. Therefore, to evaluate the implementation of a policy is inevitably to further determine (clarify) what the pursuit of some larger ends requires (means) in the context under study. Research can, of course, determine whether the racial composition of classrooms meets the quantitative guidelines established by court decrees in school integration cases. But all judicial, bureaucratic, and "affirmative action" authorities to the contrary notwithstanding, that information alone would be meaningless, as full compliance with the guidelines is as compatible with increased racial conflict and poorer education, as it is with exactly opposite achievements. Good policy research would require that compliance with the guidelines be assessed in light of the ends of education and racial justice. This kind of assessment is precisely what we wish bureaucracies did more often, when we criticize them for transforming means (rules and routines of all kinds) into ends. Thus clarity, or rather the progressive clarification of values, is a *purpose, not a condition*, of policy research, as it is of jurisprudence and jurisprudential sociology. For this reason, a fourth tenet (Principle IV) of the Berkeley program is: *The sociology of law must integrate jurisprudential and policy analysis.*

Black's distinction between applied and jurisprudential sociology rejects that principle and amounts to yet another prescription for ignorance: it directs the sociologist to ignore the purpose of the policies he evaluates. Such a directive would sterilize policy-research. If the distinction also suggests that the purposes and logic of jurisprudential inquiry differ funda-

mentally from those of policy research, then it is doubly steril-
izing. Jurisprudence lives and grows from what it learns from
policy. For policy is the realm of action where abstract ideals
are tested, redefined, and elaborated. Only by examining that
experience can jurisprudence remain factually informed, and
hope to clarify the dilemmas of moral and political choice.

Moral dilemmas, not moral causes, are the stuff of jurispru-
dence, as well as of moral and political theory. With this
observation, let us turn to Black's second criterion for distin-
guishing philosophers from applied sociologists. The former, he
thinks, *advocate* their "personal" preferences, whereas the latter
evaluate in the light of standards set by others. The equation
of normative thought and social advocacy is painfully naive. If
philosophical education makes any difference in this respect, it
is (I should think) to diminish the fervor with which any view
can be espoused, and to encourage skepticism and cautious
evaluation. Anyhow, as we saw earlier, Black agrees that the
quality of an argument is logically independent from the prefer-
ences of its author. But perhaps Black's objections to jurispru-
dential sociology are not that it advocates, but that it bases advo-
cacy or evaluation upon the *personal* preferences of the analyst,
rather than preferences imposed by some other source. Why the
source of the standard should matter, if the intrusion of evalua-
tion into the argument does not necessarily corrupt its logic, is
the next obscurity we must consider.

AUTHORITY AND VALUE

Obscure as it is, that question points to a central element
in the creed of "pure sociology." Believers in that faith claim
that science should not be used to give authority to values.

Clearly Black is not arguing that the "scientific validity" of
evaluative research depends upon the source of the standard
invoked. An "applied sociologist" might well personally believe
in the policy by which he assesses legal behavior without thereby
jeopardizing the legitimacy of his analysis. Conversely, an
American jurisprudential sociologist who personally values and
studies fidelity to "due process of law" is not exculpated by the
fact that the Constitution of the United States gives authority
to that standard.

What really matters to Black is that the applied sociologist
usually makes *explicit* the authority for the standard he studies,
whereas the jurisprudential sociologist is less apt to do so. Fail-
ing to disclose the source of one's standard makes one vulnerable

to the charge of failing to separate clearly the normative from the factual elements in one's analysis, thus possibly misleading one's readers to believe that some normative statements are scientifically demonstrated truths. "What is disturbing about the contemporary literature on legal effectiveness then is not that it evaluates, but rather, that its evaluations and proposals are presented as scientific findings" (Black, 1972b: 1092-1093).[6] To disown evaluative statements by indicating their authors are a legislature, or a judge, or for that matter anyone but a scientist, is a convenient way to avoid that risk.

There are good reasons why social scientists do not always clearly disclose the authority for their normative statements. For example, the sources may be too many, too diffuse, or simply too obvious. Consider the following statement, which is paraphrased from another obscure text of Black: "Democracy perpetuates inequality" (Black, 1973: 149).[7] However one might read it, this is a statement about values, and a good example of the kind of vague proposition with which normative political sociology begins to think. It says that two values, democracy and equality, conflict with one another, so that, to the extent we pursue the one, we should be prepared to accept some loss of the other. Quite properly, Black cites no authority for either of these values. Hence, Black's rule is not that the scientist should disown his normative statements by citing authority for them; it must be rather, that he should disown them, period. He could do so, for example, by prefacing his statements on democracy with such disclaimers as "in the hours when my mind is not governed by the canons of science, I, along with many of you, believe in democracy, but now that I must think rigorously . . ."; or "I don't believe in democracy, but because some of you do, I think that, as a scientist, I should tell you . . ."; or "I am quite ambivalent about democracy, because as a scientist I have found . . . ." Perhaps simply saying that "democracy perpetuates inequality" is sufficient indication of reservations, doubt, disbelief, or ambivalence. Any of the above ways of disowning normative statements would satisfy the all too well known rule that, when social scientists deal with a problem of value, they should be explicit about their own "personal" preference, or "bias." That rule, in turn, is just another way to

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6. See also Black, 1972a: 714, where he criticizes Selznick for not being "explicit about his legal philosophy."

7. "The more democratic a legal system, the more the citizenry perpetuates the existing system of social stratification" (Black, 1973: 149). This is how one writes when one attempts to "purify" his statements of their normative connotations.

satisfy the principle that scholars should not mislead their audiences about the scholarly merits of what they say or write *qua* scholars. With that principle, no one can reasonably disagree, even though reasonable men may differ about what specific conclusions they should draw from it. (The conclusions will vary in part with the assumptions one makes about one's audience's vulnerability to being misled. To establish an absolute requirement that normative statements be explicitly disowned is to assume all audiences suffer from excessive naiveté or debilitating deference to professorial authority.)

By now we should understand that this principle ("don't mislead") is *not* what Black has in mind, for it cannot distinguish him from those he criticizes, nor pure from jurisprudential sociology. In fact, a rigorous application of the disowning rules Black proposes would result in systematic violations of his major taboo, i.e., that the social scientist shall not make "policy recommendations in the name of science" (Black, 1972b: 1100), or "use [his] status as a scientist to promote [a] political philosophy" (1972b: 1092 n.23). The disclaimers discussed above, including the citing of authority, may indeed be understood as formulas by which scientists, using proper understatement, dissociate themselves from the irrationality with which legislatures, judges, and other people (including at times themselves) often make moral and political decisions. Thus understood, and slightly more pointed, the disclaimers read: "As a scientist, I must say there is no justification for what the legislature (the court) decided;" or "no reasonable man can want democracy and equality to the same extent at the same time;" or "it is foolish to want to have one's cake (modern industrial organization; democracy) and eat it too (have no standards of due process; have no further obstacles to equality)." Implicitly or explicitly, correctly or incorrectly, such statements criticize moral preferences on the ground that relevant factual problems or factual knowledge have been overlooked. They must assume that moral judgments *can* be better informed of the conditions under which, or means by which, values can be pursued, as well as of the costs attached to the realization of values. And they suggest that a more informed moral judgment is also likely to be better, because it is more likely to reach its purpose and to avoid unnecessary costs.

To Black, the suggestion that science can assess, and knowledge can improve, the quality of moral judgments, is anathema. Thus he sees no justification for the view that law can benefit from "an accurate sociological analysis" (1972a: 713) of the

world it governs. It is not clear why he objects to this view.
Sometimes, it would seem, his quarrel is only with theses that by
any reasonable judgment *overstate* what knowledge can do for
moral choice. For example, he disagrees with "technocratic
thought" (1972b: 1090) according to which "moral problems of
every sort are translated into problems of knowledge and science,
of know how" (1972b: 1090-1091. Italics mine.). But jurispru-
dential sociology is not committed to such overreaching. Some-
times, Black argues on moral or political grounds. If his
anarchism entails a distaste for all kinds of authority, one can
understand that he would object to the authority science is
allegedly accorded, and to the alleged fact that "students of legal
effectiveness . . . are . . . the élite of our society" (Black, 1972b:
1092 n.23). But then one wonders why he should agree that
moral philosophy has any competence, and legitimate authority,
in the assessment of moral issues (Black, 1972b: 1092). If Black
accepts that value statements be criticized on the basis of their
"logical status in relation to a more general axiological principle"
(Black, 1972b: 1095 n.33), how can he object to criticism based
upon the presence or absence of an empirically verified causal
relation between (a) behavior that accords with a given value
statement and (b) a class of outcomes defined by "general
axiological principles?" Both kinds of criticism are based on the
authority of reason. It is hard to see why it might be proper
to reduce incoherence, but improper to reduce ignorance in moral
discourse.

But most of the time, Black is not arguing that scientifically
legitimate uses of science be restricted for moral reasons. Rather
he is proposing that some uses of scientific inquiry, which might
conceivably increase the quality of moral and political choice,
be proscribed to preserve the "purity" of science. If there is any
argument for the view that science should not be used to give
or deny authority to values, it cannot be that the proposition
follows any requirement of logic. Although Black does not offer
it, there is an argument, and it is quite empirical. When scientific
inquiry touches highly controversial and divisive moral issues,
it creates a risk that the integrity and the authority of science
as an institution will be threatened and undermined. Scientific
debates may become politicized, the fervor of faith may displace
dispassionate inquiry, and even the factual assertions of "scien-
tists" may lose credibility. Undeniably, this risk exists, especially
in the social sciences. The first citation in Black's manifesto is
to a piece (Currie, 1971) that illustrates what one may fear when
scientists "shed the mantle of science and become unabashedly

political" (Black, 1972b: 1086 nn.2 and 3). The risk is avoided, or at least reduced, if the scienific establishment commits itself to a principle of prudence: "Stay away from hot issues; leave politics to the politicians, morals to the moralists, law to the lawyers." Translated for publication in textbooks on the ethics and method of science, this counsel becomes the dogma of the separation of fact and value. The principle has considerable precedent in institutional experience. It is the foundation of bureaucracy: there, the separation of administration and policy protects the autonomy and integrity of bureaucratic expertise. In effect, "pure sociology" is an extension of bureaucratic principle to the management of the social scientific establishment.

Hence, although "pure sociology" rests on rather weak intellectual foundations, one might nevertheless recommend it as a sound managerial practice. Perhaps one would do so, for the long term welfare of the scientific enterprise, if (a) the risks its principles help reduce were of such magnitude as to outweigh (b) the intellectual losses its rules of ignorance would inflict upon science and culture. It would be far more difficult to opt for "pure sociology" if the calculation of costs and benefits had to consider (c) the social harms that would follow this intellectual impoverishment. What if morals and politics, condemned by science to ignorance, lost their capacity to recognize harms?

FOR JURISPRUDENTIAL SOCIOLOGY

Fortunately or unfortunately, the bureaucratic option is not truly open to the social sciences. There is no way to study human affairs and not to make statements about issues that matter deeply for the satisfaction of needs, the furthering of interests, the achievement of purposes, the fulfillment of aspirations, the development of capacities, in short, about values. The pure sociologist may try to remove all normative words from his language. But all he can do is to ban the words whose moral connotations he sees (fears? dislikes?), or define the connotations out of existence. Obviously he cannot help using the words whose normative meanings escape his attention. The effect is a social scientific Newspeak, which prohibits access to a vast and precious stock of cognitive resources. For the connotations that surround words such as law, government, control, democracy, equality, arrest, police, family, are the inchoate knowledge with which we think about the denoted phenomena. In attempting to rule normative meanings out of existence, "pure sociology" either deprives itself and its readers of that knowledge ("system

of social stratification" is far purer than "inequality"), or requires denying the existence of that knowledge even as we use the words that evoke it (for either a word has been purified by definition, or the writer has overlooked the need for purification thus leaving the job to the reader). How else could we make sense of the following text: "By legal intelligence I mean the knowledge that a legal system has about law violations in its jurisdiction. . . . From a sociological standpoint, however, there is no 'proper' or even 'effective' system of legal intelligence. . . . [Let us therefore examine the l]imits of legal intelligence. Any legal system relying upon the active participation of ordinary citizens must absorb whatever naiveté and ignorance is found among the citizenry" (Black: 1973, 130-132). Either the language is English, and the reasoning incoherent, or the logic is proper, but we are forbidden to think of "intelligence," "naiveté," "ignorance," and "limits" as aspects of the quality and effectiveness of knowledge. Pure sociology cannot mean what it says.

Unfortunately, jurisprudence is no alternative to "pure" sociology. To prefer it would only be to choose another set of blinders. In fact, jurisprudence and pure sociology are deeply involved with one another: there is no better match for a sociology that denies the normative aspects of legal phenomena, than a legal philosophy blind to factual issues in the analysis of normative ideas. To Black, jurisprudence is as "logically" incapable of failing for lack of knowledge, as sociology is of failing for philosophical naiveté. What can disturb such a solid and comfortable relation of mutually respectful ignorance?

Perhaps sociology can do so, if it returns to its historic intellectual task: that is, to enlarge the intellectual horizons of legal, political, economic, and other modes of normative thought; to broaden the concerns of these disciplines beyond the limits of their *specialized* institutional domains; to blur, not to draw, "boundaries," as between fact and value, law and politics, economy and society, policy and administration; to help all kinds of social thought recognize the relevance of facts, problems, interests, and values, of which they would not otherwise take account. Philosophy shared that intellectual responsibility until positivism sterilized it. Must sociology go through the same crisis? And if it must, where will that responsibility be assumed?

We need a jurisprudential sociology, a social science of law that speaks to the problems, and is informed by the ideas, of jurisprudence. Such a sociology recognizes the continuities of analytical, descriptive and evaluative theory. Analytical issues—

e.g., the role of coercion in law; the relation of law to the state; the interplay of law and politics; the distinction between law and morality; the place of rules, principles, purpose, and knowledge in legal judgment; the tension between procedural and substantive justice;—are taken as pointing to variable aspects of legal phenomena. The extent to which the law is coercive, vulnerable to politics, purposive, or open to social knowledge, is subject to variations that require empirical inquiry. At the same time, those jurisprudential-sociological variables condition the ends law can pursue, and the resources it can muster to serve those ends. To study such questions as: the kinds of sanctions and remedies that are available to legal institutions; the principles and structures of authority that characterize various legal processes; the way law receives and interprets political and moral values; the administrative resources legal agencies can deploy; the authority of purpose in legal reasoning;—is also to assess the competences and limitations of different kinds of legal orders or legal institutions. Whatever knowledge is gained about these problems should contribute to formulating principles of institutional design, and guides for the diagnosis of institutional troubles.

There is nothing arcane or novel about jurisprudential sociology. In fact, as I pointed out at the beginning of my argument, and as a glance at the index of this Review would confirm, most socio-legal studies are informed by concerns for legal values or legal policy—normative concerns whose rational pursuit would require close observance of the principles of jurisprudential sociology. If the social study of law had remained free to be true to its purposes, and to be responsive to the requirements of its research tasks, all its practitioners would hold the truth of those principles to be self-evident. Unfortunately, since the ascent of bureaucratic orthodoxy in the social sciences, confessing that truth, and resisting the ritual, pseudo-scientific rigors of "pure sociology," exposes one to excommunication, to being expelled out of "the boundaries of legal sociology." The practice of jurisprudential sociology is alive; it has only been driven underground.

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[Editor's Note: Professor Black was invited to reply to Professor Nonet's paper, but he declined on the ground that readers may judge the scientific value of his approach by his recently completed book, *The Behavior of Law* (New York: Academic Press, 1976).]

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