Michigan Law Review

Volume 88 | Issue 6

1990

Sociological Justice

Christopher M. Adams
University of Michigan Law School

SOCIOLOGICAL JUSTICE. By *Donald Black.* New York: Oxford University Press. 1989. Pp. x, 179. $19.95.

Sociologist Donald Black[1] seeks to expand our knowledge of the law by introducing a new field of legal scholarship: the sociology of the case. The sociology of the case explores the extent to which various sociological factors affect the outcome of a case. In his latest book, *Sociological Justice,* Black argues that the legal profession can use the sociology of the case to understand better the impact of social status[2] upon litigation.

The field of "legal sociology," a pure sociology of law, attempts to increase legal knowledge by imparting sociological teachings to "The Law" (p. 3). Legal sociology could furnish the legal profession with "a general theory capable of predicting and explaining legal behavior of every kind" (p. 4). Such knowledge, Black argues, can increase the effectiveness of law; by increasing predictive capabilities, the legal profession is better able to conform the law in theory to the law in action.

Black disputes the accuracy of what he calls the jurisprudential model of law[3] — with its focus on rules, procedure, and logic — as a predictor of case outcomes. Instead, he suggests using the "sociological model" (p. 20), which analyzes cases by examining the impact of various social characteristics of the actors[4] upon case outcomes. Black calls "the amount of governmental authority brought to bear on a person or group" the "quantity of law" (p. 8). By attempting to explain variations in the quantity of law applied to cases presenting apparently similar factual situations, Black maintains that the sociological model can predict case outcomes more accurately than the jurisprudential model. He postulates that the social stature of the actors involved in litigation provides a framework, "the social structure of [the] case" (p. 8). This framework can be used to assess the impact of social stature.

1. Professor of Social Sciences and Chair of the Department of Sociology at the University of Virginia. Black's other publications include THE BEHAVIOR OF LAW (1976).

2. The term "social status," as used by Black, involves "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.)." P. 9. *Sociological Justice* explores how the social status of all the relevant actors in a particular case, as perceived by the decisionmaker, may influence the case outcome. *See infra* note 4.

3. The jurisprudential model of law, which Black asserts "has long dominated legal thinking in the Western world," teaches that law is "fundamentally an affair of rules." P. 19. "The jurisprudential model," Black writes, "regards law as a logical process. The facts of each case are assessed in light of the applicable rules, and logic determines the result." P. 20. Because the jurisprudential model assumes that logic dictates the results of each case, the model should allow for easy prediction of case outcomes; cases with similar facts should result in similar outcomes. *See, e.g.,* H.L.A. HART, THE CONCEPT OF LAW (1961).

4. The term "actor" includes the plaintiff(s), the defendant(s), their attorneys, the jury, and the judge(s) involved in each case.

This, Black asserts, yields observable data demonstrating that the varying social status of the individual actors produces statistically significant differences in the outcome of otherwise factually similar cases.

I. The Central Premise

Black asserts that the outcome of a case may be predicted by assessing its social structure. "Like everything else in the universe," Black states, "law varies with its [social] environment" (p. 39). Lawyers should be aware of sociological influences within a case; "a totally unsociological lawyer is incompetent" (p. 39). Through *"sociological litigation,"* or the "application of sociology to the practice of law" (p. 25), Black argues, lawyers can enjoy a tactical advantage.

Unfortunately for jurists, Black's discussion of how and to what extent sociological factors affect the decision-making process is too sparse to be of much interest. He writes that high status parties asserting claims against low status parties, or "downward" cases, have greater chances of success than "upward" cases, where low status parties assert claims against high status parties. Black states, for example, that "[socially] '[p]athetic plaintiffs' suing people with 'deep pockets' would seem to be among the riskiest clients a lawyer could represent" (p. 28). Yet he fails to detail how and to what extent this information affects the law applied in such a case.

Black also tends to make assertions, rather than build a persuasive argument; he makes bold statements without citing any evidence to support them. For example, he states that since prolonging a case increases the degree of intimacy between the parties, it would also increase "the likelihood of a compromise decision that gives something to both sides" (p. 36); yet he cites no statistical evidence to support this assertion.

Two more substantive flaws also pervade Black's work. First, Black seems to overstate the predictive value of understanding a case's social structure. While few would dispute that social factors often play a role in determining case outcomes, Black seems to imply that *only* social factors explain the outcome. Readers of *Sociological Justice* should be cautious in accepting the author's portrayal of the degree to which social status controls the outcome of cases. Although Black never explicitly rejects the jurisprudential model's ability to predict case outcomes, he does overstate the influence of sociological information as a predictor. For instance, Black asserts that one of the principles of legal sociology is that "[l]egal variation is a direct function of social information" (p. 64; emphasis omitted) and that "[a]n attorney should not regard a case as a precedent unless its social structure resembles the case to be decided" (p. 30). These statements appear quite absolute, implying that *only* the social status of the actors involved in litigation can explain variance in the outcome of cases.

It is true that the jurisprudential model cannot always explain why cases that seemingly are factually similar sometimes have divergent outcomes. The sociological model, then, can be an important tool in interpreting case variance. But like most analytical tools, the sociological model should be used in legal education to *supplement* the jurisprudential model, not *supplant* it. Litigation is complex and conditions vary dramatically, so no one model can fully explain every aspect of a case. It is telling, however, that, in at least one statement in the book, Black admits that sociological considerations provide only part of the picture. He notes that "the day may come when law professors will ask their students to distinguish one case from another . . . and the answer will be sociological *as well as legal*" (p. 1; emphasis added). Obviously, legal doctrine still influences the outcome of cases. A legal education that ignores jurisprudential considerations would be just as incomplete as an education that ignores the teachings of sociology.

The second substantive flaw is that Black does not place his work in a rather vast literature discussing the limits of conventional legal rationality. Certainly, the teaching of any first-year law student involves critical discussion of the jurisprudential model as well as considerations of sociological factors affecting the decision-making process, though they may not be referred to in Black's terms. As the Realist movement[5] firmly established, "[legal] doctrine [can]not be understood as the final product of a coherent evolutionary process — that law, like other social phenomena, was the outcome of interactions among a chaotic set of contingent forces."[6] Realists argued that judicial decisions are not merely "the outcome of reasoning from a finite set of determinate principles" and "demanded that legal scholarship recognize the social forces influencing legal change."[7] Indeed, Karl Llewellyn wrote sixty years ago that, when attempting to find certainty in predicting case outcomes, one should question the "personality of the judge," a line of questioning, he said, "that will certainly lead to inquiry into his social conditioning."[8] Black's theories would appear self-evident to any jurist.

Even before the emergence of the canonical Realists, Justice Oliver Wendell Holmes observed the role of bias in the application of law,

---

5. Legal realism was the dominant influence on American legal thought for most of the 1920s and 1930s. *See generally* White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America,* 58 VA. L. REV. 999 (1972). Much of legal realism's critical insight is given continued vitality in the Critical Legal Studies movement. *See generally,* Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship,* 95 HARV. L. REV. 1669 (1982).

6. *See* Note, *supra* note 5, at 1673.

7. *Id.* at 1670.

8. Llewellyn, *Some Realism about Realism — Responding to Dean Pound,* 44 HARV. L. REV. 1222, 1242-43 (1931).

noting that "the prejudices which judges share with their fellow-men[ ] have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[9] By writing that sociological factors play a role in legal decisions, Black merely follows a well-established current in the law.

II. THE REFORM PROPOSALS

Black does not end with a discussion of the effects of social information upon a case. In Chapters 3 through 5 of *Sociological Justice* (pp. 41-88), Black proposes three reforms that he believes would lessen the degree of discrimination due to social variables in the legal system. His first reform proposal calls for individuals to form legal cooperatives, redesigning the social structure of cases (pp. 50-56). His second proposal recommends several ways to alter the process by which decisions are made. For example, he suggests using a computer, rather than a person, as a judge over a case (pp. 70-72). His final proposal would vary the jurisdiction of law itself by leaving some aspects of life to alternative realms of regulation and dispute resolution (pp. 81-88). Black asserts that if his proposals were adopted, "sociological litigation would become all but impossible" (p. 40). Unfortunately, he focuses exclusively on his suggestions' advantages, without exploring their substantial limitations or disadvantages.

A. *Incorporating Conflict*

Black's first proposal would redesign the social structure of cases by seeking to eliminate the advantages that organizations have over individuals. Black reports that organizations such as corporations enjoy statistically significant advantages in litigation against individuals.[10] He suggests that individuals could equalize the organizational advantage by forming legal cooperatives to litigate on their behalf. The existence of these legal co-ops, Black claims, would "balance and homogenize the social structure of conflict" (p. 56).

This reform proposal is modeled after the *dia-paying* groups of nomadic Somalia, which resolve, on behalf of their members, disputes arising from injuries involving nonmembers (pp. 47-49). Membership in these *dia-paying* groups is determined by family lineage or contrac-

9. O.W. HOLMES, THE COMMON LAW 5 (M. Howe ed. 1963).

10. To support his point, Black cites statistics from his own book, THE BEHAVIOR OF LAW 86-97 (1976). In support of his contention that high status parties are advantaged, Black offers only his earlier assertion that actors of perceived higher status enjoy statistically significant advantages in litigation. This assumes, of course, that organizations are necessarily "high status" entities. Even if this is so, perhaps other, nonstatus, factors not considered by Black play a more significant role in producing the organizational advantage. For instance, because organizations have greater financial means, they are able to hire better skilled attorneys who can devote greater resources to developing their client's case. A better prepared and presented case could be the cause of the asserted advantage.

tual relations. Black proposes that hundreds, perhaps thousands, of such legal co-ops be formed throughout society. These legal co-ops would serve essentially two functions. First, they would resolve conflicts by either representing members in disputes with nonmembers or arbitrating disputes between members. Second, they would provide compensation to injured parties for any losses suffered at the hands of their members. This would spread the costs of compensation through a prescribed formula to all of the co-op's members, with the member causing the harm and that member's immediate family bearing a disproportionate share of the expense.

Claiming that adopting similar patterns would "balance and homogenize the social structure of conflict, obliterating many of the social differences between cases and reducing discrimination of all kinds" (p. 56), Black cites several advantages to these dispute resolution patterns. His analysis, however, leaves many questions unanswered. How many cooperatives should exist? What size should each one be? What would be the cost of membership? Who would pay for indigents? If "society" is to pay the cost for indigents, isn't this proposal just a mask for socialized litigation? What would be the jurisdiction of such groups? In fact, is not the present, individual state court system already such a dispute-resolving body — a legal cooperative designed to resolve disputes between its (citizen) members?

Black fails to analyze critically another important consideration: the composition of the membership of each cooperative. The goal of nondiscrimination between co-ops could be achieved only if the legal co-ops he envisions are perceived as social "equals." Without such equality, the social structure of cases would simply be recreated between the new legal co-ops, based on the differences in social status of the legal co-ops or members involved. Who, then, is to decide the group's composition and how is this decision to be made?

The same problem exists *within* each co-op. Discrimination could still exist in intramembership disputes based on the unequal status of the particular members. How would society prevent discrimination within the cooperative? And, who would resolve grievances of a member against the member's own cooperative?

Black's discussion of the regulation of membership of such groups is also unsatisfactory. Anything other than full participation would leave an unfortunate few "doomed to individuality" (p. 54). But the question remains, should society force membership upon individuals? While Black suggests making membership a mandatory incident of employment, he fails to examine the troublesome implications of such forced participation. If groups *must* accept individuals, should they be allowed to expel members? How will this process be supervised to ensure that the process is not marred by discrimination? Black's discussion of liability is similarly elliptical. His proposed system would

limit individual liability by spreading the cost of liability to the legal co-op, "though the individual directly involved in each case would receive or contribute a disproportionate share" of the costs (p. 50). The legal co-op, with heightened financial means, could more easily compensate victims. With compensation to victims a central goal of the legal co-op, Black predicts that an emphasis would be placed on the "resolution" of a case rather than the "legal enforcement" of principles guiding social life (p. 52). Black fails to consider, however, whether limiting liability would produce socially desirable results. What, for example, would be the impact of his proposal if it were to eliminate the deterrent effects of liability on the causes of harm?

Black also suggests that cooperatives could end the need for criminal trials for individuals by having the legal co-op make compensation to the victim or the victim's family (p. 51). This suggestion, however, disregards the retributive[11] and deterrent[12] functions of the criminal law. While Black may wish to abandon these functions, it seems odd to advocate their complete abolition without the slightest discussion.

B. *Delegalizing Society*

Another of Black's suggestions would vary the jurisdiction of law itself. He suggests reducing the overall "quantity of law," leaving some aspects of life to alternative realms of regulation and dispute resolution (pp. 81-88). His suggestion, which he calls "legal minimalism" or the "delegalization of . . . society" (p. 81), is twofold. First, Black suggests that the amount of discrimination observed in trials could be lessened by decreasing the number of trials. Second, discrimination could be further lessened by reducing the number and reach of laws guiding peoples' lives (pp. 86-88). He believes that reducing the number of laws and enacting obstacles to parties seeking redress for wrongs through the courts would force individuals to turn to alternative means of dispute resolution (p. 78). These alternative forms of dispute resolution would, Black asserts, be characterized by less discrimination than found in the courts.

Black offers the Japanese legal system as a "natural experiment" (p. 84) in this proposal. He points out that there are far fewer judges and licensed lawyers in Japan than in the United States. He argues that this fact, coupled with heightened barriers to litigation, acts to reduce the number of litigated cases. Consequently, individuals seek alternative forms of redress such as self-help, which in turn lessens discrimination (p. 85).

Although Black's statistics concerning the number of judges and licensed lawyers are fairly accurate, his analysis of these statistics is

11. A. GOODHART, ENGLISH LAW AND THE MORAL LAW 92-93 (1953).

12. *See e.g.*, Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L. & CRIMINOLOGY 176 (1952).

seriously flawed for several reasons. First, Black assumes that the number of lawyers and judges in Japan, relatively few compared to the number of lawyers in the United States, reveals a great deal about the interaction of laws to social intercourse in modern Japanese society. This assumption is questionable. Licensed members of the Japanese legal profession, called *bengoshi,* number only slightly above 13,000.[13] However, there are "several other legal 'professions' whose members are licensed to handle matters that in the United States would be handled only by licensed lawyers."[14] In Japan, unlike the United States, practicing law requires only an undergraduate degree. Those who graduate with an undergraduate law degree (LL.B.) are often licensed in other professions and number nearly 100,000.[15] Many law graduates move into business without ever passing, or even taking, Japan's National Law Exam.[16] These graduates are not "practicing law" in the sense of the practitioner advocating a client's position before a court. Like many American lawyers however, they perform various "legal" roles such as negotiating contracts or counseling business clients about the state of the law. When these unlicensed "lawyers" are added to the ranks of the *bengoshi,* the number of people in the Japanese legal profession is comparable to the number of lawyers in the United States.[17]

Second, although there are fewer litigated cases in Japan,[18] Black fails to question the desirability of this result. For many acts considered "wrongs" in the United States, there may be no means of redress

---

13. Miller, *Apples vs. Persimmons: The Legal Profession in Japan and the United States,* 39 J. LEGAL EDUC. 27, 27 (1989). This leaves Japan with roughly one licensed lawyer for every 9000 Japanese citizens. In the same period, the United States reported 650,000 lawyers, or roughly one licensed lawyer for every 400 U.S. citizens. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES: 1988, at 376, Table 627 (108th ed. 1987).

14. *See* Miller, *supra* note 13, at 28.

15. *Id.* at 29.

16. Chen, *The National Law Examination of Japan,* 39 J. LEGAL EDUC. 1, 1 (1989).

17. The 100,000 legal professionals in Japan lower the *per capita* ratio of "lawyers" in Japan to roughly one in 1100. This is much closer to the U.S. *per capita* ratio of lawyers. *See supra* note 13.

18. Professor Miller offers three principal reasons for the lower number of litigated cases in Japan:

> First, there may be far fewer transactions of the kind most likely to generate lawsuits. For example, although Japan has about half the population of the United States, its automobile accident death rate is only slightly above 9000 per year, about one-fifth of the annual rate in [the] United States of close to 50,000 deaths!

Miller, *supra* note 13, at 32. "Another important reason," he continues, "may be that Japan is only now beginning to experience a growth of court-enforceable rights comparable to that which the Warren Court initiated in the United States." *Id.* at 32-33. Finally, he writes "Perhaps the principal reason litigation in Japan is not a favored method of resolving disputes is that there are built-in barriers of considerable dimension" and then concludes by listing some of these barriers: comparatively high court filing fees, initial attorney retainer fees, the nature of Japanese pretrial and trial procedures, and the absence of a right to a jury trial. *Id.* at 33-35.

in Japan.[19] Professor Richard Miller postulates that "the factors that tend to close the courts to ordinary citizens render Japanese courts and trial lawyers inaccessible to an extent that would be deemed outrageous in the United States."[20] Moreover, such barriers could raise constitutional problems.[21]

Finally, Black does not clearly show how a reduction in the amount of litigation would lessen discrimination. Black fails to examine his assumption that a reduction in the quantity of law will lead to lessened societal discrimination. Certainly, if his proposals were adopted, the number of observed cases of discrimination in trials might decrease in absolute terms, but only because we would have fewer trials. It is entirely likely that, by reducing the quantity of law, individuals would be left with fewer avenues for remedying discrimination. How is one with a discrimination claim to seek redress in a legal vacuum?

The closest Black comes to establishing a link between legal minimalism and reduced discrimination is the assertion that "[l]egal minimalism seems to strengthen social cohesion" (p. 85). He cites, once again, the experience of Japan. Yet Japan seems a peculiarly inapt comparison. It is an extremely homogeneous, thus naturally cohesive, society. The United States, on the other hand, is increasingly heterogenous. And with respect to non-Japanese persons, Japan seems to exhibit a high degree of racial intolerance.[22] Japan certainly is not a model discrimination-free society that the United States should strive to emulate.

Sociological Justice describes how social characteristics affect the decision-making process of a case. Black concludes that an examination of the social status of parties involved in a lawsuit can explain the variance of legal outcomes in cases with similar factual situations — but this is a notion that has been acknowledged, and much discussed, since the birth of the Legal Realist movement in the 1920s and 1930s. If Black's book accomplishes anything, it is the addition of a new term — the "sociological model" — to describe how social factors affect

19. For example, if the United States required court filing fees and initial attorney retainer fees to the extent they are required in Japan, many poor people with legitimate product liability claims against corporations, could not afford to sue and thus would be effectively barred from seeking any redress. *See id.* at 33-34.

20. *Id.* at 37-38.

21. *Cf.* Boddie v. Connecticut, 401 U.S. 371 (1971) (due process concerns prohibit a state from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who seek judicial dissolution of their marriage).

22. In a *Newsweek* poll taken in Japan, 31% of the respondents cited "too many different racial and ethnic groups" as a "very serious" problem hampering U.S. economic development. *What Japan Thinks of Us,* Newsweek, Apr. 12, 1990, at 24. There are many reports of widespread discrimination against those living in Japan who are not ethnic Japanese. *See, e.g.,* Umakoshi, *The Education of Korean Children in Japan,* in EDUCATION AND THE INTEGRATION OF ETHNIC MINORITIES 36 (1986) (referring to widespread discrimination against Koreans in Japan).

case outcomes. Black's discussion of his reform proposals is utopian and it fails to deal with potential objections. He ignores both the impracticality of his proposals and the possibility that their adoption could exacerbate, not lessen, discrimination.

— *Christopher M. Adams*