Lawrence M. Friedman, *The Legal System*
Donald Black, *The Behavior of Law*

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What should a theory of the place of the law in the social system look like? Black and Friedman have been guided by opposite esthetic ideals in writing these general books about the relation between law and society. Black has a "classical" esthetic. He voluntarily cripples his intellect by giving up certain intellectual advantages, much as a string quartet gives up the blare of brasses, and tries to see how much social theory he can write without the blare of the intentions of people, and without recourse to distinctions among types of law and legal action. Friedman has been guided by an esthetic that leads to ornate intellectual structures: make each part as best you can, and put the parts one after another as chapters. At his best, Friedman is as neat and elegant as Black, for instance in his analysis of the causes of "legal reasoning" and of why, for example, "Talmudic reasoning" has the kind of structure it does (pp. 234-53). But Friedman's book is not "distinctively sociological," while Black's is. Friedman sounds like an astute lawyer with exceptional social insights, mixing up solid common sense, extraordinarily wide learning, and an occasional bit of "theory." Friedman in short sounds more like Max Weber, while Black sounds more like a sociologist.

The essence of the game Black plays with us could start with the following social psychological premise:

> The more socially important a person or matter in dispute, the more likely people are to call on rules of all kinds, including both criminal and civil law as well as rules of etiquette, etc., to defend that person or the interest at stake. Conversely the less important the person or matter, then the more it is a matter of "police" rather than "law" (this observation was made by Montesquieu, Ch. 27 of the *Spirit of Laws*), the less likely are his or its defenders to call on the law, and the less weight that person or matter will have if it is made the object of legal action because it threatens a more important person or matter.

Now the question Black asks of Montesquieu's observation is: can we restate this so that it does not involve anyone's intentions or judgments of importance? The trick in doing this is to use the

society's stratification system (*i.e.*, its socially organized judgments of importance and value) as a source of indicators of importance, and the quantity of legally significant actions (the "quantity of law") as a measure of the frequency with which rules are invoked.

If we make these substitutions, then we can state our generalization as a relation among "social facts." Just as Durkheim's egoistic and anomic people do not have to intend to commit suicide, and no intentions are therefore present in the theory (they are in the definition of suicide), so no one in Black's theory ever has to intend to arrest or sue anyone.

I think such games are an amusing pastime, rather like mathematical puzzles. Once in a while someone discovers interesting mathematics from working on a mathematical puzzle. Once in a while something that is all muddy with people's intentions in it becomes remarkably clear and orderly when they are taken out. Usually, though, productive social theories simplify and aggregate intentions, rather than eliminate them from the theory altogether. Economics works that way. I am convinced that the reason we know very little more about suicide than we did when Durkheim wrote, but a lot more about various subjects that Weber or Simmel studied, is that Durkheim led us down the wrong path. But Black is one of the cleanest, most exact and elegant, practitioners of the art of Durkheim—in the same class as Durkheim himself.

Since Friedman writes in the style of Weber, not Durkheim, he is playing a different game and is in another league. Friedman's style is to turn the sociology of law into a "learned discipline," rather than a "science." His book sets itself the task of giving the reader a pretty intelligent idea, backed by learned examination of the facts, about everything substantial that is connected to the law.

How does "discretion" arise and get distributed in legal systems? Are legal systems based on codes (*e.g.*, France) different in any crucial respects from those based on precedent (*e.g.*, the U.S.)? Why do revolutionary courts dispense with lawyers? Why is Talmudic reasoning so tortured? Why do laws in the United States have preambles less often now than they did in the early history of the country? Does deterrence have a different function for purely instrumental laws (*e.g.*, parking regulations) than for laws deeply imbued with values (*e.g.*, laws against murder and rape)? Why is the language used by interest groups petitioning a legislature so different from that used by the same groups petitioning a court? What kinds of people are most likely to be mistreated when the

law allows courts to coerce them for their own good (*e.g.*, in civil commitment of the mentally ill)?

If people want to increase their ability to discuss intelligently such a wide variety of topics, they should read Friedman's book.

My general esthetic preference is for the style of Black. But I see no particular purpose in crippling oneself by choosing a sociologistic style that ignores the intentions of people. Strip the intellectual structure to the minimum needful, yes, but intentions and judgments are the core of the matter. Further, I think in this field (and in most fields of high culture), I would not indulge my taste for elegant simple theory. I am further convinced that the prolix structure of Friedman's book will characterize the sociology of law in the future a patch of elegant general theorizing sprinkled here and there in a mass of intelligent commentary on the complexity of things, illustrated by much learning about particular cases. The scientific ideal of a unified theory for every subject of sociology that fits into ten weeks of lectures, divided up so as to be an appropriate curriculum for undergraduates, has never seemed to me a realistic aspiration. If Friedman offered a course on legal reasoning, rather than on law and society, it might be possible for him to attain such an elegant intellectual structure. Forcing the sociology of law into that hypothetico-deductive mold, as Black does, seems to me to ignore most of what is interesting for the sake of what little fits into the mold.

This is so (if it is) because if we needed from lawyers and judges only simple decisions that we could conveniently predict with a general theory, then we would not require three years of law school, nor law reviews, nor all the apparatus of law as a profession. The right level of generality for the sociology of law seems to me to be about halfway between that found in law review articles, in which (ideally) all relevant distinctions for any conceivable legal action get analyzed, and that found in Black, in which all legal actions—civil, criminal, maritime, and military—are treated without distinction.

These are, however, matters of taste and judgment. I have somewhat more hope for "social science," after the fashion of Black but with intentions left in, than Friedman does for "legal science." But when we spend a lot of time and money to make the behavior of talented people like lawyers more complex, then I am not convinced we can explain their behavior with a simple theory. The theory will turn out to be as complicated as the behavior (there is a theorem in cybernetics vaguely reminiscent of this), and the books about it will have to be "learned" rather than "scientific."