SOCIAL RESEARCH ON LEGALITY
A Reply to Auerbach

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We should all be indebted to Professor Auerbach for having broadened our horizons with the addition of numerous citations. I should like to reassure him that they were not excluded because, as he suggests, I might have "thought none of them had any value for the kind of theory . . . the sociologist of law ought to elaborate." Many of them are doubtless "relevant" but, as I pointed out early in the article, I omitted all manner of "relevant" literature. I did not regard it as my responsibility to develop a comprehensive bibliography of "relevant" material, but rather to indicate some of the central theoretical concerns and research interests of the developing field of the sociology of law.

Regarding these, Professor Auerbach makes fundamental criticisms. He can "think of no more fruitless task" than my conclusion that sociologists of law ought to explore "the nature of legality . . . and the conditions under which it is likely to emerge." "I do not," he continues, "see how empirical studies undertaken by sociologists of law can dispose of the question whether the Nazi genocidal laws should be regarded as 'lawful' rules for all scholarly purposes . . . I do not understand in what sense Skolnick uses the term 'fact' when he refers to the 'fact' that no all rules are lawful rules."[1]

There seem to be two separable criticisms here, one having to do with legality as a theoretical model, the other with its normative aspects. I shall try to respond to each of these criticisms. I do not believe I ever suggested that sociologists of law can

1. C. A. Auerbach, *Legal Tasks for the Sociologists*, 1 L. & SOC'Y. REV. 92 (1966).

"dispose of" the question of whether Nazi genocidal laws should be regarded as lawful. Rather, my statement that sociologists ought to explore the nature of legality means that sociologists ought to study the conditions under which men consider certain rules to be lawful rules, and how men create, interpret and transform principles and associated rules within institutions. It also suggests that sociologists consider the meaning of governance by rules from the standpoint of the citizen. For example, what does it mean to the individual to "participate" in a "legal" order? What is universal in the adversary system and what is relative?

For such purposes the sociologist must have a point of reference as to the meaning of governance by law, or the rule of law. Although it may be true that "others" may regard the notion of the rule of law in the article as "inadequate for their purposes," I would suggest that research cannot be done without some conception of the rule of law. Selznick's emphasis upon "the progressive reduction of arbitrariness" seems to be consistent with legal writings on the meaning of the rule of law. I doubt that Selznick "seeks to demonstrate the superiority of a single definition of law for all scholarly and practical purposes."[2] Rather, he is suggesting that sociological analysis of law requires a working conception of legality even if only for research purposes. In fact, a considerable amount of research in legal sociology has been influenced by the problem of legality, e.g., on police, on juvenile justice, on administrative agencies, on the jury.

Auerbach suggests (through Stone) that "excessive concentration on [the specific *differentia* of law] may indeed be a diversion."[3] He asserts that lawyers pretty much know what they're talking about when they speak of the legal order or the legal system: "They generally have in mind what Max Weber described as 'state law' and Selznick defines as 'positive law' – the rules regulating, or establishing the framework for, the behavior of members of the society which are promulgated and enforced by agencies of the state."[4] It is posible, however, to entertain a conception of a legal order that distinguishes between rules of order – positive law, Weber's legal order – and rules directed toward constraining the arbitrary behavior of officials, e.g., search and seizure restrictions. The conception of a legal system that Auerbach says lawyers "generally have in mind" directs attention to certain kinds of questions – e.g., why people violate positive law – rather than to a concern for the behavior of authorities. Thus Auerbach's conception of law may prove too "restrictive," a charge which he levels at ours. Law involves both procedure and substance, and the relation between the two is a central issue for empirical inquiry, as

2. *Id.* at 93.
3. *Id.* at 94 and n. 19 ff.
4. *Id.* at 94.

I suggested in my discussion of the relation between substantive law and its administration, including the administration of automobile accident law (pp. 18-20). By asserting that lawyers generally know what a legal order is, Auerbach may inadvertently be seeking "to demonstrate the superiority of a single definition of law for all scholarly and practical purposes."

Auerbach finds that my writings puzzle him, as do the writings of Nonet and Carlin. As sociologists of law, we should merely be interested, he says, "in what the profession *does*." But lawyers "do" all sorts of things – eat, sleep, go to the theater, read, write, talk, make love. If Auerbach is suggesting that we simply record the "behavior day" of lawyers, as Gesell tried to do with children, that is a tenable, albeit naive, methodological stance to take. Once he begins to suggest that some behaviors are more important to observe than others, we want to know why. In the telling, I suspect that he will begin to sound suspiciously like those whom he criticizes. We all are interested in "the effect of law on men and men on law." But this requires empirical study with guiding concepts and orienting hypotheses. *One* of these is the role of lawyers vis-à-vis the integrity of the legal system. As Selznick recently wrote, "Certainly a continuing preoccupation of the lawyer *qua* jurist is to enhance the integrity of the system and its procedures; but legal craftsmanship must also be concerned with bending a received tradition to emergent social needs, exploiting the resources of law for practical ends. When the tension between these commitments is faced, jurisprudence comes alive."[5] The identification of such central issues is required for the development of a sociology of law.

It was for such a purpose – suggesting research issues – that the analysis of private government was emphasized in my paper. Auerbach misses the point when he says that the identification of "government" in non-state groups means that the action of such groups is "state action." This was an analytical point, and it is a serious error to impose the special imagery of "state action," as it arises in constitutional interpretation in this country, upon a theoretical approach to governance in private groups. As sociologists we are concerned with making generalizations regarding certain kinds of processes, and not at all in deciding which branch of government should be "the supreme arbiter of national economic policy." Generalizations might call for examination of systems of governance that do not have the official stamp of government. We are interested in punishment systems, not in prisons alone. We are interested in compliance with types of authority. We are

5. P. Selznick, *Review of Fuller, "The Morality of Law,"* 30 AMER. SOC. REV. 947-8 (1965).

interested in the development and promulgation of rules through sanction, whether through a system of criminal courts or faculty-student committees. We recognize that "adjudication" is a process that takes place in many contexts – arbitration provides a ready example – and is not only carried on by men who are called judges. Our concern with the idea of legality is in effect the introduction of a model in order to understand how the model develops and operates under different institutional conditions.

When I wrote that not all rules are lawful rules I was, to be sure, using a conception of fact based upon a normatively derived model of legality. Much valuable social science has this character. For example, political sociology considers the nature of "democracy" and the conditions for its development; social psychology studies the "primary group," and its determinative conditions; urban sociology investigates the nature of "community" and the features of urban life that undermine or enhance its maturation. Social science is replete with studies of normatively derived models which in themselves are perhaps problematic, but not as problematic as Auerbach suggests.

Thus in the sense that I used the word "fact," it is a "fact" that there cannot be "democracy" without elections, there cannot be a "primary group" without interaction, nor a "community" without commonly held values. Similarly, as Fuller has suggested, there cannot be "legality" when authorities (1) fail to achieve rules; (2) fail to publicize or make rules available; (3) legislate retroactively; (4) make vague rules; (5) make contradictory rules; (6) require conduct beyond the powers of the affected party; (7) introduce such frequent changes in rules that subjects cannot orient their actions to them; (8) administer a set of rules different from those announced.[6] A critic may disagree with Fuller that "a total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[7] Perhaps another "route to disaster" can be found, or one or two of these may be less significant than the others, just as failure to meet criteria of suffrage or frequency of elections may result in a political structure that is not properly called "democratic." But Fuller provides us with an acceptable model for pursuing empirical investigation, as good as or better than most models we experience in social science.

6. I. FULLER, THE MORALITY OF LAW 39 (1964).
7. Fuller, *ibid.*

The heart of the controversy seems to arise from a linguistic ambiguity. The analogy to the study of "democracy" is instructive here. We ordinarily speak of a "democratic" or an "oligarchic" form of government, recognizing that political structures vary. Then we attempt to account for the development of these different political structures. The question is, are all systems of social control through rules and enforcement "legal" systems? It is possible to answer affirmatively by considering "legal structures" as being on the same conceptual level as "political structures." There *is* that ambiguity about the term "legal." For the reasons stated above – that "legality" is distinctive, that it is potentially an important research model, that a distinction between order and law is useful – I believe we will make greater advances in sociology of law research if we consider "legality" as conceptually parallel to "democracy," not to "political structure." Thus, I would again suggest that sociologists consider the nature and functioning of legality as a central concern.

Auerbach, however, may be making two other points. He may be arguing from a strictly behaviorist position that we should not study normative concepts, a position that would exclude numerous theoretical conceptions in social science. I doubt that he is saying that, though he sometimes seems to be. If so, I would simply disagree. On the contrary, I would argue that if we are to have a science of society we must study normative phenomena. Or he might be suggesting that if we study normative phenomena we should take care not to become merely spokesmen for a normative position. I agree that there is a danger here, but I am worried that the concern for a value-free social science will produce a valueless social science. The ideal of "health" is also normative, but a concern for having a healthful community does not preclude scientific inquiry into physiology or microbiology.

Like Auerbach, I would prefer to see greater collaboration between lawyers and sociologists, but I do not believe that "every practicing lawyer must be a sociologist of law in order to better ply his trade."[8] If all Auerbach is saying is that every lawyer must be familiar with the legal order in practice as well as with "book law," he is right, of course. But the sociology of law is not merely a description of the law in action, which *some* legal realists took it to be in response to the "black letter" emphasis of many law teachers. It is also an analysis of the meaning and function of law in societies of different kinds. Unfortunately, unlike the early Holmes, most lawyers and law teachers have not concerned themselves with such questions, and I used the word "most" advisedly, to suggest a majority. Perhaps I

8. Auerbach, *op. cit. supra* note 1 at 97.

am wrong. I hope so. I fear, however, that a review of legal writing and teaching will bear me out.

Thus, the issue is not whether there ought to be a collaboration, but, as Auerbach recognizes, what collaboration means. Auerbach agrees with Stone that the "contributions to understanding the law" offered by the social sciences "must be marshalled and organized around the problems which confront the lawyer." If they mean by this "problems which confront the legal order," I could not agree more. Such an emphasis would suggest *basic* research into the functioning of the legal order. I fear, however, that Stone means what he seems to say, i.e., that the sociologist should confine himself to *applied* research that lawyers consider useful. To use the medical analogy the lawyer, like the medical doctor, is concerned with developing vaccines. The research scientist, however, may be equally interested in understanding the nature and functioning of viruses. The two concerns are not unrelated, but there is usually a tension between those who want only to cure, and those who want also to understand.

In closing, I should like briefly to return to what Auerbach says in his chief complaint, that my "horizon is too limited." A scanning of Auerbach's horizon reveals no principle or perspectives for orienting research. A mere listing of topics and studies will not pass muster as a theoretical guideline. Certainly research into the "social process by which a legislative statute is formulated and passed" is important since it may go to the issue of the meaning of law, of how a society develops its norms for governance. Of course, studies of administrative agencies may be important, depending upon the issues they raise. Nothing in my paper suggests otherwise.

The real issue, however, is not what is studied, but how and why it is studied. Most studies of voting behavior, for example, have been concerned with explaining voting without seriously attempting to demonstrate how the variables that affect voting influence the legal order. And it is the legal order that is the central concern of the sociologist of law, not voting, not organizational dynamics, not decision-making behavior, not sexual behavior. Studies in these areas may shed light upon, or provide analytical tools for, examination of the legal order, and to the extent that they do they are relevant. In any social science field there are countless "relevant" studies. Relevance and centrality, however, are not the same thing. The concern of my paper was to suggest criteria of centrality, to respond to the question "What are distinctive theoretical issues guiding the sociology of law?" I hope that, as a result of Professor Auerbach's critique, the response to that question has been somewhat clarified.