Review Essay

THE DURKHEIMIAN TRADITION IN THE SOCIOLOGY OF LAW

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Donald Black, *Sociological Justice*. New York: Oxford University Press, 1989. x + 179 pp. (*SJ*)

Frank Pearce, *The Radical Durkheim*. London: Unwin Hyman, 1989. xvi +232 pp. (*RD*)

Jeffrey C. Alexander (ed.), *Durkheimian Sociology: Cultural Studies*. New York: Cambridge University Press, 1988. xi + 227 pp. (*DSCS*)

Steven Lukes and Andrew Scull (eds.), *Durkheim and the Law*. Oxford: Martin Robertson, 1983. 241 pp. (*DL*)

I

Among the classical traditions of the sociology of law, that based on Émile Durkheim's work is at once the most problematic and the least developed in modern literature. Indeed, Durkheim's writings, almost symmetrically spanning most of the last two decades of the nineteenth century and the first two of the twentieth, remain the last neglected continent of classic theory in the sociological study of law. Although his major theoretical ideas are part of the common currency of social science as a whole, it is possible for a contemporary sociologist, in one of the volumes under review here, to declare that "at the present time Durkheim's reputation is the lowest" among those of the classic figures of sociology and that "the author of sociology's most powerful manifestos, 'Mr. Sociology' himself" is "probably at his low point in popularity in the seventy years since his death" in 1917 (*DSCS*, p. 107). If this statement is correct, and if, in this case, general sociological repute carries over to the special field of legal studies, the short-term prospects for further development of Durkheimian sociology of law are not good.

Durkheim's writings on law are voluminous, if largely frag-

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mentary, extending far beyond the texts by him which make up Steven Lukes and Andrew Scull's useful reader on *Durkheim and the Law*. Further, law was always a major focus of interest for the school of followers and colleagues clustered around Durkheim as contributors to the *Année Sociologique*, the prestigious journal of which the first series, under his editorship, appeared in twelve volumes between 1898 and 1913. Some of the Durkheimians produced substantial monographs on law and legal concepts (Davy 1922; Fauconnet 1928). Numerous anthropological, historical and theoretical studies bearing on the evolution, functions, or organization of law appeared as products of the Durkheim school. Yet many of these works have never been translated into English and accepted into the English-speaking world's recognized canon of pioneer writings on sociology of law. They do not figure as significant influences on the general development of contemporary studies of law in society. Even in France, the school's homeland, "the vein seems rather exhausted" (Carbonnier 1978:114); and the writings of the man whose theories inspired so much of this work are not prominent in influential currents of contemporary sociological research on law. Durkheim's thought remains significant through the diffuse influence of his major sociological concepts (ibid., p. 111), rather than through any of his specific claims about law.

Reasons for the neglect of Durkheimian ideas are easy to find. Lukes and Scull summarize three "bold and striking hypotheses about law" originally set out in Durkheim's (1984) *The Division of Labor in Society*. First, law is to be conceived as an "external" index, symbolizing the nature of social solidarity in any society in which it exists. Second, legal development presents a relatively consistent evolutionary pattern from the predominance of penal law with repressive sanctions (aimed at the punishment of wrongdoing) to a predominance of "civil law, commercial law, procedural law, administrative and constitutional law" with restitutive sanctions (aimed essentially at the restoration of the status quo in social relationships). This evolution reflects the development of societies "from less to more advanced forms, from an all-encompassing religiosity to modern secularism, and from collectivism to individualism." Third, crime is to be understood as a violation of collective sentiments, and punishment an expression of them, so that punishment's "real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour" (*DL*, pp. 1, 33, 38, 69).

All three hypotheses, or clusters of hypotheses, have been seen as problematic. As Lukes and Scull note in relation to the first, Durkheim's "index" view of law is "remarkably narrowly focussed" (*DL*, p. 5). Law and morality are virtually equated so that law is "treated as an undistorted reflection of society's collective morality" (*DL*, p. 6). Potential moral conflicts are underplayed. So also is the possibility that law and morality may conflict, or that

law is often best analyzed apart from moral dimensions. Further, Durkheim's focus on law as a constraint "precluded any systematic inquiry into its positive or enabling aspects" (*DL*, p. 7). The Durkheimian legal outlook is contrasted unfavorably with, for example, a Weberian one which seriously addresses the question of law's contribution to the formation of economic and political structures. Durkheim also "was curiously blind to the sociologically explanatory significance of *how* law is organized—that is, formulated, interpreted and applied." Seeing law primarily as an expression of a diffuse moral condition of social life, rather than as an instrument or expression of power, he paid little attention to the individual or collective interests or strategies of legislators, judges, lawyers, and administrators. Durkheim's writings treat officials and legal professionals, for example, as "the executive committee, not of a ruling class, but of the moral consensus of society as a whole; they are the authorized 'interpreters of its collective sentiments' " (*DL*, pp. 7–8, 45).

These positions ensure that Durkheimian legal theory bypasses most modern research on the organization of legal systems and legal practices and on relationships among law, power, and economy. In these respects, Durkheim's legal sociology reflects broader problems apparent in his ideas on the state and politics generally (e.g., Giddens 1986), ideas which seem consistently to underemphasize social and political conflict, and thus the role of law in such conflict. As if this indictment were not sufficient, it is reinforced by critiques of the second and third Durkheimian hypotheses. A substantial literature now challenges Durkheim's proposed general pattern of evolution from a preponderance of penal or repressive law to one of cooperative or restitutive law (e.g. Barnes 1966; Lenman and Parker 1980). Indeed, some critics claim that an opposite pattern of evolution is revealed by the historical evidence (Sheleff 1975). It has proved rather easy to show that restitutive sanctions or processes of some kind are widespread in simple societies (Malinowski 1926; Schwartz and Miller 1964; Wimberley 1973), and that penal sanctions, with the religious overtones which Durkheim associates with them, are much less prominent than he seems to suggest. Even in ancient societies possessing written legal codes, which Durkheim particularly emphasized as evidentiary sources for his evolutionary hypothesis, legal control of conduct which in modern societies would be the concern of criminal law was often sought through the public regulation of private redress, composition, or self-help. Further, the use of penal sanctions does not seem to conform to the historical pattern Durkheim indicated (Grabosky 1978). Political centralization, rather than being a contingent and subordinate factor as Durkheim suggested, appears to be directly and consistently associated with greater reliance on repressive controls and with greater punitive intensity (Spitzer 1975, 1979; cf *DL*, ch. 4). It has not been difficult to argue that with the

growing power and scope of modern states, the repressive character and functions of law increase and, indeed, that modern types of law which Durkheim characterized as restitutive have significant penal aspects.

Durkheim's third hypothesis or cluster of hypotheses, entails, as Lukes and Scull note, three separate claims. First, crime and punishment promote social integration insofar as crime elicits punishment, which, in turn, reaffirms collective beliefs and sentiments and thus social solidarity. Second, a certain level of crime is to be considered normal and a crime-free society is impossible. Indeed, if existing types of crime disappeared, society would create new types in order to allow the condemnation of deviance necessary to fulfil the expressive and integrative function of punishment. Third, crime has a generally indirect, but very occasionally direct, utility in provoking change in society's moral framework. Durkheim gives the example of Socrates' crime of promoting unacceptable ideas, which perhaps directly helped prepare the way for a new Athenian morality. With respect to the idea that crime and punishment are functional to social integration, Lukes and Scull argue that the primary difficulty of the thesis is its vagueness. Without clarifying "which practices, relations and institutions constitute 'society' and, in consequence, just what constitutes the 'social disintegration' that would *ex hypothesi*, attend the non-punishment (to what extent?) of criminal offenses (which? and committed by whom?)" (*DL*, p. 18), the thesis merely serves as a conservative justification for any chosen institution or practice or for the punishment of any activity treated as threatening social integration. Further, the assumed distinction between the normal and the pathological which underpins Durkheim's thinking on crime has long been considered problematic (*DL*, pp. 86–90; cf Lukes 1973:302–13); and the claim that crime provokes changes in the moral framework of society remains unproven.

Thus, it is not surprising that, as Randall Collins points out in an essay in *Durkheimian Sociology*, few sociologists now defend Durkheim's general analysis of crime (he includes himself, Donald Black, and Kai Erikson as three who do) (*DSCS*, p. 108; see Collins 1981; Erikson 1966; Black 1976:96, 98; but cf. Black 1976:78–79). Yet Durkheim's views remain much discussed. A recent major theoretical study of the social character of punishment devotes much attention to Durkheim's treatment, concluding that, while many criticisms of Durkheim's historical generalizations are unanswerable, these "fail to strike at the heart" of his work (Garland 1990:49) and do not destroy the power of his reflections on punishment as a component of the complex moral fabric of social life. Indeed, other recent literature on the Durkheimian tradition in sociology suggests that demonstrations of the empirical inadequacy of many of Durkheim's sociological generalizations do not undermine the value of some of his primary theoretical ideas. To some extent,

the problem of coming to terms with the Durkheimian tradition—in the sociology of law as elsewhere—is an aspect of the broader problem of clarifying appropriate relationships between theory and empirical research in social science and, specifically, of establishing appropriate objectives of any social theory of law. It may be that the Durkheimian tradition can be reinterpreted in ways which show that its theoretical "essence" retains a significance unaffected by some of the serious empirical criticism of Durkheim's work. Before looking at these possibilities, however, it is necessary to consider the primary context in which Durkheim's name has been invoked in sociological studies of law.

II

Outside the fields of criminology and the sociology of deviance, Durkheim is probably most frequently relied on in contemporary law and society studies as a reference point for certain broad research traditions, especially those emphasizing positivist rather than *verstehende* methods in social science, the importance of a rigid separation of social fact and subjective values, or the utility of studying "macro-level" patterns of social variation independently of the motivations or understandings of individual actors. Thus, a Durkheimian tradition has been claimed to underpin the methodological assumptions and approach of most longitudinal studies of courts (Sanders 1990). The Durkheimian legacy is identified with an emphasis on "macro processes" or social facts, which (as in the case of litigation rates) can be studied quantitatively relatively independently of the "micro processes" of human social action by which rates are produced. In a very different context, Donald Black, championing a behavioralist approach in sociology of law invokes Durkheim's authority to claim that "at the level of social life in its narrow sense," law is merely behavior, and that if concepts of rule or norm are to be used in sociological analysis, they must "always refer to a behavioral pattern of some kind" (Black 1972:1091). Black has been called "one of the cleanest, most exact and elegant, practitioners of the art of Durkheim" (Stinchcombe 1977:130), yet he rarely invokes his predecessor except as one literature source among many for specific empirical claims. Black is compared with Durkheim usually because of the positivist outlook on social research that both are held to espouse. Both writers "consider social facts as things"[1] external to and coercive of individuals and to be studied without compromising a strict separation of fact and values (Durkheim 1982:52, 60, 159–62; Black 1972:1091, 1094–95, 1098. See also, e.g., Griffiths 1984:39).

Sociological Justice, Black's most recent book, is, indeed,

[1] Compare *DL*, p. 152, where Durkheim refers to the consideration of law "as a set of things, of given realities the laws of which must be sought according to the method of the natural sciences."

Durkheimian in many superficial ways. Like his previous work, it shows a burning faith, like Durkheim's, in the power of sociology as "science" (*SJ*, pp. 102–3; cf *DL*, pp. 99–100); a similar catechismic style involving the bold statement of general social laws (cf. Durkheim 1982); a comparable belief that ambitious generalizations can properly be grounded in deliberately limited but carefully chosen data (cf. Durkheim 1976:415–16); and, above all, the Durkheimian view that social control is a central—perhaps *the* central—concern of sociology (cf. Black 1984; Black 1976:ch. 6). Building on the theses of his *Behavior of Law* and subsequent works, Black seeks to show, with a sociological imperialism strongly reminiscent of Durkheim, that all who practice, use, or make law need the resources of sociology; that behavioral sociology of law can show the way law really works; and that no participant in legal processes can afford to ignore sociology's lessons. This powerful modern sociology of law, which reveals the social structure of litigation, Black calls the "sociology of the case." This structure refers primarily to clustered criteria of relative social status, relational distance, authoritativeness, and organization that determine which cases, claims, and litigants are "sociologically" strong or weak. The sociology of the case allows the "self-conscious application of sociology to legal action" and the possibility of "sociological justice" (*SJ*, p. vii).

Lawyers are now in a position to understand, with the aid of the sociology of the case, how law "as a natural phenomenon" (*SJ*, p. 4) behaves. In principle, they could choose cases on such a basis (weighing the possibility of success or failure in terms of litigants' and other legal actors' relative social status, relational distance, and collective organization or isolated individual character). They could select witnesses or determine how to handle them by taking careful account of "authoritativeness" criteria related especially to relative social status and associated characteristics of "powerful" or "powerless" speech and demeanor; and they could assess prospects of success before particular judges and juries using similar criteria. They could fix their fees accordingly and in all aspects of their work design strategies on sociological as much as "technical" legal criteria. "In theory, an attorney might design an entire practice from a sociological standpoint" (*SJ*, p. 26).

Thus, Black fulfills Durkheim's intention, though hardly in the way Durkheim envisaged, that sociology should provide useful knowledge for the special field of law. Being value-neutral, the sociology of the case is not committed to particular interests or nonscientific objectives. Thus, Black points out that while it should have special relevance in law schools (*Sociological Justice* is the product of its author's several years of teaching sociology of law at Harvard Law School), this knowledge cannot be monopolized by lawyers. Indeed, litigants could use it in choosing their lawyers. With no hint of irony but a strong sense of theoretical symmetry,

Black adds that the sociology of the case is available to help criminals select their victims; for sociology can explain which victims are likely to complain and seek redress and, if they do, which will be in a potentially strong position in terms of the total social structure of the case, so as to make it predictable that the offender will be subjected to legal sanctions (*SJ*, p. 39). The value-free character of the sociology of the case comes into its own here, as it does when this sociology provides lawyers with the technical knowledge for scientific screening of cases and clients. The sociology of the case highlights the relatively poor prospects for legal professional entrepreneurs in representing blacks, the poor and the homeless, women in general, and a host of disadvantaged or relatively "low-status" isolated individuals in litigation. Indeed, it can help a lawyer calculate whether to demand higher fees when involved in such unpromising cases (*SJ*, pp. 25–26). Sociology, Black reminds us, "is only a tool, not a theology" (ibid., p. 33).

Despite the availability in principle of the sociology of the case to all, Black undoubtedly considers that the best immediate prospects for its career as useful knowledge reside with lawyers. As he readily admits, many are already aware of some of its findings. Yet, lacking proper sociological data and theory they frequently make false assumptions. Thus, the common-sense "theory of deep pockets," which suggests one should sue the most affluent available party, is wrong because the sociology of the case reveals that such action will usually involve "upward" law, hard to mobilize against relatively high-status defendants. Again, the common-sense "theory of the pathetic plaintiff," suggesting that sympathy for the downtrodden can be enlisted to win cases, is sociologically wrong because these litigants are usually the weakest on all sociological criteria of success in legal conflicts.

The most substantial parts of Black's book are certainly its first two chapters, which restate, elaborate, and supplement, in the form of the sociology of the case, some of the provocative insights and empirical generalizations established in *The Behavior of Law*, and then present this material as useful to participants in legal processes. Noting appropriately that "many readers will surely find the idea of sociological litigation unattractive" and that the "application of sociology to litigation might well shock and disgust anyone who believes in the rule of law" (*SJ*, p. 39), Black seems to have three answers for such fainthearts. The first is that wishful thinking cannot make the legal realm different from what it is. Second, while it is foolish to imagine that changes in law itself could overcome the discriminations which undermine the pretensions of the rule of law, there are possibilities for adjusting the social structure of litigation to counter some discriminations affecting litigants and for insulating legal processes in certain ways from this social structure. Black's third, most radical answer is that if we look at law sociologically and do not like what we see, an ap-

propriate response is to reduce the scope of law to a minimum, rather than to try to do something further about the social conditions which defeat its claims to treat litigants fairly.

Thus, the remainder of *Sociological Justice* speculates freely about ways in which the organization of law, and ultimately the scope of law, might be dramatically changed to escape the discriminations and inequalities inevitable in modern legal systems. First, Black recites the advantages that organizations have over individuals in virtually all aspects of the legal process (*SJ*, pp. 41–44; cf. Black 1976:91–96). The social structure of the case almost always favors corporate actors as against isolated individuals. A rational response, therefore, would be for individual litigants to organize to redress the structural imbalance. Seizing on the illustration of the "dia-paying group" institution found among some Somalian nomads, Black suggests transplanting a version of it to modern Western litigious societies and relabeling the transplant a legal cooperative association, or "legal co-op." Legal co-ops "would collectivize the conflicts now defined and handled as the business of individuals" (*SJ*, p. 50). They would take on the litigation (both claims and defenses) of their members, who might join co-ops voluntarily or perhaps be required to take out membership like a kind of compulsory insurance. The collectivity would act in disputes, civil or criminal, involving its members, holding damages received from their claims, and paying damages for which their members were held liable, although "the individual directly involved in each case would receive or contribute a disproportionate share" (*SJ*, p. 50). Co-ops would also deal with disputes between their members. Black suggests that such a system would reduce economic incentives to sue (since the injured party's co-op would be the primary recipient of economic redress). It would strongly encourage nonlitigious forms of dispute resolution and the use of compensatory remedies and negotiated solutions in criminal cases (since the co-ops would be able to supervise the whole process of redress). It would also facilitate action against recidivists, who would be far less socially anonymous than at present (since other collectivity members would be directly concerned with their conduct). Recidivists could, if necessary, suffer the penalty of banishment from the association.

These ideas evoke aspects of Ehrlich's (1936) classic theory of the living law of social associations. Black's co-ops proposal even calls to mind some of Durkheim's ideas on the delegation of regulation to morally responsible associations intermediate between the state and the individual (e.g., Durkheim 1957:ch. 9). But Black does not relate his proposals to Ehrlich's, Durkheim's, or any other systematic theory. In fact, it is difficult to know what to make of legal co-ops since almost all important questions about them remain unaddressed. "How many members legal co-ops would have, their social composition, how they could be financed, how their ac-

tivities would be regulated, and other questions remain to be answered, but these details need not concern us here" (*SJ*, p. 53). Along with such matters, it might be thought essential to consider the major problem of power relationships in such collectivities, the moral or political conditions under which members would actually contribute voluntarily, or be made to contribute to each other's legal welfare, the ways in which grievances and defenses would be assessed within the association and disputes between members handled, and the position of those who cannot pay for membership and are likely to be seen as free riders by at least some of those who can. In other words, what remain are almost all of the complex regulatory problems of discrimination, social differentiation, and social structure that Black's proposals are apparently designed to address. His proposals merely enclose these problems within the framework of co-ops and their interrelations and remove them from the sphere of responsibility of the legal system of political society as a whole.

From this point on, *Sociological Justice* appears increasingly bizarre. According to Black, the social structure of the case defeats the ideal of the rule of law because legal decisionmakers (judges, juries, etc.) have *knowledge* of such matters as the relative social status, respectability, and authoritativeness of litigants, criminal defendants, and witnesses. Consequently, Black proposes that these decisionmakers be denied knowledge, as far as possible, of the social structure of the case. This would entail greatly restricting evidence relating to the circumstances, characteristics, or identity of those involved (*SJ*, p. 68). Because testimony is colored by social status and other social structural considerations, witnesses should also be excluded from the courtroom and all evidence presented in documentary form. Litigants and criminal defendants should also be excluded. Cross-examinations would be allowed but not in court. Only transcripts of the exchanges would be presented (*SJ*, pp. 69–70). Since lawyers also import their social character into the courtroom, they might usefully be excluded as well and reduced to producing arguments to be "added to the other transcripts submitted to the court for its deliberations" (*SJ*, p. 70). However, judges and juries are also thoroughly contaminated by social structural determinants of justice. Hence, as far as possible, they too should be expelled from the halls of justice. Admittedly, while "juries might conceivably be abolished, judges present more of a challenge in sociological engineering"; nevertheless their removal "would accomplish the final step in the desocialization of courts: closing the courtrooms themselves" (*SJ*, p. 71). What would be left would be an embodiment of scientific decisionmaking immune to the subjective evaluation of social facts: a computer dispensing objective "technical" legal justice, free of the intrusions of the social structure of the case.

However seriously all this is to be taken (and common law

systems today reflect *some* aspects of the tendencies envisaged here[2]), Black's remarkably narrow—and, from a lawyer's perspective, dangerously distorted—perception of law is dramatically demonstrated. It is no longer enough to say that this sociological standpoint is alternative and "external" to the lawyer's, with which it can coexist, for now Black's conception of law as governmental social control claims superiority over lawyers' conceptions. What lawyers treat as law is, for him, only a bundle of "technical" matters, distinct from the "sociological" aspects of the case (*SJ*, pp. 20–21, 26–27). He shows no recognition that legal participants' views of law might themselves be sociological in an important sense, that legal doctrine itself is, in part, a form of social knowledge, or that processes of creation, invocation, and interpretation of law as doctrine themselves require sociological understanding. Black sees no substance in legal doctrine and its settings except technicality; it follows that when his behavioral sociology becomes imperialistic in *Sociological Justice*, it *replaces* law, since it treats law as having no social substance, no reality as institutionalized doctrine. In fact, law is invisible to the sociology of the case, which sees only government behavior. Legality, treated as a hypothesis about behavior falsified by Black's observations, is dismissed. What the behavioral method makes invisible is the character of the rule of law as a fluctuating set of processes, or a cluster of institutional values, professional motivations, and collective aspirations. Seeking the rule of law as an observable social fact, Black fails to recognize it as a striving toward certain kinds of equality of treatment in governmental activity; a historical tendency dependent on specific social conditions (Neumann 1986); and a complex, ever changing pattern of regulatory problems and provisional solutions.

Another aspect of this myopic perception of law is apparent. The sociology of the case debars itself from understanding what is going on in legal arenas. Because it is unconcerned with legal discourses, their effects, and their conditions of existence, it cannot explain *why* the social structure of the case is so difficult for legal processes to cope with. Treating discrimination as an irreducible social fact, it has no interest in the balance sheet of law's successes, failures, and possibilities in combatting specific discriminations; yet, as will appear, Black draws radical conclusions from an assumption of *inevitable* failure. Nor can his methods recognize the actual constraints on communication and influence between legal, sociological, and other discourses (e.g., Teubner 1989; Nelken forthcoming; Cotterrell 1986) and the distinctive social characteristics of legal institutions as experienced by those involved with

[2] Examples might be the extension of the use of documentary evidence in trials, the declining practical importance of the jury in the English legal system (including its virtual disappearance in civil cases), and the "mechanization" of the processing of traffic and other minor offenses through the use of tariff systems and administrative rather than judicial proceedings.

them. Yet these matters are now major concerns in sociology of law, if only because they have a direct bearing on questions about law's regulatory failures and its capacity to provide normative frameworks responsive to social change.

In discussing the authoritativeness and status of judges, for example, Black writes always in terms of general social indicators and gives no attention to the institutional structure, ideology and organization of judiciaries, which may have as powerful an effect on judges' behavior as their social origins or allegiances.[3] Yet even thirty years ago, among the legal realists whose collective theoretical contribution is characterized in *Sociological Justice* mainly as something to do with the effects a judge's breakfast has on his decision (*SJ*, p. 5), Karl Llewellyn (1960) provided perceptive ideas about the influences on judicial work of institutional steadying factors, period styles in judging, and professional "situation sense."

The claim that sociology replaces law becomes explicit as *Sociological Justice* progresses. Certainly, the expulsion of most forms of human life from the courtroom is advocated as a way of *preserving* legal processes in improved conditions. But the minimal effort made to explore the practicalities, limitations, and consequences of most proposals—and, indeed, the manifest implausibility of the assumptions that legal decisions can be more fairly and reliably made with less knowledge of the social circumstances in which they arise and to which they are to relate, and that the weight of evidence can be distinguished from assessments of the reliability of its sources—suggest that Black's heart is not in the enterprise of draining law of subjectivity. The last two chapters of the book confirm this idea. He proposes that the only real cure for law's failings is to minimize its scope. More explicitly than in his earlier writings (Black 1976: ch. 7), he proposes a kind of supervised anarchy, or perhaps a Nozick-style minimal state, as the way of the future, claiming, in terms reminiscent of Ehrlich, that a "minimum of law—even a complete absence—is not synonymous with chaos in modern life . . . but may actually bring about a heightened concern with trust, honor, and morality" (*SJ*, p. 86; cf. Ehrlich 1936:71).

Black's style never really allows for the expression of irony. Nevertheless, his exploration of radical reforms of legal processes designed to purify law's technical processes may be intended only to show how absurd law's pretensions are. Lawyers and most social scientists typically see discrimination as a cluster of distinct social problems (racism, sexism, ageism, etc.) to be addressed, often by means of law, but Black treats as discrimination all patterns of inequality and, therefore, considers it endemic in social life. Thus, in his view, law holds out an impossible dream of equal treatment.

[3] Compare, e.g., Black's assumptions about the relevance of race or ethnic origins of judges (*SJ*, pp. 32–33) with the generally negative research findings reported in Spohn 1990.

Since society cannot be changed by law, it is law which should give way. And since discrimination, inequality, and disparities of power and influence are natural, it presumably follows—though Black is not explicit—that law as government behavior should leave the "natural" social equilibrium of prejudices and dependencies, domination and subordination, privilege and deprivation in peace. Peace may not always be the result, and Black notes that law remains necessary to curb violence. But he believes that law also begets violence, because it reduces the motivation of community members to take responsibility for antisocial acts, and for dealing with offenders in their midst.

Although *Sociological Justice* seeks to be critical, it does not confront the faults and failings of law as a structure of institutions and doctrine. Rather, seeing behavior divorced from the institutions and ideas that give it meaning in legal contexts, Black's radicalism *avoids* legal issues. Co-ops are havens of collective self-help against the oppressions of governmental social control. They are not a means of building a more just or legally rational society, as a political project, but of insulating members against the need to participate in such a project. Again, Black's proposals for legal minimalism and his claims about the naturalness of discrimination suggest that his sociology of law has become an excuse to avoid any collective responsibility for promoting a more cohesive society through public institutions of government and law. This is remarkable given the mass of evidence sociological research has presented of the scale of inequality of life chances, and the sense of alienation thereby produced, in modern industrialized societies. Since Black fervently champions the discipline of sociology and its ever expanding knowledge (*SJ*, p. 103), it might be asked to what public use he thinks this voluminous research should be put.

Ultimately, the question of the supposedly value-free character of behavioral sociology of law reappears. Black's sociology aids lawyers and litigants in a position to choose freely their counsel. It might also aid criminals in choosing victims. It is employed to show the mythical character of the rule of law and the potential of law as governmental repression. Yet it does not seem concerned to examine rigorously the consequences that would follow for "have-nots" if law were to be replaced with near anarchy. Black's sociology emphasizes public power. Thus, he claims that the poor would not suffer greater victimization if law were reduced, since they are already often victimized by law enforcement agents and processes. But he makes no mention of forms of *private* power which law channels (through contracts, property, etc.) and, therefore, to some extent regularizes and makes predictable. Black's sociology does not explore the benefits, for the relatively powerless, of legal formality in the channeling process (e.g., Delgado 1987) or of the ability to invoke legal rights (e.g., Williams 1991:146–65). Nor does he address old questions of the repressive character of *Gemeinschaft*

relationships from which legal distancing provides some escape (Merry 1990:174–75), the intolerances of unfettered enforcement of community morality, or the vulnerability of those whose claims as participants in social life depend not on their significant legal status but only on the emotional responses or economic calculations of others.

Indeed, Black's sociology does not give credence to the idea that law itself holds out an important *promise* of nonrepressive community or solidarity embracing all citizens, even if the promise seems broken for many. Even if discrimination is endemic in social life, it does not follow that all forms of discrimination have the same essential character, causes, and conditions of existence and raise the same policy issues, nor that all are immune to legal control or influence. In short, behavioral sociology of law, as expounded in *Sociological Justice*, has a no less unbalanced agenda of priorities and preferences than does law itself. This may be because, in ignoring law's character as institutionalized doctrine, it cannot confront distortions in the social vision of this doctrine but merely substitutes its own.

III

The most significant part of the Durkheimian tradition may be excluded by Black's use of seemingly Durkheimian methods. While subscribing to a view of sociology as the scientific and, in some sense, value-neutral, study of social facts, Durkheim saw it also as a form of enlightenment. Moral concerns could never be far from the center of a science whose primary object was the study of society as a moral phenomenon. Indeed, the Durkheimian concern to identify moral foundations of modern secular societies that are dominated by instrumental reason is central to a recent revival of interest in Durkheim's substantive work among sociologists. Whereas, for Black, law and morality compete with and replace each other as modes of social control (Black 1976:107), for Durkheim they are mutually reinforcing and deeply interpenetrating. Unless treated as behavior, law, for Black, is merely abstract technicality, almost invisible to sociology. By contrast, Durkheimian law expresses real social bonds as an officially sanctioned form of morality. Thus, law as institutionalized doctrine does not disappear from sociological view. Durkheim's sociology makes questions about law's moral functions and grounding central, whereas for Black these questions are nonexistent.

For Durkheim, legal action is necessary to limit gross inequalities (especially of inherited wealth) in the interests of maintaining the balance of moral interdependence which constitutes social solidarity in modern conditions (cf. *RD*, p. 78). Law is a necessary means of providing the framework for and expressing this solidarity. Black's sociology does not examine whether solidarity could

exist in the near anarchy he proposes, nor whether the removal of law's flimsy efforts at promoting justice would only fuel even further the resentment of those excluded from life's benefits. By contrast, for Durkheim and some writers in a renewed Durkheimian tradition, a pressing issue is how to symbolize social unity and create for modern complex societies a moral framework in which regulation is effective and the regulated are able, in some way, to participate as moral actors in a solidary society that is more than an economic free-for-all.

Frank Pearce's *The Radical Durkheim* and the *Durkheimian Sociology* collection exemplify recent attempts to reinvigorate these aspects of the Durkheimian tradition. A major hurdle is to overcome, or at least bypass, the perceived defects of Durkheim's political sociology, especially its conception of state and law as largely unproblematic expressions of moral consensus. The essays in *Durkheimian Sociology* do not address law as such, but their relevance here is in illustrating ways in which modern writers are seeking to advance Durkheimian sociology. Many of the papers use Durkheim's ideas on ritual or the representation of moral unity through the sphere of the sacred. They address such matters as the symbolism of the French Revolution, the political cleansing process of the Watergate affair, the progress of modern revolutions, the sociology of friendship, mass strikes, and the presentation of reality by the mass media. Although these essays canvass many interesting ideas, they often give the impression that similar conclusions could have been reached and the structure of argument might not have been very different if no appeal to Durkheim's work had been made. The use of Durkheimian theories or concepts occasionally even seems contrived.

Two papers, those by Hans-Peter Müller and Randall Collins, stand out, however, as particularly thoughtful efforts to engage Durkheim's legacy and demonstrate its continuing relevance. Müller, in what is by far the most scholarly and theoretically rich contribution to the book, uses Durkheim's ideas on civil religion in exploring debates about "legitimation crises" in advanced capitalism. Like most other contributors, he follows the theme set by editor Jeffery Alexander that Durkheim's later work emphasizing the social functions of religion is fundamental to a renewal of Durkheimian sociology. The "new understanding of religious phenomena which emerged after *The Division of Labor*" (*DSCS*, p. 143) allowed Durkheim to portray the moral consciousness of modern societies in a new light. As Müller puts it: "The morality of family, friendship, and professional groups is infused with a contagious individualism which moves an abstract cultural ideal into the center of social life. There is, in short, a shift from rigid regulation via traditional religion and cultural system to open regulation via the institutional order. There develops a new distribution of moral competences through the different institutions of society. . . . Far

from leading to the loss of morality, then, functional differentiation and secularization lead in the late Durkheimian perspective to a moral decentralization of social life *and* to an intensive regulation of the differentiated institutions by specific morals" (ibid., p. 144).

Müller thus sees Durkheim as emphasizing complexity and differentiation in modern society and, at the same time, denying that this makes moral bonds unimportant. On the contrary, modern individualism presupposes and requires expression through moral bonds sustained by differentiated institutions, such as occupational groups. A coherent but complex moral structure of this kind is, in Müller's view, necessary for the legitimacy of a modern social and political order. Durkheim sketched the conditions for a modern society of solidarity: "a corporative society in which professional organization overcame economic anomie in the economy, welfare institutions combined economic efficiency with social justice in the polity, and democracy restructured communication and restored checks and balances throughout" (ibid., p. 146). Essential to such a structure, Müller argues, is the adherence of individuals to a moral community (ibid., p. 148).

While Müller's argument may seem distant from legal concerns, it shows a serious effort to argue that Durkheim's conception of morality in modern societies is more complex and sophisticated than the idea of an undifferentiated *conscience collective*. Morality is located in differentiated institutions and therefore linked to many different kinds of regulation and different types of regulated groups within society. It is, therefore, less monolithic than is claimed in many accounts of Durkheim's work. It would seem to follow that law as an index of morality may also be more complex, more differentiated, and perhaps more contradictory than the law-as-index thesis at first proposes.

Collins's essay takes on the seemingly unpromising task of revealing Durkheim as a theorist of social conflict. His strategy is the simple one of reading Durkheim's ideas on integration, consensus, and shared values as referring not to "whole societies" such as nation states but to " 'society' in its generic sense, as any instance of prolonged sociation, whatever its boundaries in space or in time" (ibid., p. 109). Thus, Durkheim's ideas on morality and social solidarity can be treated as defining the conditions of unity or cohesion of various collectivities within political societies. The cohesion of social classes can be considered in these modified Durkheimian terms. Collins's development of this idea seems simplistic, however, when he attempts to contrast middle-class organic solidarity with working-class mechanical solidarity, and it seems a distortion of Durkheim's ideas to suggest that they can provide the basis for a conflict sociology simply by turning their claims about social cohesion into claims about cohesive groups or classes engaged in confrontation with each other. Nevertheless, Collins moves imagina-

tively in a direction similar to Müller's in suggesting that Durkheim's theories can be used to emphasize moral and social diversity no less than uniformity.

Pearce's *The Radical Durkheim* also tries to save Durkheim from himself by applying his ideas to portray society as a complex of discourses, moral frameworks, and systems of action. Like Müller and Collins, Pearce thinks that Durkheim's writings provide some warrant for this strategy, although he recognizes that Durkheim often treats society as a monolithic "expressive totality" (*RD*, pp. 26, 106). Pearce's book is essentially a set of linked essays dealing with such matters as the divergent components of Durkheim's sociological outlook, his politics, aspects of his study of suicide, the origins and forms of the division of labor, and the relationships between Durkheim's view of modern society and Marx's. Pearce's avowed aim is to enlist a "modified Durkheimianism" to develop a conception of a feasible democratic socialist society, which seems to mean here a society combining individualism with reinvigorated democratic traditions and conditions of community, which entail a sense of participation and "belonging" drawing society's members into a moral commitment to each other. The appeal of Durkheim for Pearce (as for Müller) is precisely his stress on the constructive moral foundations of social order and his recognition of the complexity of moral conditions in modern Western societies and the need for diverse institutional locations for moral bonds.

The Radical Durkheim returns us directly to law since two of its chapters specifically concern Durkheim's ideas on the subject. Pearce boldly suggests that the relevance of the Durkheimian tradition today must be found in the substance of what Durkheim has to say about links among law, morality, and society, rather than through any generalized appeals to a Durkheimian positivist methodology in social research. Indeed, Pearce shows convincingly that Durkheim's outlook on sociology is too complex and multifaceted to be appropriately summarized in the package of protocols of research to which the term "Durkheimian methods" is often attached. Durkheim's work contains, for example, explicit or implicit critiques of empiricism, methodological individualism, positivism, theoreticism, and metaphysical conceptions of society (*RD*, p. 19). The "brilliance" of Durkheim's outlook is in its "feel for the power of the social," while its fundamental failings are the tendency to treat society as a sentient being and the belief in a separable social essence and in societies as "unities of complex wholes" (ibid., pp. 19, 25). For Pearce, Durkheim's work consists of a variety of "intersecting discourses," often mutually contradictory but allowing the possibility of development. Trying to read Durkheim constructively, he does not hesitate to use Durkheim's concepts in ways that might have startled their originator.

Pearce tries to trace Durkheim's earliest views on law. He

looks beyond the familiar texts to rely heavily on an 1887 essay on the "Positive Science of Morality in Germany" which discusses the ideas of the German jurist Ihering (Durkheim 1986). Here Durkheim explains, apparently with approval, Ihering's view of relationships between law and force. "In origin, law is nothing but force limiting itself in its own interest" (ibid., p. 351). Peace treaties are early forms of law. Insofar as the victor could destroy the vanquished but considers it unprofitable to do so, these treaties consist of "rules which restrain the power of the victor; doubtless, it is the victor who imposes this on himself, but nevertheless law benefits the vanquished" (ibid., p. 352). Thus, force precedes law but becomes subordinated to it and serves it. Law is coercive, but its positive aspects are to be stressed. Further, if law fails to maintain the social balance (the "peace treaty") which is its ultimate raison d'être, "force, instead of letting itself be regulated by the law, could overturn it to create a new version of it" as in a revolution (ibid., p. 352). In Pearce's view, if Durkheim had followed this "Hobbesian conceptualisation" of the relationship between law and force in his later work and emphasized conflict and power in social change "he might have developed a more adequate theory of law" (*RD*, p. 108).

It is, however, by no means as clear as Pearce seems to think that Durkheim accepted Ihering's positions in this early paper. Not much evidence suggests an early Durkheimian position contrasting strongly with that of the later writings. Consequently, Pearce's discussion is more productive when it seeks constructive elements in Durkheim's later views on law, punishment, and legal evolution. Research now suggests that repressive measures are typically *not* the predominant form of social control in what Durkheim termed *societés inférieures*, and compromises and restitutive measures prevail, but Pearce cites modern anthropological arguments that collective action of a severely repressive kind (expulsion or execution) is used in technologically simple societies against gross violators of community norms or against recidivists (ibid., 96–97). According to Sally Falk Moore, while Durkheim may have greatly overestimated the scope of repressive law and its significance in the general life of simple societies, "he was right about the larger picture, the existence of ultimate penalties for the source of group disruption, the trouble maker, the individual who will not conform" (Moore 1987:124). In some ancient societies possessing legal codes Durkheim's primary error, Pearce suggests, was in failing to recognize the limited role of law as one form of social control, alongside informal social controls based in the extended household structure (*RD*, p. 94). But Durkheim was not wrong to believe that the possibility of punishment of gross violators of certain social norms of basic collective concern is fundamental to the moral constitution of early or simple societies.

This conclusion certainly does not vindicate Durkheim's hy-

potheses about legal evolution; Pearce is right to stress that legal development is related to political and organizational factors that Durkheim considers only to a very limited extent. But Durkheimian sociology properly drew attention to the general sociological importance of the idea of responsibility. "Every collectivity will impose obligations on its members and impute to them the capacity for responsibility" (ibid., p. 97), presumably symbolized most powerfully in the treatment of those who most blatantly reject responsibility. What is most significant in Durkheim's legal sociology is not any claims it may make about the specific character of legal regimes in particular phases of social development but the development of the idea of institutionalized social responsibility, which Pearce calls the "juridical relation." The juridical relation "is endemic to social order itself" and refers "not so much to formal legal relations but rather to the ways in which individuals are held responsible for their actions" (ibid., p. 99). "It is only if individuals are, on occasion, considered responsible for their actions that they are recognized as personalities; thus punishment can rejuridicalize subjects" (ibid., p. 101).

The idea of the juridical relation remains vague, but what Pearce is attempting through its use is the recovery of Durkheim's ideas about links between punishment and the moral constitution of social groups or societies (cf. Garland 1990:68; Fauconnet 1928:227) and about the symbolism of the relationship between individual and group provided by the formal attribution of responsibility.[4] The project is to recover these insights without being ensnared by Durkheim's legal evolution thesis or by his failure to follow through Ihering's insights about relationships between law and power. Pearce's efforts along these lines are in tune with the general emphases of Durkheim's sociology and constructive in opening up important sociological questions about moral foundations of social life, expressed through legal ideas including those of responsibility. But Pearce does not go far enough, since he fails to explain the relationship between these ideas about responsibility and Durkheim's more specific discussions of law. He apparently thinks that we can applaud a Durkheimian sociology of responsibility as quite distinct from a Durkheimian view of law which is unacceptable because of its remarkable neglect of questions of power and conflict. Following this approach, however, the dilemma of why Durkheim provided such a seemingly inadequate account of law remains impossible to solve.

Durkheim's view of law, therefore, requires further clarification and elaboration. One method of providing this may be through efforts, such as those of Müller and Collins, to explore the

[4] Pearce does not cite Paul Fauconnet's (1928) Durkheimian study of responsibility that, however, similarly asserts the importance of the attribution of responsibility among the mechanisms by which a society is morally constituted.

ambiguities of Durkheim's conceptions of moral unity and solidarity and thereby show their relevance in considering political tensions and conflicts. By this means law might be presented as expressing moral diversity as much as any moral unity of a society. It is also necessary, however, to rescue Durkheim's concepts of restitutive and repressive law from the mass of critical interpretation and testing they have received. Restitutive law should not be conflated with arbitration or mediation (cf. Schwartz and Miller 1964), the prevalence of which in early and simple societies Durkheim well recognized. Durkheimian law does not need a state, but it does need a guarantee produced by "the very conscience" of the society in which it exists—in other words, by the fact that members of the society at large "feel linked together in the struggle for existence" (*DL*, p. 149). Hence, localized dispute resolution, however fundamental to social control, is not enough to satisfy Durkheim's criteria of restitutive law. This law depends on and reinforces stable relationships between diverse structural components of a society. It requires and expresses a relatively complex pattern of social organization. Georges Davy's (1922) Durkheimian account of the origins of contractual bonds is interesting in this context, since it argues that contract law evolves from public law sources in the constitutional relationships between social groups and family structures. Restitutive law is much more than dispute resolution in specific exchange relationships or local conflicts.

Again, as regards repressive law, it has been claimed that Durkheim mistook the character of early forms of law; in emphasizing the prevalence of penal law and repressive sanctions in simple or ancient societies, he failed to see that "crimes" in these societies are often dealt with by restitutive measures (Sheleff 1975). But, in fact, Durkheim himself notes this state of affairs (*DL*, p. 64). He sees "private punishment"—in which the punishment of serious wrongs is left to private initiative— as lying on the boundaries of both repressive and restitutive law (*DL*, p. 66). But he insists that criminal punishment, as such, did not originate in private vengeance or compensation by which many individual wrongs more undoubtedly redressed (*DL*, p. 157). Its wholly different source was in prohibitions presupposing a sense of the social group's moral identity. The redress of wrongs to individuals remained "on the threshold of the criminal law" (*DL*, p. 127) in early or simple systems. Only later were some of these wrongs pulled into the orbit of a conception of crime established from essentially religious origins. Thus, Durkheim does not claim that wrongs to individuals in simple or ancient societies are dealt with by penal sanctions. The claim is that penal, repressive sanctions relating to individual, interpersonal wrongs gradually develop as a concern for the integrity of the individual and relations between individuals become matters for society as a whole. Presumably it is at that stage that we begin to observe tariff systems of social control

(sometimes specifying exact redress to the victim for wrongs done) as law struggles to assert social control and moral hegemony over matters previously dealt with by feud or negotiated compromise. For Durkheim the eras before these developments are ones in which "society" exists, if at all, only as the abstract idea of an undifferentiated community, not in complex relations between individuals. Hence, the earliest law, as he understands it, would not be concerned with individual wrongs but with the moral definition of this undifferentiated community.

My aim in making these points about Durkheim's conception of law is not to defend his legal evolution thesis. Rather it is to show that the concepts of restitutive law and repressive law are developed in such a way as to build into them, by definition, the moral components of social solidarity which Durkheim seeks to illustrate through their use. His concepts of restitutive and repressive law are intended to identify generalized legal forms or expressions of certain idealized forms of moral cohesion possible in societies. They are not devised primarily as empirical generalizations about actual legal systems but are efforts to express, with the aid of legal concepts, certain abstract and elusive moral bonds that are sociologically possible (that is, capable of being experienced as actual social relationships) in particular historical conditions. In writing about law, therefore, Durkheim is usually searching for material clarifying the character and conditions of existence of these moral bonds. Since his treatment of law serves this purpose and *not* that of a full account of the political reality of law, his lack of attention to that wider political reality, including especially the elements of power and conflict fundamental to law, is less surprising than it otherwise seems.

A further conclusion follows. Because of the way repressive and restitutive law are conceived by Durkheim, his sociology of law, in some of its most important aspects, does not allow the kind of empirical testing that has often been attempted on it. Pearce goes too far in claiming that Durkheim's mode of investigation and explanation is, by its nature, "unlikely to produce empirical knowledge" (*RD*, p. 17). Many important empirical claims are made in Durkheim's writings on law. But his most important propositions about the general character of law are not set out in a form that positivist sociology can easily test. Rather, as has been seen, Durkheim takes from the historical materials of law suggestive elements relevant to his claims about the moral character of social life. Certain aspects of law become, for him, the key to something that positivist method cannot reach—the condition of responsibility arising from interdependence of individuals or their commitment to a community. When he wrote of treating law as a social fact, he did so because he wished to claim that the methods of science (as he understood them) could be harnessed to the exploration of moral problems. But after *The Division of Labor*

(Durkheim 1984) was published, the idea of measuring the incidence of types of law in order to observe patterns of social solidarity was largely replaced in Durkheim's work by a more general idea that legal doctrine and institutions in their complexity and variety are integral to the moral life of society, which sociology must understand.

For some critics, the detachment of Durkheim's legal studies from the ambit of positivist legal sociology might be enough to condemn them. But Durkheim can be read as a different kind of theorist of law from the empirical sociologist of legal and penal evolution that many have tried to find in him. He can also be read as an empirically minded social philosopher considering what links among law, individuality, and communal interdependence are *possible*, and what the conditions might be for law to function as an instrument and expression of community or social solidarity, given the diverse moral milieus of modern societies. Tentative and inconclusive as any such project of rereading Durkheim's work on law may be at present, it at least has the merit of keeping to the fore what may be Durkheim's most significant quality: his single-minded search for a sociological grounding for moral bonds in societies which, to many observers, appear to have become far too complex, chaotic, secular, and atomistic for any such moral frameworks to exist.

REFERENCES

BARNES, John A. (1966) "Durkheim's *Division of Labour in Society*," 1 *Man* 158.

BLACK, Donald (1972) "The Boundaries of Legal Sociology," 81 *Yale Law Journal* 1086.

——— (1976) *The Behavior of Law*. New York: Academic Press.

——— (1984) "Social Control as a Dependent Variable," in D. Black (ed., 1 *Toward a General Theory of Social Control*. Orlando, FL: Academic Press.

CARBONNIER, Jean (1978) *Sociologie juridique*. Paris: Presses Universitaires de France.

COLLINS, Randall (1981) "The Normalcy of Crime," in R. Collins, *Sociological Insight: An Introduction to Non-obvious Sociology*. New York: Oxford University Press.

——— (1988) "The Durkheimian Tradition in Conflict Sociology," in J. C. Alexander (ed.), *Durkheimian Sociology: Cultural Studies*. New York: Cambridge University Press.

COTTERRELL, Roger (1986) "Law and Sociology: Notes on the Constitution and Confrontations of Disciplines," 13 *Journal of Law and Society* 9.

DAVY, Georges (1922) *La foi jurée—étude sociologique du problème du contrat: la formation du lien contractuel*. New York: Arno Press (reprint 1975).

DELGADO, Richard (1987) "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" 22 *Harvard Civil Rights–Civil Liberties Law Review* 301.

DURKHEIM, Émile (1957) *Professional Ethics and Civic Morals*. Trans. C. Brookfield. London: Routledge & Kegan Paul.

——— (1976) *The Elementary Forms of the Religious Life*. 2d ed., trans. J. W. Swain. London: George Allen & Unwin.

——— (1982) *The Rules of Sociological Method and Selected Texts on Sociology and Its Method*. Trans. W. D. Halls. London: Macmillan.
——— (1984) *The Division of Labour in Society*. Trans. W. D. Halls. London: Macmillan.
——— (1986) "The Positive Science of Morality in Germany," trans. F. Pearce, 15 *Economy and Society* 346.
EHRLICH, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Trans. W. L. Moll. New York: Arno Press (reprint 1975).
ERIKSON, Kai (1966) *Wayward Puritans: A Study in the Sociology of Deviance*. New York: Wiley.
FAUCONNET, Paul (1928) *La responsabilité: étude de sociologie*. 2d ed. Paris: Félix Alcan.
GARLAND, David (1990) *Punishment and Modern Society: A Study in Social Theory*. Oxford: Oxford University Press.
GIDDENS, Anthony (1986) "Introduction," in A. Giddens (ed.), *Durkheim on Politics and the State*. Cambridge: Polity Press.
GRABOSKY, Peter N. (1978) "Theory and Research on Variations in Penal Severity," 5 *British Journal of Law and Society* 103.
GRIFFITHS, John (1984) "The Division of Labor in Social Control," in D. Black (ed.), 1 *Toward a General Theory of Social Control*. Orlando, FL: Academic Press.
LENMAN, B., and G. PARKER (1980) "The State, the Community, and the Criminal Law in Early Modern Europe," in V. A. C. Gatrell, B. Lenman, and G. Parker (eds.), *Crime and the Law: The Social History of Crime in Western Europe since 1500*. London: Europa Publications.
LLEWELLYN, Karl N. (1960) *The Common Law Tradition: Deciding Appeals*. Boston: Little, Brown.
LUKES, Steven (1973) *Émile Durkheim—His Life and Work: A Historical and Critical Study*. Harmondsworth: Penguin Books.
MALINOWSKI, Bronislaw (1926) *Crime and Custom in Savage Society*. London: Routledge & Kegan Paul (reprint 1978).
MERRY, Sally Engle (1990) *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*. Chicago: University of Chicago Press.
MOORE, Sally Falk (1978) *Law as Process: An Anthropological Approach*. London: Routledge & Kegan Paul.
MÜLLER, Hans-Peter (1988) "Social Structure and Civil Religion: Legitimation Crisis in a Late Durkheimian Perspective," in J.C. Alexander (ed.), *Durkheimian Sociology: Cultural Studies*. New York: Cambridge University Press.
NELKEN, David (forthcoming) "The Truth About Law's Truth," in A. Febbrajo, D. Nelken, and G. Teubner (eds.), *European Yearbook in the Sociology of Law*. New series. Vol. 2. Milan: Giuffre.
NEUMANN, Franz L. (1986) *The Rule of Law: Political Theory and the Legal System in Modern Society*. Leamington Spa: Berg.
SANDERS, Joseph (1990) "The Interplay of Micro and Macro Processes in the Longitudinal Study of Courts: Beyond the Durkheimian Tradition," 24 *Law & Society Review* 241.
SCHWARTZ, Richard D., and James C. MILLER (1964) "Legal Evolution and Societal Complexity," 70 *American Journal of Sociology* 159.
SHELEFF, Leon S. (1975) "From Restitutive Law to Repressive Law: Durkheim's *The Division of Labour in Society* Revisited," 16 *European Journal of Sociology* 16.
SPITZER, Steven (1975) "Punishment and Social Organization: A Study of Durkheim's Theory of Penal Evolution," 9 *Law & Society Review* 613.
——— (1979) "Notes Toward a Theory of Punishment and Social Change" in R. J. Simon and S. Spitzer (eds.), 2 *Research in Law and Sociology*. Greenwich, CT: JAI Press.
SPOHN, Cassia (1990) "The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities," 24 *Law & Society Review* 1197.
STINCHCOMBE, Arthur L. (1977) Review Essay: Lawrence M. Friedman, *The Legal System* and Donald J. Black, *The Behavior of Law*, 12 *Law & Society Review* 129.

TEUBNER, Gunther (1989) "How the Law Thinks: Toward a Constructivist Epistemology of Law," 23 *Law & Society Review* 727.
WILLIAMS, Patricia J. (1991) *The Alchemy of Race and Rights: Diary of a Law Professor*. Cambridge: Harvard University Press.
WIMBERLEY, Howard (1973) "Legal Evolution: One Further Step," 79 *American Journal of Sociology* 78.