

## LAW SCHOOL "LAW" AND SOCIOLEGAL RESEARCH

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Whether and how to carry out interdisciplinary inquiries between law and the social sciences is a problem that has bedeviled the legal academic community for some years.<sup>1</sup> Perhaps it also bedevils the social science community. One senses that the law people gaze at social scientists in envious anticipation that they may have some insights (causal theories and explanations) that will make more manageable the law's burdens of social stabilization and implementation of social goals. The social scientists meanwhile gaze at the law in contemplation of its plenitude of underexamined phenomena that might be illuminated by the light that social science has generated, or would like to generate. There is also the point that law and social science have a common subject matter and that law people and social scientists find themselves interested in many of the same problems. Hence the mutual attractions.

Despite the mutual attractions, a marriage has yet to occur. It seems likely that it never will, given the very different interests that preoccupy law schools and social science departments. Yet a "relationship" seems possible and desirable, and this essay is written on that widely shared assumption. From that point of departure the question becomes, "What are the barriers?" Many have already been identified: status rivalry within and between disciplines; poor interdisciplinary communication; inadequate theoretical foundations in both law and social science; etc. One factor often identified is the divergence of professional and intellectual responsibilities and aims as between law schools and departments of social science.<sup>2</sup> This paper seeks to articulate some of the differences in intellectual style and outlook involved in that divergence, concentrating attention on the milieu of the law schools. A related aim is to suggest that a shift of emphasis in

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<sup>1</sup>The most recent efforts to consider these problems are the *Symposium on Social Research and the Law*, 23 J. LEGAL ED. 1 (1970), and the *Symposium on Some New Concerns of Legal Process Research with Political Science*, 6 LAW & SOC. REV. 9 (1971). A particularly suggestive discussion is in Harry Kalven's paper, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in LAW IN A CHANGING AMERICA 56 (G. Hazard ed. 1968). Most of this paper is the product of reflecting on these sources.

<sup>2</sup>The most succinct characterization of this divergence I have seen is Ohlin, *Partnership with the Social Sciences*, 23 J. LEGAL ED. 204 (1970).

what *law schools conceive themselves to be doing* as professional schools might reduce the divergence of aims. Such a reconceptualization could thereby facilitate the integration that has so long been sought.

### *Law Schools as Law Offices*

To state the diagnostic point quickly if elliptically, the difficulty with basing sociolegal research in law schools is that the law schools are preoccupied with the study and teaching of law as a professional discipline. Effectively performing these responsibilities creates an environment that is in many respects hostile to the pursuit of sustained research of a scientific or theoretical character. There are some related distractions present in many law schools, notably the opportunity for law faculty to engage in private legal consultation and the widespread practice of recruiting law faculty to help government, including university government. The distraction of private practice need not be elaborated. Service to government, like private practice, involves commitments of time, maintenance of areas of confidentiality, and assumption of responsibilities for practical results. It also inevitably involves commitments to policy positions, and faithfulness to sources of support for those positions, that make it difficult to consider the policies *de novo* from the external perspective that the scientist or theoretical analyst endeavors to adopt. This difficulty is not unique to the law schools, for it is now clear that members of such disciplines as economics, physics, and statistics become to some extent politicized when they undertake not merely to explain social reality for an audience at large but to give advice about how to change that social reality. This politicizing effect is ever present in the law schools, however, given the pragmatic activities in which their faculties are typically engaged.

Even if these distractions did not exist, however, the law schools would be relatively inhospitable environments for sociolegal research. This is because as law schools they are supposed to give their students the basic intellectual equipment required to engage in being lawyers and to pursue doctrinal research in the law. I believe the roles involved in performing these functions tend to be in conflict with a successful role in sociolegal research.

The lawyer's pragmatic outlook is characteristically involved even in the doctrinal research that traditionally has been the scholarly work of law school faculties. Doctrinal research in law, while not inherently incompatible with a scientific or theoretical

approach to research in law, works out that way in practice. The doctrinal analyst at work usually tends to perform a major judgmental function with regard to his material, as a method of shorthand if nothing else. In crude and direct form, the judgmental task is performed through the medium of such terms as "wrong," "failure to take account of," or "lacking adequately principled justification." Implicit in such judgments is the assertion that some adaptation other than the one actually made by the court/agency/legislature would have been more consistent with established understandings as to right and wrong or with prudent estimates of the public interest. In more subtle form, the task is performed by making selective choice and synthesis among the available doctrinal sources in such a way as to state the law as "really" being consistent with more or less explicitly stated conceptions of right and wrong or the public interest. In either event, the observer by his procedure of interpretation has become an active participant in the behavioral transaction—the formulation of legal rules—that he is undertaking to report. Indeed, he is often *expected* to do this as a law person because omitting to do so would be an unlawyerlike failure to "resolve" the problem under consideration.

Hence, even the process of "conventional" legal research, *i.e.*, doctrinal analysis, has within it a heavy component of the lawyer's professional technique—that of "resolving" legal problems. The idea of "resolving" legal problems is central to conventional legal education in American law schools. The process consists of purging the uncertainties posed in the law's value-laden dilemmas by clarifying or restructuring those dilemmas in such a way as to eliminate or to at least reduce uncertainty about them to the point where a decision that resolves them can comfortably be made. The technique of clarification and reconstruction with a view to reaching a practical decision is what the legal process is all about—as Harry Kalven has said of trials, a "system for managing doubt."

### *The Legal Educational Process*

Introduction to this professional technique is what the conventional law school is all about. The courses taught in first-year law school are prototypical. These courses—torts, property, contracts, and procedure—center on some fundamental dilemmas of the law. The dilemmas to which they are respectively addressed are those arising in pursuing courses of action that may harm others; in differentiating between "mine" and "thine" in domin-

ion over material things; in creating voluntary obligations; and in reaching decisions when the evidence is inadequate. These dilemmas, and all other legal problems, are *legal* dilemmas—problems requiring some kind of ultimately authoritative resolution—precisely because in their intricacy there is no feasible way to resolve them by merely factual, logical, or consensual procedures. The law consists of a variety of devices to accomplish this task by something a little more appealing than naked force or fiat. To know the law is to be familiar with these devices.

Law school is not only the place where these devices are taught, but is also the vocational and intellectual nursery of the faculty which teaches them. With relatively few exceptions, law school faculty members are themselves products of an education in which mastery of these devices was their salient intellectual/emotional experience. The education that most law faculty members have received consists of liberal undergraduate education and professional legal education. "Liberal" undergraduate education neither aims at nor succeeds in socializing students to any particular vocational role or viewpoint. Undergraduate training in social or natural science may have had the effect of inducing a scientific outlook in a student, but few students who really internalize the scientist's outlook thereafter abandon science for law, let alone thereafter travel the course into law teaching. At the same time, relatively few law teachers have had any advanced training in which the legal process is viewed in purely scientific or theoretical terms. Hence, the outlook of law faculties is predominantly the result of the intellectual orientation and professional socialization characteristic of the very teaching process in which they themselves later become engaged.

The teaching process in conventional legal education creates an emotional counterpart to the problem-solving orientation of the legal process itself. The law student is required to proceed on his own in study and in class and to be a solo diagnostician and interventionist in the problems under consideration. His sense of doubt is heightened by his isolation as a more or less anonymous member of a large group, by the intense competition implicit in the use of identical assigned materials, and by severe rationing of positive reinforcement in the form of praise or confirmation from the teacher. The total effect is of a highly uncertain subject matter being explored in a highly uncertain setting.<sup>3</sup> At the same

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<sup>3</sup>See Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971), and references cited therein.

time, both subject matter and situation are presented as amenable to resolution with a double payoff. First, the legal problems in the courses are "solved" through manipulations of the questions and possible answers in such a way as to fall within limits of legitimacy and expediency determined by the teacher. Second, mastery of this process of manipulation solves the student's situational problem because it gives him a method of analysis, a vocabulary, and a more or less combative style of personal interaction with which to cope with problematic situations. Moreover, and of equal importance, both the solutions to the legal problems and the technique of solving the situational problem are evolved over a very short time span. The legal problems are investigated and resolved in "cases" that are given relatively few hours of consideration and sometimes are disposed of at the rate of several an hour. Whole subject matters are regarded as exhausted after a year or even a few months of treatment.

Mastery of the technique is often called "analytical rigorosity." Whatever it is called, the technique is indispensable in most forms of law practice and at least highly useful in all of them. Since law schools are places whose principal function is the intellectual training and emotional preparation of students for the practice of law, teaching the technique is entirely appropriate. And because the technique must be passed on to succeeding generations of law students, proficiency in it is appropriately a necessary qualification for membership on law school faculties.

The members of law school faculties spend their teaching time engaged mostly in the exemplification and stimulation of this technique. The technique continues to be used throughout the three years of law school, and is carried over into small group teaching situations, even though its usefulness rapidly diminishes. In small group situations, its form is modified to the extent that somewhat more limited subject matter is pursued somewhat more intensively and the medium of student expression is shifted from talk to writing. The procedure in approaching problems, however, remains essentially the same: a problem is defined as an encounter that a legal practitioner might have; the thing to be done with the problem is to "solve" it; and the method for solving it is to work out some seemingly fair way of allocating the risks of error, uncertainty, and irregularity among those involved in the encounter. The successful teaching-learning experience is one in which this task is performed quickly and with a sense of self-assurance.

This is not all that all law schools do all the time. All law schools have faculty who have other teaching procedures and modalities. All have courses and programs that depart from the type described either in the direction of more lifelike clinical involvement, or in the direction of inquiry and study more comparable to the style of scientific or theoretical research and scholarship. Some law schools have a faculty whose teaching duties are sufficiently light that they are more or less free of the domination of teaching over their vocational identity. Nevertheless, the conventional law school teaching process largely establishes the character of the law school as an institution. It determines what most of the students do most of the time they are at work, and it fixes their reward system. It also does the same thing for the faculty.

### *The Lawyer's Frame of Reference*

Maintenance of this milieu has great practical utility, as the ubiquitous employment of lawyers attests. Yet it also involves a peculiar and limiting frame of reference. Concepts of relevancy in the law are tailored to formulating and deciding problems in the short range and in terms of the defined responsibilities that are implicit in the way a "legal problem" confronts a lawyer: "Who has to pay?" or "How can that be done most expeditiously?" The verbal manipulation involved in legal analysis and the rhetorical devices characteristic of legal argument often serve to distort or obscure a problem, so as to make its resolution in a particular way more apparently easy or palatable (or, conversely, impossible or totally repugnant). Above all, it is assumed that the problems of the law are to be confronted from the situation of the active practitioner and within the severe time limits under which he must work.

The lawyer's role of course varies according to what kind of lawyer is being thought of in relation to the "legal problems" under consideration: there are very many lawyer roles. The range runs from small town practitioner to government functionary to captain of industry and cabinet officer. Common to all concepts of the role, however, is the element that the occupant of the role has a responsibility for making a reasonable and practical recommendation for taking immediate action to dispose of a problem. Putting the point differently, while problems of law are simultaneously problems of history, philosophy, politics, economics, social relations, and psychology, "legal problems" are "legal" by virtue of the role outlook from which lawyers regard them.

It is quite evident that "legal" problems can be looked at in some other ways. They can be thought of as puzzles for social science and philosophy, as indeed they are by the social scientists and thinkers who decide to study them.

If the law schools are to analyze and investigate problems of law in a way congenial to the methodology of social science, they can most readily do so if the frame of reference in which these problems are considered is more nearly like that of the social scientist. But such a change in frame of reference cannot be made at the expense of introducing confusion or conflict into the professional training process in which the law schools are principally engaged. The question, then, is whether problems of law can be thought of in some way that makes them at the same time "relevant" to the process of legal education and susceptible of investigation according to the tempo and methodological imperatives inherent in science. The key to such a reconceptualization is to recognize that "the law" in law school has to be approached from the lawyer's role-viewpoint—but to consider whether that viewpoint can be redefined. The remainder of this essay suggests such a redefinition.

#### *Law as a Problem of Administration*

A rule of law, or a set of rules of law such as "the law of contracts," may be conceived of as the normative skeleton of an administrative system designed to realize the goals and to recognize the constraints specified or implied in the rule. This is the way an administrator would think of a rule of law that he is charged with implementing. Such an outlook or frame of reference resembles the lawyer's as conventionally conceived, in being result-oriented and entailing personal responsibility for making decisions. At the same time, a "good" administrator is concerned not merely with clarification and pronouncement of a rule and conjectures about its effects; he is concerned comprehensively with knowing and understanding the operation of the rule in its context, its collateral effects, and the factors that facilitate or impede its desired implementation. Of equal importance, he is concerned with a rule's consequences considered in quantitative terms and from a long range perspective. The dimensions of his needs for knowledge, ideally, are as comprehensive and of as high an order of precision as is permitted by available techniques for acquiring knowledge.

A legal problem thought of as an administrative problem is susceptible of analysis along something like the following lines:

1. What are the goals that are explicitly or implicitly sought to be realized through the rule or set of rules in question? What are the constraints that have to be reckoned with?

2. What is the situation of various people involved with the rule's operation in the context in question? Who are they, what are their relations to each other, what are their perceptions and expectations in the situation, what will they probably try to get for themselves out of the transaction?

3. What material resources are available—money, who has it, who wants it, how can it be used efficiently, can more be made available somehow?

4. What are the ideals and ideologies that have to be taken into account in working out a program? What constituencies have to be consulted or mollified?

5. What is the information flow among the participants, including the flow of information to the legal tribunal or body that may ultimately assess the situation?

6. What kinds of control and responsibility can be expected to be exercised by various persons, or by anyone, in the situation?

This list is indicative rather than exhaustive, but may serve to suggest the kind of thing that is involved. The questions presented are ones often asked about legal problems, but it seems unconventional to ask all of them as a matter of standard inquiry. To ask such questions is to reveal the administrative program implicit in a rule of law, or at least to indicate what must be known to discover what that program is or indeed whether there is any such program. To answer them requires formulation of theories about social relationships and the development of techniques of investigation that are comparable in generality and susceptibility to quantification to the theories and techniques that are the implements of social science. Both questions and answers involve dimensions of scale, time, and immediate responsibility for taking action that are much broader than "law practice" as traditionally conceived from the work of the social scientist and theorist but which are inherent in the administrative viewpoint I have tried to describe. Hence they provide an agenda that could be vocationally and intellectually relevant to the concerns of both social scientists and legal professionals. Such studies as those of Albert Reiss concerning police field practices,<sup>4</sup> Leon

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<sup>4</sup>A. REISS, *THE POLICE AND THE PUBLIC* (1971).



Mayhew concerning enforcement of anti-discrimination laws,<sup>5</sup> Alfred Conard and his associates concerning automobile reparations,<sup>6</sup> and Stewart Macauley concerning automobile dealer-manufacturer relations<sup>7</sup>—to cite only illustrative instances—thus appear with equal verisimilitude to be the professional work of a social scientist and that of an analyst of the law's administration.

The discrepancies in aims, methods, and responsibilities that have interfered with relationships between law and social science seem, on this view of the matter, to be minimal or nonexistent. Whatever impediments remain to the integration of legal analysis and social science and social theory are ones about the nature of man and his response to legal governance.<sup>8</sup> Perhaps the next step is to begin explication of those premises.

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<sup>5</sup>L. MAYHEW, *LAW AND EQUAL OPPORTUNITY* (1968).

<sup>6</sup>AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (A. Conard ed. 1964).

<sup>7</sup>Macauley, *Changing a Continuing Relationship Between a Larger Corporation and Those who Deal with It: Automobile Manufacturers, Their Dealers, and the Legal System*, 1965 *Wis. L. Rev.* 483.

<sup>8</sup>See, e.g., S. LIPSET & E. LADD, *ACADEMICS, POLITICS AND THE 1972 ELECTION* (1973); S. LIPSET & E. LADD, *PROFESSORS, UNIONS AND AMERICAN HIGHER EDUCATION* (1973); Lipset, *Academia and Politics in America*, in *IMAGINATION AND PRECISION IN THE SOCIAL SCIENCES* 211 (T. Nossiter ed. 1972).