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Lawyers and Social Scientists - Guiding the Guides

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LAWYERS AND SOCIAL SCIENTISTS — GUIDING THE GUIDES

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"THE LAWYER and the judge and the juryman are sure they do not need the experimental psychologist. . . . They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more; and if the time is ever to come when even the jurist is to show some concession to the spirit of modern psychology, public opinion will have to exert some pressure." [1] So wrote Hugo Münsterberg in 1908. I doubt that this slap was deserved by the legal profession. But Münsterberg was ahead of his times, and the law — with ancient prudence — likes to remain a bit behind the times. That useful barometer of the law profession's excitements, the Index of Legal Periodicals, however, shows that presently the lawyer, though lagging, was no laggard in his interest in what the psychologists were saying. The Index for the years 1886 to 1899 shows only a handful of articles concerning the relation of psychology to law,[2] whereas the Index for the period 1908 to 1922 embraces a heading, "Psychology," under which fifty-three articles appear.[3] The Index today shows this many articles appearing yearly in law journals. This, I think, is a sort of "discomfort index" denoting contentions and tensions with reference to the relationship of the two fields, an energetic expression at once of dissatisfaction with, and hope for, that relationship — and above all, a deluge of proposals concerning it.

One more symposium — one more set of proposals. One feels a certain ennui at hearing popped again the old question of how social scientists can help guide legal processes. And one feels a timorousness

* The following four articles are adapted from addresses given by the four writers before the American Psychological Association at their convention in Cincinnati on September 7, 1959.

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1. MÜNSTERBERG, ON THE WITNESS STAND, 10 (1908).
2. JONES, AN INDEX TO LEGAL PERIODICAL LITERATURE (1899).
3. CHIPMAN, AN INDEX TO LEGAL PERIODICAL LITERATURE (1924).

in daring to cook up any more answers — answers which, like most answers so far, may damn all the other answers as impracticable and then go on to urge new impracticabilities — and always lubricated with those sickeningly slick subjectives, "would" and "could."

In much of the literature which concerns the question we have come here to answer today this character of unreality is heightened by caricatures both of social science and of our legal system which have unwittingly been made. The impression has occasionally been given that our psychologists, for example, are in possession of a vast mass of data which they have long since unanimously and irrevocably verified, susceptible of ready application in the resolving of human conflicts.[4] The law, on the other hand, is pictured as unchanging and unchangeable and wedded to ancient science. And it is hinted that our legal system itself is an anachronism.

A fairer estimate of the two disciplines would show that psychologists (as that group of social scientists chiefly interesting us at this symposium) do not speak with one voice on many questions which are of interest to the law.[5] And experience has shown the lawmaker that on some occasions when they and other social scientists have spoken with a degree of unanimity, these conclusions have been disturbingly tentative.[6] And it would also be seen that our law has been a far from static thing and that a most remarkable feature of it has been its acceptance—in due course—of new social fact.[7]

A third reason why an atmosphere of unreality sometimes surrounds our subject is because a high percentage of the writings which have really had as their aim the bringing of law and the social sciences

4. See Frank, *The Place of the Expert in a Democratic Society,* 16 PHIL. OF SCI. 3, 11, 12, 13 (1949). Judge Frank put his finger upon another factor contributing to unrealism in the relationship between law and social sciences when he said: "Thanks to the social scientists' obsessive desire to imitate the natural scientists, many products of the former have been little more than reports on the trivial or, worse, elaborate efforts to prove the obvious . . . . Louis Wirth has said: 'The findings of social science are sometimes elaborate statements of what everybody knows in language that nobody can understand.'" 4 J. PUB. L. 8, 21 (1955).

5. See Davidson, *Criminal Responsibility: The Quest for a Formula,* in HOCH AND ZUBIN, PSYCHIATRY AND THE LAW, 61-71 (1955) and compare Guttmacher, *Criminal Responsibility in Certain Homicide Cases Involving Family Members, ibid.,* 73, 95, for differing views respecting the *M'Naghten* rule.

6. Note the following reference by Guttmacher and Weihofen to state sterilization laws: "Today we are far less certain of the controlling role of heredity in human behavior than we were thirty to forty years ago, when, on this basis, a number of states passed enactments legalizing the sterilization of the insane, the intellectually defective, criminals, rapists, and syphilitics." GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW, 17 (1952).

7. "One of the basic characteristics of the common law is that it is not static, but is endowed with vitality and a capacity to grow. It never becomes permanently crystallized but changes and adjusts itself from time to time to new developments in social and economic life to meet the changing needs of society." Holtzoff, J., in Belt v. Hamilton Nat. Bank, 108 F. Supp. 689, 690 (D.D.C. 1952).

into closer relationship have so emphasized points of mutual opposition as to create—unjustifiably—the feeling that they are wholly in polarity. In fact, social science and the legal processes work today hand in hand in very many areas. We really need not answer the question "Should Social Scientists Play a Role in Guiding Legal Processes?" They do, and have for decades. The greater question is *"What* Role Should Social Scientists Play in Relation to Legal Processes?" Limiting the class of "social scientists" to psychologists and psychiatrists, let me also limit the term "legal processes" to some considerations relating to our fundamental law, our constitutional law. After considering some problems of relationship in this limited but basic area, I will hazard some not very remarkable proposals in aid of bettering that relationship.

Large in volume and trenchant in its criticism is the literature attacking the failure of the law to embrace the conclusions of contemporary psychology and psychiatry.[8] Repeatedly hammered home to us is the adherence of some of our courts to the *M'Naghten* rule,[9] and the inadequacy from a scientific point of view of many of the rules of evidence employed in our courts, particularly with reference to expert testimony.[10] Other areas of the law's shortcomings have been justifiably stressed.[11] I have already touched upon some reasons why "findings" which have long since gained general acceptance among psychologists and psychiatrists have failed of acceptance by the law. I would now suggest one further and more basic reason: this is our failure properly to educate our lawyers. When you come to consider the commanding role which the lawyer plays in the American society you appreciate that a serious lack of informational equipment on his part may have wide implications in our society. In the Commonwealth of Pennsylvania 14% of the members of the state House of Representatives are lawyers, and 36% of the Senate. This is believed fairly typical of state legislatures. Even higher percentages of lawyers are found in the houses of the Federal Congress. Lawyers conduct our litigations. They become our judges. They exercise enormous effects upon the conduct of our businesses and social life. Yet it is a fact that more often than not the lawyer's formal education has given him no acquaintance with the vast body of learning to which an

8. Lawyers, it should be noted, have in large part led the attack.

9. See BIGGS, THE GUILTY MIND (1955); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925).

10. See Overholser, *The Psychiatrist in Court,* 7 GEO. WASH. L. REV. 31 (1938).

11. Undoubtedly the best summary is to be found in GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW (1952).

eminent member[12] of your profession has given the name, "The Third Revolution". A check of the records of one hundred law school freshman entering class this fall showed that only half had had so much as an elementary "Introduction to Psychology" course during four years of college. Of the hundred-odd law schools which are members of the Association of American Law Schools only a handful offer any course on the relationship of law to psychology or psychiatry, and this mainly at the post graduate law level. True it is, that in such regularly taken courses as Criminal Law, Torts and Family Law the student may be given some familiarity with scientific findings relating to those branches of the law. This will depend, perhaps precariously, upon the interest and knowledgeableness of the instructor. Some good efforts to educate in this field have been made in the area of continuing legal education—special courses for persons already admitted to the bar. These courses, while they fill a much needed function, reach only a small percent of the total bar.

This omission in the training of lawyers is perhaps the root cause of the unwillingness of the bar to give more attentive ear to voices in your field. But law school administrators complain that today's law school curriculum is already loaded to the breaking point. Perhaps a realistic, though minimal, solution would therefore be to establish in the law schools—not a full course but, say, a brief but intensive institute, along with a short list for required reading. A few schools have held such "Law and Psychiatry Institutes" for their students with reported good results.

In sum: the problem of changing—so far as it is needed—the attitude of the organized bar and of the legislatures and of law enforcement officials to one of acceptance of valid conclusions of the social scientists is a problem of changing the attitude of the lawyer—a change which is best accomplished in his formative process.[13]

Let us now give a bit closer look at the social scientist in his relationship to the law. Here one occasionally meets with most disturbing proposals, proposals which indicate that the social scientist making them is a stranger in the house of the law. Some of the proposals made would not inform legal processes but supplant them. This is particularly disturbing with respect to the area of constitutional due process of law. Dr. Lawrence S. Kubie, Clinical Professor of Psy-

12. Karl Stern. Stern equates in historical importance the revolutionary effects of modern psychiatry with those of the Marxian revolution relating to economics and the "racist" revolution relating to biology. STERN, THE THIRD REVOLUTION (1954).

13. Also note, respecting responsibility of the law schools, Cahn, *Jurisprudence*, 31 N.Y.U. L. REV. 182, 193, 194 (1956).

chiatry at Yale University School of Medicine, recently called upon us to "re-examine the assumption that there must always be one lawyer for each side." [14] He adds: "I do not doubt that this modern version of the ancient trial by jousting is often fun for legal gentlemen," and he suggests that it is time we called off this sort of fun-making. Thus blithely dispatched is all the travail of the centuries which ultimately brought into being the provision for the assistance of counsel contained in amendment VI of our Constitution, and the great judicial development given that provision by the United States Supreme Court down to today. Other statements of some social scientists which one reads, while not directly proposing contraventions of constitutional guarantees, reflect nevertheless a seeming unconsciousness of them and of our legal system generally. Much of this literature sounds strange in the ears of anyone who has closely followed United States Supreme Court decisions of recent years. More and more sharply has the Court been delineating the requirement of due process of law in every matter relating to the criminal proceeding, for example, definiteness of the standard of guilt in the wording of the criminal statute,[15] a real hearing,[16] the assistance of counsel.[17] At a time when the Court is more and more fully defining civil liberties—and frequently under heavy fire—it is odd to contemplate that possibly more significant threats to our civil liberties are being posed by some among our social scientists than is perhaps posed by some of the most vocal Supreme Court critics.

This, I submit, is due not at all to any conscious anti-libertarian spirit on the part of the social scientists in question. It is due quite simply to a lack of real acquaintance with law, with the nature of legal rights, with our concept of limitation of the power of the state and historically how that concept came to be embraced, with the function of the adversary system, with the concept of case law, with the reason for the steps in a trial, with appellate review and why we have it. One could go on. Suffice it to say that I am now pointing to a defect in the training of many a social scientist which parallels the defect I have described in the education of lawyers. I doubt there can be further improvement in the cooperative efforts of the two until each acquires elementary knowledge of the other's field and also a certain feeling for its spirit.

14. Kubie, *Research in Judicial Administration: A Psychiatrist's View*, 39 B.U. L. REV. 157, 158 (1959).

15. Musser v. Utah, 333 U.S. 95 (1948).

16. Massey v. Moore, 348 U.S. 105 (1954).

17. Moore v. Michigan, 355 U.S. 155 (1957).

What might be prescribed for this legal education of the social scientist? Clearly, a few visits to court is *not* the answer. In fact, to a person uninitiated in the law a visit to court may prove an unedifying obstacle to coming to an appreciation of the law.[18] Since many a social scientist will have many contacts with the law, and—more importantly—since he may have much to offer the law—it is desirable that his formal education include, perhaps, two courses devoted to law. One such course should undoubtedly be a course in "Legal Method," or "Introduction to Law" such as appears in the freshman curriculum of many law schools. Typically, these courses deal with the sources and forms of the law, basic legal concepts, the judicial function, the court system, equity, the conduct of a case, the legal profession and legal ethics. The reading and analysis of cases is usually undertaken. The complete record of a case may be examined. Acquaintance with court personnel, filing systems, calendars, etc., through a visit to the court is very often included in such a course. The other course should be a brief course in American Constitutional Law taught, not by a textbook, but by the reading of cases. An even moderate immersion in the opinions of our Supreme Court Justices in the great cases of the past and of today is bound to have a desirable effect. I cannot imagine the non-lawyer having studied—without acquiring a cast of mind hospitable to the "rule of law,"[19] and a lasting consciousness thereof—the opinion of Justice Douglas in *Skinner v. Oklahoma,*[20] of Justice Hughes in *Norris v. Alabama,*[21] of Holmes dissenting in *Lochner v. New York,*[22] of Frankfurter in *Rochin v. California,*[23] of Marshall in *Marbury v. Madison,*[24]— to suggest but a few.

Let me now, in conclusion, turn to an instance of a fortunate union of the law and social science—an instance which is a striking example of the utility of social science in the realization of constitutional rights. In *Brown v. Board of Educ.*[25] the Court had before it the question of whether statutorily segregated schools denied Negro children equal protection of the law. The Court used sociological data as a means of proving its proposition that "separate" could never be

18. Nowhere more so than in some magistrates' courts in large cities which frequently have something of the calm aspect of the French *Tribunaux Revolutionaires* circa 1793.

19. See THE RULE OF LAW IN THE UNITED STATES (1958) printed by the International Commission of Jurists, for an outline which should be useful to the non-lawyer in gaining an appreciation of protections of personal liberty in the American system.

20. 316 U.S. 535 (1942).
21. 294 U.S. 587 (1935).
22. 198 U.S. 45, 74 (1905).
23. 342 U.S. 165 (1952).
24. 1 U.S. (1 Cranch) 137 (1803).
25. 347 U.S. 483 (1954).

"equal." This, it seems to me, was most commendable and most desirable.

But I have heard it urged that the *Brown* decision was not the strongest declaration of the rights of Negro citizens that the Court might have made and that the Court might better have resorted to the very fundament of the American idea—namely, that "all men are created equal," that Negro children had the right to be educated with white children simply because they are people—"men," in the words of the Declaration of Independence. Then, so the argument runs, their equality would not be posited upon the shifting sands of sociological data—selected data at that—but upon their nature as persons. I consider that this argument expresses a sound principle, and I also consider that this principle is the one upon which the Supreme Court based its decision. But how was the Court to counter the objection of the state attorneys general, who said that they agreed with the principle—that they agreed that Negroes and whites should enjoy equality, but that the separate facilities furnished provided such "equality"?

Certainly here lay the justification that the Court turn to the social scientists, as to expert witnesses, to furnish it with data which would bear upon the question of whether separate school facilities do provide true equality. Now as we all know, the witnesses to which the Court accorded credibility concluded in the negative. These witnesses said, in effect, that segregation damaged personality and that such psychological damage rendered the school facilities in the case unequal. The Court converted this conclusion of the social scientists into a conclusion of law.

In the furious aftermath of *Brown v. Board of Educ.* we have heard much horror expressed over the Court's having resorted to the social scientists for guidance. See, for example, the comments of Charles J. Bloch, of the Georgia bar, in his book, STATES' RIGHTS, THE LAW OF THE LAND.[26] I submit, however, that much of the attack upon the Supreme Court's having sought such guidance was not at all based upon the principle of seeking such guidance but upon the particular guidance harkened to by the Court. It was not, in fact, the guidance but the guides—as Mr. Bloch makes evident in his chapter entitled "The Philosophy of Myrdal, Clark, et al. Versus 'The Law of the Land' "[27]—referring to my distinguished co-panelist. Had the Court resorted to guides whose views sustained the states' position would the principle of a court's using psychological data be so widely

26. BLOCH, STATES RIGHTS, THE LAW OF THE LAND 249-51 (1958).
27. *Id.* at 207.

decried? Segregationist opinion would probably be largely the other way.[28]

Yet I think that there are other persons who would—all apart from the specific character of the data furnished by the social scientists—still challenge the principle of basing any legal decision upon psychological data. These persons are, in the main, lawyers—quite a good many lawyers. They rightly say that the law must be certain, knowable, stable. Of the principle of basing decisions upon precedent Roscoe Pound has said:

> "The chief cause of the success of our common-law doctrine of precedents as a form of law is that it combines certainty and power of growth as no other doctrine has been able to do. Certainty is insured within reasonable limits in that the court proceeds by analogy of rules and doctrines in the traditional system and develops a principle for the cause before it according to a known technique.
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> ". . . The doctrine of precedents means that causes are to be judged by principles reached inductively from the judicial experience of the past, not by deduction from rules established arbitrarily by the sovereign will. . . . The common-law doctrine is one of reason applied to experience. It assumes that experience will afford the most satisfactory foundation for standards of action and principles of decision." [29]

Not all lawyers, however, know jurisprudence or are possessed of the acute perceptiveness of a Dean Pound. And the principle of precedent, which he envisions as combining "certainty" with "power of growth" has become for them a principle assuring only a fixity of the law, with power of growth ruled out. *Stare decisis*—a means, a mechanism—becomes an end, an absolute. Some lawyers, I think, encourage the view that the law is a most exact science, its exactness resting upon "authority"—either enacted or prior decisional law—this "authority" of the past being controlling of the instant decision, not relatively, but absolutely. And here is born confusion. Critics of *Brown v. Board*

28. It is interesting to note that psychological factors are taken into account in the school placement acts which many southern states have now adopted, undoubtedly as a means of continuing school segregation. See Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101 (1958), the Supreme Court affirming upon the grounds stated for the decision of the district court reported in 162 F. Supp. 372, 384 (N.D. Ala. 1958). The Alabama Act in question, which contained such standards for pupil assignment as "the psychological qualification of the pupil for the type of teaching and association involved" was held constitutional on its face. Similarly in Dove v. Parham, 176 F. Supp. 242 (E.D. Ark. 1959) the court upheld the Arkansas school placement act containing like provisions.

29. POUND, THE SPIRIT OF THE COMMON LAW 182, 183 (1921). And see Aronson, *Mr. Justice Stone and the Spirit of the Common Law*, 25 CORNELL L.Q. 489, 494 (1940).

of Educ. everlastingly assert that the Supreme Court in that case resorted to "improper *authority*" in referring to extra-legal materials, *i.e.,* findings of psychologists.[30] The proper authority, so they argue, was *Plessy v. Ferguson*[31] in which the Supreme Court, fifty-eight years before, had held valid, over equal protection clause objections, a state statute providing for "equal but separate accommodations for the white and colored races" in passenger trains. In the *Brown* case, at the lower court level, had not a three-judge federal district court declared itself bound by the precedent of *Plessy v. Ferguson*? I say that the *Plessy* case *was* the sole authority, a case closely in point, one to which, in the usual course of events, the Court should have resorted. Except that this "case in point" was now dead. The factual assumptions upon which it rested were now no longer true or had been disproved. The Supreme Court in *Brown* did not cite the psychologists' findings as legal authority at all. What legal authority there was, was contained in *Plessy*. The Court then used the psychologists' findings as expert testimony, in effect, which, to the Court, demonstrated that the factual basis of *Plessy* had no validity in 1954.

30. There is nothing revolutionary in courts' making use of extra-legal materials. Surveys of economists and sociologists have not infrequently been utilized by courts in the past. "Listening to arguments, examining records and briefs, analyzing the issues, investigating materials beyond what partisan counsel offer, constitute only a fraction of what goes into the judicial process of this Court.

"For one thing, the types of cases that now come before the Court (as the present United States Reports compared with those of even a generation ago bear ample testimony) require to a considerable extent study of materials outside the legal literature." Frankfurter, J., in Dick v. New York Life Ins. Co., 79 S. Ct. 921 (1959).

31. 136 U.S. 537 (1896).