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HOW SOCIAL SCIENTISTS CAN SHAPE  
LEGAL PROCESSES

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I SHOULD LIKE to begin by asking three questions:

1. Will legal processes be improved if social scientists consciously attempt, in one form or another, to guide or shape them?
2. Will social scientists do injury to the cause of science itself if they attempt such a role?
3. And finally, how can the contributions of social science be most effectively presented to courts and legislatures?

To avoid semantic disputes, I should explain that by "legal processes" I mean not only the traditional civil or criminal court case but also the adjudication of controversies by quasi-judicial administrative agencies and, equally important, the law-making procedures of legislative bodies. I include within the term "social scientists" sociologists, anthropologists, psychologists, historians, statisticians, demographers, indeed all those who study the social world, but not the therapists, such as analysts, psychiatrists or clinical psychologists, concerned primarily with the treatment of the individual.

That legal processes need improvement will hardly be denied by any lawyer. The day when even a comic opera Lord Chancellor could proclaim: "The law's the true embodiment of everything that's excellent. It has no kind of fault or flaw" has long since passed. There are many areas in the law which could profitably stand an infusion of the findings and conclusions of social science as well as an understanding of the methods and goals of investigations by such scientists. Let me cite a few examples.

Almost all American courts administer a rule of law, repudiated by almost every scientist who has studied mental disease, to determine whether a defendant in a criminal case is mentally responsible. The so-called *M'Naghten* rule absolves a defendant if at the time he committed a crime he did not know the nature or quality of the act he

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was performing or, if he did know it, did not know that what he was doing was wrong. Courts continue to administer this theological relic because modern findings about mental disease have not been presented to them, or to the state legislatures, in a sufficiently persuasive form to induce them to recast a rule adopted by the House of Lords in 1843.

Let us consider another area in which our courts need assistance: the promulgation of public school desegregation decrees. Federal courts located in southern states are of course concerned with minimizing racial tensions and easing the host of problems encountered by school administrators. But these orders are issued without the advice or insight of our social psychologists. The result is that desegregation often begins at a high school level where adolescent tensions and parental fears are at their height instead of in the relative calm primary grades. The grade at a time method of desegregation complicates matters for Negro parents who often must send one child to one school and another to a second school. A court that handles a desegregation decree the way it does a problem of contract enforcement will only pile up trouble for the school, the community and itself.

In some types of litigation, the state of the public's opinions, feelings or attitudes is a relevant fact that may determine the issue before the court. Some illustrations are: a defendant in a criminal case asks for a change of venue, *i.e.*, that his trial be moved to some other geographical district, claiming that widespread prejudice makes it unlikely that an unbiased jury can be selected; a real estate developer seeks a variation from a zoning restriction and tries to show that the people in the neighborhood do not oppose a particular commercial development; a defendant in a trademark infringement suit seeks to show that the public in fact distinguishes his trademark from that of the plaintiff.

In this third area, courts are slowly beginning, despite the hearsay rule, to find that opinion surveys constitute a valid measurement of the state of public opinion. Such evidence was even received recently in a criminal case where a change of venue was sought.<sup>1</sup> Perhaps one reason for the lessening of judicial suspicion in this area is the growing skill and sophistication of the surveyors, a result due in part to the constant self-criticism of the practitioners of this technique organized in the American Association of Public Opinion Research. A book has even been written discussing the legal and technical problems involved.<sup>2</sup>

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1. *State v. D'Alesandro*, Criminal Court of Baltimore, Baltimore Daily Record, March 16, 1954.

2. BARKSDALE, *THE USE OF SURVEY RESEARCH FINDINGS AS LEGAL EVIDENCE* (1957).

The distinguished psychologist, Marie Jahoda, sees the collaboration between law and social science not as a danger but as an opportunity. She urges social science to collaborate with law so that it may gain a channel through which to make its knowledge available in the world of practical affairs and rightly points out that such collaboration will stimulate social scientists to seek means of applying their insights. Such practical applications will in turn aid in the development of this science.

I am sure that I need not belabor this point. Social scientists are probably convinced in any event that a large part of law is mumbo-jumbo that could benefit by the application of empirically verifiable data. But there are some who believe that a conscious effort to shape or develop new legal concepts or procedures will only result in the denigration of social science. Two problems should be of concern: First, are the courts or fact-finding tribunals competent to pass judgment upon problems of social science where scientists themselves disagree on what is an appropriate method of investigation, upon the reliability or validity of the findings based on such investigation or upon the conclusions to be drawn therefrom? Secondly, are there any dangers to the social sciences and particularly to their youngest offspring, social psychology, in a conscious effort to shape the processes of a discipline so charged with emotional controversy and so vital to the good government of our people?

The courts themselves are reluctant to assume a role for which they do not deem themselves qualified. In *Beauharnais v. Illinois*,<sup>3</sup> a case upholding the constitutionality of an Illinois statute outlawing incitement to racial or religious hatred, Mr. Justice Frankfurter, who wrote the majority opinion for the Supreme Court, stated that "it is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community."<sup>4</sup>

But such reservations do not and cannot free a court of its obligation to decide any type of question that is properly before it, regardless of its complexity or the court's lack of familiarity with the problem. It is a daily occurrence for judges without scientific training to decide cases involving the most difficult technological and theoretical problems in medicine, metallurgy, ballistics, calligraphy and other disciplines. They can decide such cases because the lawyers on both sides are aided by a battery of experts who are able, at least in theory, to simplify the issues so that a mere judge can understand and rule on

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3. 343 U.S. 250 (1952).

4. *Id.* at 263.

them. Expert witnesses — physicists, chemists, biologists, and engineers — are skilled not only in their sciences but in the art of presenting the essential data to laymen. Cross-examination, the lawyer's indispensable weapon for disclosing bias, incompetency, carelessness or inadequate observation, is utilized to expose weaknesses in a presentation. Social scientists need not fear, therefore, that judges or lawyers will be unable to understand their shop talk or penetrate the mysteries of their craft. Indeed, the lawyer's task to persuade the court that the social science issue is properly before it, and that expert testimony will be useful, presents the greatest difficulty.

Of far greater concern, and particularly to this audience, are the dangers to social science itself if its undisciplined members, at the threshold of this promising new development, sour our fact-finding tribunals. The true menace comes not from the prospect that equally eminent scientists will present sharply conflicting data or differ strongly about the conclusions to be drawn from one set of facts. Courts are habituated to witnesses sharply in conflicts, even expert ones, and are sophisticated enough to realize that there may be some validity in each point of view. Indeed, the quest for truth will itself prosper if our tribunals examine critically the data presented to them by experts. Judge Jerome Frank in a 1955 symposium<sup>5</sup> offered his brethren on the bench some advice in evaluating the testimony of experts. He suggested that: (1) not only the competence of the specialists but also the limits of their competence needs attention; (2) the court should determine whether there are conflicting positions on any theoretical issue and inform itself of the opposing position; and (3) a court should ascertain whether an expert's opinion rests on a doctrine that has won substantial, if not general, acceptance of his fellow-experts. He might also have added that the court should determine whether the proffered opinion is based upon a specified piece of research or investigation or is based solely on theoretical considerations. Even the unseemly spectacle of a scientist on one side of a case shouting "black," while his opposite member on the other side screams "white" can be avoided. Social science skills can serve the interests of the court rather than the litigants. A fact-finding tribunal may, for example, persuade both sides to agree upon a survey that they will jointly supervise and pay for to test conflicting claims. The Food and Drug Administration has been successful in sponsoring such joint surveys in the evaluation of complaints against manufacturers.

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5. 4 J. PUB. L. 1, 8 (1955).

As I see it, the danger lies rather in a social scientist attempting to palm off on a court as solid conclusions opinions that are not based upon verifiable data. A court may not accept the findings of a social psychologist but if they rest upon a solid bed of research they will at least be treated with respect. But a witness who offers categorical opinions about problems which himself has never truly investigated and which are not even discussed in the literature of his discipline is not likely to influence a fact-finding tribunal.<sup>6</sup>

The scientific integrity that we seek to achieve is not forfeited because the social scientist is a "collaborator" of the lawyer. Recently, in a case involving the validity of a state statute forbidding racial inter-marriages, I sought the help of a physical anthropologist to aid in the presentation of an attack upon some of the unscientific notions in the statute. The anthropologist was still a scientist despite his collaboration and his already-held point of view because he rigorously collected and presented all of the recent research on the issue without attempting to gloss over inadequacies in his proof and because his fidelity to scientific truth outweighed all other considerations. Of course, unconscious bias cannot be ruled out, even in the selection and sorting of data, but neither is a witness who professes himself completely disinterested immune from such unconscious predilections.

The Society for the Psychological Study of Social Issues can minimize the harm done by the partisan expert who distorts science in the interests of a good cause if it systematically analyzes the testimony given by social scientists in major cases. Such analyses might raise the standards of proof offered to courts.

Up to now, I have considered the role of the individual scientist. But what of the role of organized bodies such as the APA or SPISSI? I believe these bodies can be most helpful by attempting to stimulate and organize research in the many areas where the law needs counseling. The last thing that I would urge is an official opinion by SPISSI on any scientific controversy, but the selection of priorities and the spurring on of research need not lead to any official orthodoxy. If SPISSI were, for example, to consider the various pupil assignment laws hastily enacted in the last few years to delay or circumvent public school desegregation, it should be able soon to present a systematic study of the possibilities and limitations of psychological and aptitude testing that would be of inestimable benefit to the bench and the bar when the inevitable challenges to such assignment laws arise.

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6. For a devastating analysis of one such expert's testimony, see Cahn, *The Lawyer, the Social Psychologist and the Truth*, 31 N.Y.U. L. Rev. 182-94 (1956).

In recent years, the controversy about religious education in the public schools has grown more and more bitter. On the one hand, it is argued that such religious training reduces juvenile delinquency and increases ethical values. On the other, it is claimed that such education creates nothing but religious tensions. A coordinated effort to organize systematic research on this problem would likewise be of great value. Such studies would gain additional authority because they come not from litigants but from the keepers of the flame — those whose paramount interest is the advancement of science.

The APA may well consider another function: that of presenting to legislative bodies the views of its members on public issues of concern to its members as social scientists. When a congressional committee is conducting hearings on juvenile delinquency, narcotic drug control or the suppression of pornography, social science and the country will benefit by presenting the committee with the well-considered views of this professional association. For this purpose, the APA might consider the establishment of standing committees composed of members from every psychological specialty who would be authorized to testify as a constituent of the APA. The experience of the American Bar Association may well serve as a guide to the APA in organizing such standing committees.

Justice Frankfurter once remarked: "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards any more than it requires them to keep abreast of the latest scientific standards."<sup>7</sup> But it certainly does not forbid legislatures to reflect such insights. It is the responsibility of bodies such as this to see that such insights are presented in a form and under such sponsorship as will be most effective.

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7. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948).