Book Reviews

THE INDIAN — AMERICA'S UNFINISHED BUSINESS. By William A. Brophy and Sophie D. Aberle, Editors. University of Oklahoma Press, Norman, Oklahoma, 1966. Pp. xix, 236. $5.95.

In 1953, Congress by resolution embarked upon a new policy of terminating "as rapidly as possible" the special relationship which existed between the federal government and the American Indian.[1] In 1957, during the heyday of that "termination" policy, the Fund for the Republic, Inc. established the Commission on the Rights, Liberties, and Responsibilities of the American Indian[2] to review generally the status of the Indian. *The Indian — America's Unfinished Business* is the final report of that commission, and was compiled and published by two of its members in 1966.

As the most recent general survey[3] of the status of Indians under federal protection,[4] *The Indian — America's Unfinished Business* is highly useful to any person, professional or otherwise, who is dipping into the field of Indian affairs for the first time. The introductory chapter sets forth basic facts about Indians and gives a capsule history of Indian law, beginning appropriately with the Northwest Ordinance of 1787:[5]

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent . . . .[6]

Notable among the other landmarks mentioned in the introduction is the General Allotment (Dawes) Act of 1887,[7] under which tribal land, upon the expiration of a specified trust period, was allotted in fee to

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[1] H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953).

[2] The commission originally included O. Meredith Wilson, Chairman; William A. Brophy, executive director; W. W. Keeler; Karl N. Llewellyn; Arthur M. Schlesinger, and Charles A. Sprague. Sophie D. Aberle succeeded Mr. Brophy as executive director, and after the death of Mr. Llewellyn, his wife Soia Mentschikoff was appointed in his place.

[3] The best known study of Indian affairs was the work popularly known as the Merriam Report, directed by Lewis Merriam. This exhaustive report was published in 1928. BROOKINGS INST. FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). More recently, a task force appointed by President Kennedy conducted a study of the subject. TASK FORCE ON INDIAN AFFAIRS, REPORT TO THE SECRETARY OF THE DEPARTMENT OF INTERIOR (1961).

[4] Excluded from the scope of the survey are some 100,000 Indians, mostly east of the Mississippi or in Alaska, who have no special relation with the federal government. Also excluded are fully assimilated Indians. W. BROPHY & S. ABERLE, THE INDIAN — AMERICA'S UNFINISHED BUSINESS vii (1966) [hereinafter cited as THE INDIAN].

[5] Ordinance of 1787: The Northwest Territorial Government, 1 U.S.C. xxxvii (1964).

[6] *Id.* at xxxix.

[7] 25 U.S.C. § 331 (1964).

individual Indians, or was disposed of as "surplus." The Act ultimately resulted in some 90 million acres passing out of the hands of the tribes. Equally notable, and far more in keeping with the spirit of the Northwest Ordinance, was the Indian Reorganization (Wheeler-Howard) Act of 1934,[8] which put an end to the allotment system and recognized and encouraged tribal self-government.

After this introduction, the editors present chapters dealing with major areas of concern in Indian affairs: Tribal Government, Economic Development, Bureau of Indian Affairs, and Education and Health. They end with a chapter entitled "Policies Which Impede Indian Assimilation." Each chapter concludes with a series of recommendations. It should be apparent from the wide range of these subjects, as well as from the fact that the topic is "The Indian" rather than any one of the many diverse Indian tribes or groups, that literary unity is not to be expected from the report (or this review of it, for that matter). The reader is likely to find himself immersed in the various chapters, one after another, with relatively little concern for transition or synthesis.

There are, however, some recurrent themes appearing throughout the book which can only meet with wholehearted approval. The first is that programs and policies concerning Indians are doomed to failure if their formulation does not include Indian participation and if their goals lack active Indian support. They will not only fail to achieve their aims, they will aggravate the existing situation by adding one more botch to the already extensive list upon which Indians base their distrust of new programs. Another welcome theme, particularly appropriate in education and tribal self-government, is that special recognition must be given to the Indian cultural heritage; not simply to make allowances for it, but to capitalize on its peculiar advantages, such as the strong cultural leaning toward cooperation and harmony. The editors do not mean that there is a future for Indians in cultural isolation; but rather that survival within the dominant culture does not require abandonment of Indian culture.

The chapter on tribal government succeeds in showing the virtue and necessity of self-government in most tribal situations — not only for purposes of decentralization and participation in government, but as an educational experience as well. This chapter also deals with the administration of justice, setting forth in summary form the jurisdictional rules of federal, state, and tribal courts over Indians on and off the reservation, as well as over non-Indians on the reservation. At some points this catalogue tends to be more expository of law than fact. For example, it is pointed out that Indians committing the "major crimes"[9]

[8] 25 U.S.C. § 461 (1964).
[9] The Major Crimes Act makes the following crimes committed on a reservation

are tried by federal rather than tribal courts, but mention ought also to have been made of the fact that many tribes have great difficulty getting busy federal prosecutors to prosecute sexual offenses or aggravated assaults allegedly committed by Indians against Indians on the reservations. Since the tribal courts lack jurisdiction over such cases, a gap in law enforcement results which is a common source of complaint by tribal authorities.

The commission makes one point that is of particular merit:

> The reservation governments are small and flexible enough to allow Indians to use and appraise the effectiveness of modern methods of public administration, including the arrest and treatment of offenders. These regimes need not limit sentences to fines, jail, or public work, for other deterrents such as the kinship, clan, family restraints, or traditional tribal sanctions may prove more effective.[10]

The commission felt that this approach would be particularly effective in juvenile matters, and it can be applied as well to treatment of alcoholics. Sadly, this observer has seen little difference between the dismal petty criminal process of the non-Indian police courts and that of most tribal courts. Tribal jails look about like any others and the tribal penal system is equally ineffective in deterring or rehabilitating repeaters.

One major recommendation of the commission has come to fruition. The report urges that legislation be passed assuring Indians of basic constitutional rights vis-á-vis their tribal governments. Only in this proposal does the commission deviate from its general principle that major Indian legislation should not become effective without the consent of the tribes.[11] The Civil Rights Act of 1968, with its extensive Bill of Rights for Indians,[12] is now a fact, and doubtless the commission's position provided added impetus for its passage. The Act also contains another provision recommended by the commission — a requirement that tribal consent must be secured before a state may assume civil or criminal jurisdiction over reservations.[13] To this extent then, the commission has succeeded in rendering its own report obsolete.

Space does not permit extensive discussion of the chapters on Economic Development, Health, and the BIA. The desperate economic plight of most of the reservations is well portrayed, and particularly

triable in federal court: murder, manslaughter, rape, carnal knowledge, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny. 18 U.S.C. § 1153 (1964).

[10] THE INDIAN, *supra* note 4, at 36.

[11] *Id.* at 60.

[12] 25 U.S.C.A. §§ 1301-41 (Supp. 1969).

[13] 25 U.S.C.A. §§ 1321-22 (Supp. 1969). Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, *as amended* 18 U.S.C. § 1162 (1964). 28 U.S.C. § 1360 (1964) extended state civil and criminal jurisdiction over some reservations and permitted states in other cases to assume such jurisdiction -- all without the consent of the tribes.

useful treatment is given the problems of water rights and fractional land ownership arising from the allotment system. Nevertheless, a total picture of the economics and the development process on the reservations does not appear. Information abounds, but convincing statistics are lacking. The reader is told, for instance, that the sawmill at Navajo, New Mexico, is turning out 150,000 board feet of lumber per day, and that production will increase to 200,000 board feet per day.[14] The mill employs 500 Indians and has an annual payroll of about $1,700,000. The reader is told this, but he is not told what it means — what relation these facts have to the total economic picture in the area, and what multiplier effect and other relevant consequences may be expected. It may well be that no economic statistical overview is possible (as opposed to Indian health, where one is given), due to lack of information. But one of the difficulties which must strike the reader in a treatment of a subject as diverse as "the Indian problem" is that discussion tends to be buttressed by an example here, a figure there, and no synthesis. Such a fault may be inherent in the nature of the task, but it is no less distracting for that.

Increasing uncertainty over the future of the BIA lends special interest to the commission's review of that agency. The commission finds that keeping virtually all Indian services except health under one office has advantages that outweighs its drawbacks. The principal advantage is the elimination of buck-passing; it is now relatively clear where responsibility lies, and that clarity is not the least of the Bureau's current burdens. The commission reviews a number of alternatives, such as transfer of Bureau responsibilities to the Department of Health, Education and Welfare or to the states, and concludes that the former would result in little change and the latter in duplication of bureaucracy. Being unable to suggest a better allocation of authority, the commission concludes that the Bureau should be left where it is for the time being, but that it should streamline its procedures and give much more authority to its agency superintendents in the field.

Perhaps one of the best chapters of the report is the last: "Policies Which Impede Indian Assimilation." Curiously enough, that chapter deals only with the policy of termination, which indirectly gave birth to the commission. Three excellent short descriptions are given of the experiences of terminating the Klamaths of Oregon, the Menominee of Wisconsin, and certain bands of the Paiutes of Utah. Each termination was a disaster in its own way, but all failed at least partially as a result of the common factors of lack of preparation by the tribes, rapid loss of distributed assets, and inadequate state structures to assume the burden of providing necessary services. The commission states that

[14] THE INDIAN, *supra* note 4, at 87.

"This chapter demonstrates that any official policy which ignores the prevailing value systems of Indian tribes is not only doomed to fail, but to compound the difficulties already existing."[15] It also recommends that there be no termination until the Indians involved are "no longer in the lower segment of our culture in education, health, and economic status."[16] Insofar as this chapter lays to rest any push toward hasty termination without Indian consent, so much the better. The termination policies of the 1950's are properly discredited; but one questions whether there are not even more fundamental questions of cultural differences to be faced in this matter of "assimilation." It is true, as the commission states, that policies of assimilation must not ignore cultural value systems, but too easily implied in this statement is that the goal of assimilation is unquestioned and that as a matter of tactics it must be accomplished in ways that wisely manipulate these value systems. More fundamental questions are whether or not there must be Indian participation in formulating the goals of Indian policy, and whether those goals might not be wholly changed as a result. Perhaps the goal will always be to encourage the Indian to join the "mainstream." But it is also possible that new styles of living together which preserve much more distinct cultural identity for those who desire it will be the shape of the indefinite future. Certainly Indian health, economic status, and education must be improved, but it is not entirely clear that the goal must be assimilation.[17]

In conclusion, a few comments about the chapter on education will best reveal some of the strengths and weaknesses of *The Indian — America's Unfinished Business*. The chapter contains an excellent portrayal of the difficulties facing the young Indian student, with a particularly sensitive description of his cultural values. The analysis carefully differentiates between students who have virtually no English background and no familiarity with the ways of a technological culture and those who in varying degree do have those advantages. The weakness of this and the other chapters lies in the recommendations. The proposals are not necessarily incorrect, however. One can scarcely disagree with the first one:

> Indian education should afford the individual the opportunity for realizing his full capabilities. The quality of the instruction he receives and its adaption to his needs should be the prime consideration. The schools — federal, public, and private — which Indians attend should have the best curricula, programs, teaching methods, and guidance employed in educating white

[15] *Id.* at 179.
[16] *Id.* at 211.
[17] Assimilation: "sociocultural fusion wherein individuals and groups of differing ethnic heritage acquire the basic habits, attitudes, and mode of life of an embracing national culture . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 132 (3d ed. 1965).

> students, with all these factors being modified and augmented to meet the special requirements of Indian students.[18]

The recommendation is unexceptionable. It is also hardly surprising. And, while the recommendations do go on to suggest separate treatment for three classes of Indian students, one is not struck by any flashes of implemental insight. The recommendations leave one with a feeling that the problems have not only not been solved, but in many instances have not even been met. Take the recommendation on education that:

> The Indian parent must see that his child attends school regularly and must encourage him to do well in his studies.[19]

Again, no one can disagree. But the question which has been driving to distraction everyone faced with the general problems of Indian education is *how* you stimulate this kind of behavior on the part of the parents. That is the point at which the planner discovers himself faced with a cultural gulf which he does not know how to bridge, and, faced with it, he finds the recommendation above overly facile and underly helpful. Because this tendency is reflected in the recommendations elsewhere in the book, one concludes that *The Indian — America's Unfinished Business* is very valuable as a primer on Indian affairs, but not as a blueprint for action.

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THE SOCIOLOGY OF LAW. By Rita James Simon, Editor. Chandler Publishing Co., San Francisco, California, 1968. Pp. xii, 688. $8.50.

Winston Churchill, while speaking of a gentleman named Bossom, is reputed to have remarked, "Bossom?! Bossom?! It's neither one nor the other!" A book of interdisciplinary readings, such as the one under review, is similar. Even worse for the reviewer, it is like a family of "Bossoms," or as W. C. Fields might have said, like a veritable bestiary of the redoubtable hippocampi. To review each piece would be to anatomize a mixed museum and zoo, for early and dated, as well as recent work is represented. A suggestion of the contents and tenor of the book, a look at its qualities and uses, and a final amateur glance at the sociology of law — which is oftentimes neither the one nor the other — therefore, is in order.

The Sociology of Law, a selection of pieces written by legal scholars

[18] THE INDIAN, *supra* note 4, at 156.
[19] *Id.* at 158.
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and social scientists over the last sixty years, is intended to be an overview of relatively recent empirical and theoretical trends in American sociology of law. By far the largest portion of the book is devoted to selections which reflect and demonstrate contemporary empirical research. A much shorter section discusses early empirical efforts, while two brief sections are devoted to theoretical statements and recommendations for a sociological jurisprudence.

There are serious major omissions, noted by the editor, in the areas of law and economics and law and poverty. These omissions, the absence of selections from recent works on the administration of criminal justice, and a certain narrowness of range (the collection being limited to material consciously concerned with law and society), limit the book's usefulness. Curiously, and in partial explanation, the book appears to have been compiled in 1965 or 1966,[1] but not published until 1968. Consequently, some very interesting recent works, such as Skolnik's *Justice Without Trial*,[2] Carlin's *Lawyers' Ethics*,[3] LaFave's *Arrest*,[4] Newman's *Conviction*,[5] and the Task Force Reports of the President's Crime Commission,[6] are not represented. While explainable, these omissions are unfortunate, for these works represent a substantial, perhaps major, part of current efforts in the sociology of law. Similarly, the absence of selections on juvenile delinquency, on the operations of the lower courts, on mental institutions, on legislatures and administrative agencies, and on sociological studies of deviance too greatly narrow the range of the book. Of course, some of these institutions and areas of study may be covered elsewhere in a sociology curriculum. But, while it is certain that the book is not comprehensive, there is also some question as to whether it is genuinely representive and as useful as it might otherwise be. The lack of a bibliography of theoretical and empirical studies related to the sociology of law also detracts from the helpfulness of the work.

This leads to the question of whom the book was designed for. It does give a fair review of what has been done in certain areas, particularly jury studies. Moreover, it supplies a somewhat undetailed, but useful, sampling of methodologies. In overview, the text would be of interest to some members of the legal profession but would prob-

[1] THE SOCIOLOGY OF LAW 250 n.7 (R. Simon ed. 1968).
[2] J. SKOLNIK, JUSTICE WITHOUT TRIAL (1966).
[3] J. CARLIN, LAWYER'S ETHICS (1966).
[4] W. LAFAVE, ARREST (1965).
[5] D. NEWMAN, CONVICTION (1966).
[6] THE TASK FORCE ON THE ADMINISTRATION OF JUSTICE, THE PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT (1967). Individual Task Force Reports were published on: The Police; the Courts; Corrections; Juvenile Delinquency and Youth Crime; Organized Crime; Science and Technology; Assessment of Crime; Narcotics and Drugs; and Drunkenness.

ably be most useful as an introduction to the sociology student and, to a certain degree, the beginning social science-oriented legal scholar.

Before interviewing for his first job, every law student should read the three selections on the legal profession.[7] Although there is some reason to suspect that social awareness and a decline in some kinds of discrimination are changing recruitment patterns for lawyers, the legal profession's selection standards are very revealing. Ivy League trained "WASPS" go to the big firms and get all the big business. Lawyers trained in better state schools tend to connect with middle sized firms, doing work for medium-sized corporations and wealthy individuals. The lawyer without a good academic record, minority group lawyers, and night school lawyers tend to be individual practitioners who have to scramble for a living.

These selections studying the legal profession, and other selections in the book, lead to the conclusion that the struggle for income and business affects every aspect of law practice and, in so doing, seriously affects the quality of justice. Neglect and indifference meet the cases and problems in which the lawyer's duty does not coincide with his interest.

Studies dealing with the "quality of justice" would bear repeating in different states and jurisdictions. For example, an investigation of the type and quality of counsel typically appointed in criminal cases,[8] should be repeated, not so much to test the validity of the results and generalizations of an earlier study, but to discover the local status and condition of the administration of justice. Such studies can be based on questionnaires, interviews and observations, and would be relatively easy to carry out by using law students and law journal facilities.

A few selections have lessons for the development of legal rules. For example, there is a suggestion in the selection "The Effect of Newspapers on the Verdicts of Potential Jurors"[9] that the potential prejudice of pretrial publicity can be made to evanesce through a cautionary instruction. This is certainly a very significant finding in a highly controversial area. To be sure, even if it would not really alter the debate at the present time, it should be well publicized and perhaps further substantiated with other studies.

An included study of curriculum innovations in law schools clearly indicates that professional responsibility courses appear to be failures,

[7] Carlin, *The Road to Individual Practice*, in THE SOCIOLOGY OF LAW 255 (R. Simon ed. 1968) [hereinafter cited only by reference to author and title of section]; Smigel, *Work of the Wall Street Lawyer*, at 264; Ladinsky, *Careers of Lawyers, Law Practice and Legal Institutions*, at 275.

[8] Willcox & Bloustein, *Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime*, at 591.

[9] Simon, *The Effects of Newspapers on the Verdicts of Potential Jurors*, at 617.

at least insofar as they are expected to change outlook and behavior through a change of attitudes.[10] It was shown through tested responses of students who participated in clinical programs that in the areas of legal ethics, their expected involvment in community and professional activities, and their reactions to types of clients, were not significantly different from students who did not take a professional responsibility course.[11] The fact that clinical programs did not produce significant effects should be and is a disconcerting result. The explanation offered is that law students are oriented toward the profession and realize that it does not reward the kinds of attitude and behavior changes clinical programs are expected to produce. In reality, this perhaps should not have been so surprising; major attitude changes are not likely to be induced in a simple programmed way: Saul of Tarsus needs to be stricken from his horse and blinded; Luther needs many years of agonized study; Kant needs the incisive brilliance of Hume. This is, however, quite a reflection on a profession which claims to have a deep concern for the public interest. The conclusion of the study is that "innovations in the curricula of professional schools, no matter how radical, are not likely to seriously alter students' outlooks unless comparable innovations are going on in the profession."[12] Experiments and designs in legal education meant to create a corps of socially conscious and responsible attorneys must overcome the inertia of the profession and the career orientations of the students. Recruitment and radically different training of the socially concerned student, together with academic legal leadership in the development and support of ways to remunerate public service lawyers, may be the only ways for legal education to change the course of the profession.

A relatively large portion of the book is devoted to jury studies of one kind or another.[13] This is perhaps to be expected in view of the fact that the editor participated in the Chicago jury study and has herself written a jury study book, *The Jury and The Defense of Insanity*.[14] The jury study material, being a major long-term, systematic, and empirical undertaking, is important in the recent development of the sociology of law. While the jury studies are not particularly interesting or enlightening, some of the material is valuable if for no other reason than to shed light on the debate about retention of the jury system.

[10] Simon, *An Evaluation of the Effectiveness of Some Curriculum Innovations in Law Schools*, at 573.

[11] *Id.* at 586.

[12] *Id.* at 589.

[13] Kalven, *The Dignity of the Civil Jury*, at 293; Simon, *Jurors' Evaluation of Expert Psychiatric Testimony*, at 314; Kalven, *The Jury, The Law and the Personal Injury Damage Award*, at 329; Broeder, *Plaintiff's Family Status as Affecting Juror Behavior: Some Tentative Insights*, at 339; Simon, *The Effects of Newspapers on the Verdicts of Potential Jurors*, at 617.

[14] R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1967).

As indicated previously, however, the quantity of jury study material in the book tends to skew the representativeness of the material presented.

Other selections — and I express an admitted prejudice here — such as the studies of the judicial behavior patterns of the United States Supreme Court Justices are tedious and unrewarding in the extreme.[15] The study of decision-making, judicial or otherwise, is perhaps the significant focus of political science, and so important and obvious an institution as the United States Supreme Court must be examined. However, statistical and scalar analysis of Supreme Court decisions or judicial behavior are even more boring than a film by Andy Warhol or a speech by a local politician, if that is conceivable. One such selection takes twenty-three pages to tentatively identify Justices Warren and Frankfurter as the leaders of opposing blocs on civil liberties in 1958 and to suggest that the civil liberties opinions of the justices depend on one dominant operating variable, "attitude toward claimed civil liberty deprivations."[16]

Political scientists, however, can be outdone. A piece used to give the flavor of early empirical research is "The Business Failures Project"[17] by William O. Douglas (the same) and Dorothy Thomas. The Business Failures Project, a bankruptcy study, was itself a failure. Perhaps out of some need to justify research time and money, to publish, and to offer a cautionary tale to the would-be researcher, the failure was described in ennervating and caressing detail. I am not unjust; the authors so describe it: "This somewhat pedantic and perhaps over-detailed account of the meagreness of data obtained by various uses of the questionnaire . . . ."[18] It is, of course, instructive and perhaps in a very good way. As Kenneth Boulding has said, "It seems to be a fundamental principle of development that nothing fails like success, because the more successful you are the less you learn from it."[19] The lesson is well-taken. Law teachers and researchers are woefully lacking in methodology, a sense of how to operationalize questions for and avoid difficulties in the way of meaningful empirical research.

As far as methodology goes, the book does not indicate whether there is, as yet, much sophistication in empirical research techniques in the sociology of law. This is not necessarily a criticism. Perhaps sophistication is not required. In any case, questionnaires, surveys, attitude studies, observations, interviews, content and case analysis, and

[15] Ulmer, *Supreme Court Behavior in Racial Exclusion Cases: 1935-1960*, at 353; Ulmer, *The Analysis of Behavior Patterns on the United States Supreme Court*, at 407.
[16] Ulmer, *The Analysis of Behavior Patterns on the United States Supreme Court*, at 430.
[17] Douglas & Thomas, *The Business Failures Project — II, An Analysis of Methods of Investigation*, at 94.
[18] *Id.* at 109.
[19] Boulding, *Human Resources Development as a Learning Process*, in HUMAN RESOURCES DEVELOPMENT 48 (Jakubauskas & Baumel eds. 1967).

simulations seems to dominate the selections. The inconclusiveness of some of the studies and the relative triviality of others may indicate that the method available, rather than the hypothesis to be tested or the information to be sought, dictated the study. In some measure, a call for knowledge in methodology may be misplaced as method may have to develop dialectically with individual projects and pieces of research. Part of the problem is that we are not always certain what it is we want to know. Yet readings in methodology are suggestive, and it is well to be appraised of some of the pitfalls obstructing meaningful research.

If one were inclined to do so, various stages in the sociology of law could be traced with this book, particularly using the two sections on sociological jurisprudence in which there are excerpts from Pound, Holmes, Llewellyn, Weber, Beutel, Loevinger, and Selznick, to give some of the more well-known names. All the themes are found here: the rejection of older notions of law as a kind of uniform and consistent logic; a developing positivist concern for the "real" law; the effort to catch the law in flux in a society in flux, and to evaluate it in terms of its effects; an overwhelming and extremely ambitious desire to discover social and economic consequences, or lack of them, in the operation of laws; to know how to make laws effective; and to use law in full consciousness as a means to achieve social ends. Also present is the visionary and misplaced emphasis by some on the predictability of decisions or results. There was a faith operative in some of this work, like that of Beutel and Loevinger,[20] that when enough had been learned and when there was a genuine "scientific jurisprudence," it would be possible, given legislative purposes, to create truly "efficient" laws — laws which would achieve noble purposes and eliminate irrationalities from the legal system and from the behavior of individuals on whom the system relies. Part of the flavor here is that of positivistic enamorment with science, expressed in the notion that law was among the last of the disciplines to shake off dogmatism and non-scientific thinking, and that scientific law could approach the results of the exact sciences.

In a way, these selections, which are intended to represent a more current stage of sociological jurisprudence, are unfortunate, for they convey a simplistic notion both of law and exact science. Perhaps some marching in the ranks of science is essential to stir this conservative profession with vested interests in its monopoly of formal channels of dispute resolution and its adherence to the status quo. But beyond this, there is an implication that law can and should be like science. This is what is simplistic. Furthermore, and without debating the issue,

[20] Beutel, *The Essence of Experimental Jurisprudence*, at 163; Loevinger, *Jurimetrics: The Next Step Forward*, at 178.

it has become reasonably clear that rule based disciplines or areas of human activity, such as law, ethics, and language have a subtle and complex "logic" of their own, and that a sociological jurisprudence will, as a matter of first priority, have to understand the logic of language and of rule-oriented behavior. It may be that the sociological aspect of this kind of study is not easily seen, but it is unfortunate that the book does not recognize the necessity of such studies and does not represent these efforts among the selections. Granting the fact that the work of H. L. A. Hart and others is not "empirical" but conceptual, no general study of law as a device of social control can be complete without an understanding of rule-oriented and rule-based behavior. Similarly, I find startling the absence of some selection from the work of the very prolific Julius Stone, who is today identified with sociological jurisprudence. These deficiencies signal that the intent of the sections on sociological jurisprudence may not have been to give a brief, representative survey of the thought in this area, but rather to provide a backdrop for the empirical selections.

It is dismaying to be reminded by one of the early selections, that of Angell,[21] of how long the partnership of law and social science has been fervently urged and how little really has been done until just recently. The Yale teaching materials in Criminal Law, Family Law and Law and Psychiatry; the Chicago jury project; the Russell Sage Foundation efforts at Northwestern, Wisconsin, and Berkeley; and the recent studies sponsored by the American Bar Foundation are the beginnings of substantial interdisciplinary training and research. Aside from these efforts and the current creation of federally financed institutions for the study of the administration of criminal justice, the sociology of law, as the selections in the book indicate, is poorly organized, generally unsystematic and unprogrammatic. Some further impetus to the organization and direction of studies, with a view to comparability and compatibility, is essential.

Notwithstanding the long-term unfulfilled promise, there is yet ferment in the law schools about the introduction of social sciences into the study of law. While there is this fervor, and although the relevance of the social sciences is obvious, there is anything but certainty as to how this union should be accomplished. Traditional vies with radical as conflicting purposes of legal education are muddled with conflicting theories of pedagogy, the role research is to play, and the lack of serviceable teaching materials. As it is generally presented, the debate may be irresoluble, but a problem solving orientation, which is quite consistent with the conception and function of the lawyer, may lead to concrete developments.

[21] Angell, *The Value of Sociology to Law*, at 65.

It should be clear initially that there is a substantial difference between the sociology of law and the use that law may make of the social sciences, between the effort to understand law and legal institutions as social phenomena and the effort to utilize this and other social science knowledge for social purposes. There are, of course, substantial areas of congruence, for example, the study of the social and economic effects of legal rules and the study of legal professions. Perhaps the most important area of joint interest and a most significant area for research is that offered by Selznick,[22] the study of social organization and the limits of law as an instrument of social control; or more generally, the "quality of legality." Until we have really concrete knowledge about legality and social control through law, we must assume, unless there is disconfirming evidence in particular cases, that law is more or less effective. For law study and research, beyond these nice, difficult, and fundamental problems of the conditions of social control, encompasses the issues and serious current problems of authoritative policy.

The traditional concern of the lawyer in the United States, at least in the best tradition, has been with interests, claims, and demands, with rights and protections, with justice and fairness, and with freedom. While for most of our history these have been the concerns of individualized justice, of justice in the particular case, the quality of these concerns changes in the era of the positive, social service state. Matters of most significant individual concern turn on remote and perhaps invisible decisions of policy made by public and quasi-governmental private administrations and organizations. Major long-term national and societal commitments of incredibly destructive or revolutionary potential have been made by government and industry with little thought of or concern with the effects of these commitments on individual lives. Significant issues concerning the uses to which technological and scientific advances are to be put are being decided without consultation with the affected populace. Government and administration is huge, insensitive, and unaccountable. Problems are administered, not solved; grow, do not disappear. Our environment is polluted by noxious chemicals, noise, and refuse. Over half of our national budget and most of our research and development are devoted to war. The grip of the military-industrial-scientific-academic complex squeezes blood from the stone, and it becomes increasingly difficult to distinguish the national interest from the interests of large corporations and research establishments. The personnel — technologists and administrators — easily move back and forth between industry, the academy, and government, and policy is manufactured in the interstices of their crossed paths. The consumer is cheated, defrauded and victimized; his safety is jeopardized; yet he is

[22] Selznick, *The Sociology of Law*, at 190.

persuaded to consume almost as a patriotic duty. The cost of providing medical care images the inflation of South American currencies; its quality for the mass of the general population is uncertain. Drug costs are prohibitive, yet profits are substantial, and more is spent on drug advertising and promotion than on drug research.[23] Our cities choke; their more unfortunate residents stifle and slip into rage, anomy or suburban escape. Poor Americans starve in the South and Southwest, and yet cannot get surplus food. Race and poverty remain extremely volatile issues and as problems are no closer to solution than ever. Given the conditions of some of our schools, wonderment follows on disbelief that anyone is educated at all. All this, and much more which could be added to this jeremiad, affects each citizen, in his pocket, in his person, in the quality of his life, and in the development of his spirit. Governmental and social policy, in one way or another, directly or indirectly, is deeply involved in these conditions.

For much of history, most social relationships were outside the scope of conscious government. Today, government, including the quasi-governments of the large corporations, has taken on many functions formerly served by the family or other sets of social arrangements. Areas of unregulated activity formerly disregarded because of social philosophy or because of de minimis effects now come to be major social and governmental concerns because of the accumulated effects of massive populations. Yet curiously and tragically, even when the government takes formal control, it does not take responsibility. It is impossible to find anyone accountable for the untoward consequences of unregulated social relationships.

In government run according to the tenets of interest group liberalism, unorganized interests are neglected. Public institutions and administrative agencies are quickly captured by caseloads and constituencies. Technology and technical expertise exacerbate problems; policy decisions become the province of an elite on whom our decision-makers must rely.

Because of his traditional concerns and his general role as all round problem solver and likely government official, the lawyer — some lawyers — can be in a position to join with experts from other disciplines to challenge and take responsibility for these conditions. To do this, however, and to rescue the legal system where it is failing, the lawyer or law trained person — someone outside the government — must be able to understand the complex issues involved and to assess the consequences of alternative technical policies. In this lies the greatest significance and use of the social and other sciences in the law school

[23] *See, e.g.*, B. BARBER, DRUGS AND SOCIETY 55 (1967); Blenkiron, *Advertising by the pharmaceutical Industry*, 190 PHARMACEUTICAL J. 112 (1963).

curriculum and in legal research. For it is in these issues where advocacy and adversariness are most needed so that the ideals of the profession, a concern for social justice, for fair, open, principled and reasoned decision-making, and for responsibility and accountability may be fully realized.

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