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FOREWORD

This volume, which is the first in an annual series, contains fourteen invited essays by scholars representing five disciplines. The articles cover a wide range of topics, issues, and methods. The common theme is the importance all of them attach to the working relationship between law (making, interpreting, and enforcing) and social institutions, values, and public opinion. The contents of this volume as well as the style in which the articles are written should appeal to an academic and professional, as well as an interested lay audience. None of the pieces is overburdened by mathematical, statistical, or legal symbols or jargon. All address issues and topics about which persons trained in law, the social sciences, and the humanities might be interested. Almost all of them have theoretical as well as public policy import.

Of the twenty authors who have contributed to this volume, four are law professors, six are political scientists, five are psychologists, one is a historian, and four are sociologists. The volume is divided into four major

sections. In part, the first section continues a debate on function and significance of law in developing countries. It contains a long essay by Seidman which takes issue with the position assumed by David Trubek and Marc Galanter in their earlier article on that topic which appeared in the *Wisconsin Law Review* (1974), Trubek's and Galanter's response to Seidman, and Seidman's brief response to Trubek and Galanter. Included in this first section are also pieces by Claude and Strouse on the relationship between human rights and economic development in developing countries. It is followed by Rothman's theoretical analysis of the historical and judicial responses that have been made to the dilemmas posed by the First Amendment to the United States Constitution, and it concludes with a piece by Simon and Barnum that reports the results of surveys concerning public attitudes and support for civil liberties in the United States and Israel.

The second section deals mostly with substantive issues of criminal law. It includes a piece by Gibbs in which he asks whether we can meaningfully identify deterrence as a goal of our penal policy. A piece by Chambliss, who claims that one must examine the political and economic forces that shape the laws governing the manufacture, distribution, sale and technology of drugs, because the policy that our government, or any capitalist system assumes vis-à-vis a given drug is a function of whether the system can profit from that drug. Monahan and Hood focus on definitions of dangerous acts as perceived by jurors. They compare jurors' beliefs about which types of acts are most dangerous against criminal psychiatric standards. Baumgartner has gained access to court records from seventeenth-century New Haven and uses the information they contain to assess the relationship between the inhabitants' social status and the rates of conviction, acquittal, and sentences in that colony.

The third section contains essays with strong methodological implications. The Nagel and Neef piece demonstrates concepts and methods for determining causality in the legal process. The thrust of Seidman's essay is to urge social scientists in general, and those working on issues affecting criminal justice and law enforcement in particular, to re-examine the premises that underlie the selection and formulation of their research problem, to generate alternative conceptualizations, and to thoroughly examine the intended and unintended social consequences of their research.

The last section contains three essays that stress the interaction between the written law and social practice. The articles examine and expose the degree of consensus and conflict between legal and social science expertise. Adolph Grundman examines Appellate Court responses to social scientists as expert witnesses and to social science data in the Virginia school desegregation cases heard in the late 1960s. Kirk Schwitzgebel

explores the use of personal-service assistants to help persons function more effectively in their natural social environments. Jacqueline and Stewart Macaulay trace the law, the conflict, the current status, and the various alternatives to the placement of black children in adoptive family settings. They contrast the relative stability of the formal law against the more turbulent living law.

The pieces by Seidman, Trubek and Galanter, and Claude and Strouse concentrate on the appropriateness or the exportability of American concepts of law, due process, and legal liberalism to developing Third World nations. Responding to an earlier article by Trubek and Galanter, in which they expressed despair for the value and the usefulness of legal liberalism to help restructure those societies, Seidman takes them to task for the ethnocentrism of their views and model. Seidman's theme is that scholars whose research is guided by models that explain the world of the middle-class American academic will not be likely to serve the disinherited of Brazil, India, or other Third World countries. He urges scholars to do research on law and development problems by focusing on genuine existential problems in the Third World.

Trubek and Galanter respond that Seidman has distorted their original position. They claim that their entire article was devoted to showing that the method of legal liberalism was fundamentally wrong; that it was based principally on comparing their world institutions against an idealized model of Western law. But, they argue, Seidman has stood their original thesis on its head and in his essay accuses them of holding the very position they attacked. In Seidman's brief response, he pleads not guilty to the charge of distorting Trubek's and Galanter's thesis, and holds to his original view that Trubek and Galanter do not offer appropriate or useful tools for testing the model of liberal legalism.

There is a good deal of bitterness and name calling in the exchange. When they are all through, both sides seem to agree that appropriate methods have not yet been developed for testing the model, and that more work mostly of a methodological nature needs to be done.

Claude and Strouse trace the record of human rights of advanced industrial democracies against those of the developing countries. They show that economic development rates are negatively associated with social development and communications, particularly among those countries which sustain high standards of civil liberties and political rights. They posit a model that offers a base for predicting relationships between human rights (political rights and civil liberties) and economic, social, and political development.

The essay by Rozann Rothman shifts the locale to the United States as she identifies the contradictory historical and judicial responses that have been made to questions posed by the First Amendment. She assesses the

competing demands of an absolute principle governing First Amendment questions against the exigencies of politics and collective security.

In the last essay in Section 1, Simon and Barnum report the results of two surveys of a cross section of American and Israeli publics concerning attitudes toward civil liberties issues in those societies. Civil liberties in the United States are guaranteed by the Constitution and by federal statutes. The rights specified in those documents are protected from recall or revision by enormously complicated mechanisms. Israel, on the other hand, is a society that has a substantial body of law which permits or legitimizes serious violations of individual rights, and lacks a written constitution. One of the purposes of the surveys was to explore the extent to which the Israeli and American publics are interested in and supportive of civil liberties and to determine the extent to which the written laws and formal mechanisms reflect or are at odds with popular sentiments in each society.

The essays in the second section focus on matters pertaining to criminal law and procedure. Three out of the four have explicit public policy directives. For example, in the first essay, Jack Gibbs writes that "to speak of crime prevention as a goal of penal policy is virtually meaningless without identifying the preventive mechanisms (e.g., deterrence, incapacitation, normative validation) by those who make penal policy." He observes that the validity of the deterrence doctrine could depend in large part on the amount of agreement between legal officials and the public as regards conceptions of crime. Thus, Gibbs concludes, "how much the public knows about criminal law is an important but underresearched issue."

Chambliss begins with the claim that "basic changes in law are a reflection of qualitative and quantitative changes in the political economy of a historical period and not simply the forces within a particular country." As Chambliss indicates early on, he plans to trace the development of legislation and law enforcement practices with respect to opium and its derivatives as illustrative of a model of rule creation that will be useful for analyzing law from a macro-political economic perspective. The bulk of the paper traces the policies that various governments pursued (the Portuguese, the British, the American) vis-à-vis the trade in opium. Chambliss concludes that "the heroin industry is a mainstay of the political economy of much of the capitalist world and it shall not be eliminated any more readily than will the automobile, banking, or construction industries."

The third essay in this section by Monahan and Hood has as its topic one of the most controversial issues in American criminal justice—that of operationally identifying and treating persons who are believed to be

dangerous to themselves or to others. The first part of the article is concerned with definitions of dangerous behavior and the second part reports the results of an empirical study in which jurors (as representatives of the general citizenry) rated various behaviors (from having committed murder to using marijuana) as to how dangerous they are. After presenting the jurors' ratings, Monahan and Hood show how the ratings vary as a function of the jurors' social characteristics and how they vary or are consistent with clinicians and court officials who make decisions about treatment and confinement of persons considered dangerous.

The last piece, by M. P. Baumgartner, analyzes data based on 389 cases (148 civil and 241 criminal) heard in the colony of New Haven between 1639 and 1665. Baumgartner focuses on the relationship between the social status of the defendant and the litigant, and the verdicts and sanctions awarded them. She finds that in both the civil and criminal cases, principals who enjoyed high status were more likely to receive favorable treatment by the court.

The third section contains two essays that on initial inspection seem quite unrelated. The first one by Edward Seidman, a community psychologist whose most recent work has been the organizing and evaluating of a juvenile diversion program, is a critical and subjective analysis of the social and political implication of much of the research currently being done in law and criminal justice. Seidman claims that most of the research and theorizing that is done in this area functions to perpetuate the status quo. In his words, "it seems to do little more than reify existing legal and criminal justice policies, practices, and inherent values. Often the process is both insidious and unworthy." The first error that social scientists make, in Seidman's view, is the error of conceptualization—they select the "wrong problem for study." Seidman concludes by providing a set of guidelines for examining the premises underlying the selection and formulation of research problems.

Unlike Seidman, Nagel and Neef do not question the value premises that underlie problem formulation and conceptualization in research in law and society but believe that persons working in this field need more technical skills so that they can ferret out and better understand causal relationships. With the help of several detailed examples, the authors illustrate and explain how one can determine different types of causal analyses: co-effects and intervening variable causation, joint causation, and reciprocal causation. According to Nagel and Neef, the reasoning they ask their readers to apply is useful whether one is attempting to explain the outcomes of cases, the behavior of judges or attorneys, the treatment of defendants, or the effects of regulatory laws. Thus, in this section, Seidman urges researchers to re-examine the premises by which they choose to work on

different problems and to carefully assess the social consequences of their output, and Nagel and Neef exhort researchers to gain more technical skills so that they can understand more fully what it is their data mean.

The essays in the last section examine the division of labor between law and social science, the conflict that arises between legal and social experts, and the contribution that various specialties make to the solution of social problems. Using *Brown vs. The Board of Education* as his point of departure, Adolph Grundman, a student of American constitutional history, shows how two major social science documents, "The Coleman Report" and "Racial Isolation in the Public Schools" (a study sponsored by the U.S. Commission on Civil Rights), were reviewed and treated by the Appellate Court in deciding school desegregation issues in Virginia. Grundman's essay concludes on a note of pessimism as he scans the future interest that the Appellate Courts are likely to have in social science and the influence that social scientists are likely to exert on appellate decisions. The pessimism stems largely from the breakdown of consensus which Grundman notes has occurred among social scientists in their assessment of the impact of segregated and desegregated schools on the self-image and emotional well-being of black children.

Schwitzgebel's piece is an exploratory essay on the feasibility of developing the role of personal-service assistants to help "ordinary persons" (not limiting the service to mental patients and "stars") function more effectively in their natural social environment. Schwitzgebel reviews studies that have shown the success that nonclinical volunteers have had working with mental patients in getting them to manage their business and personal affairs and the practice developed by prominent persons and stars in the entertainment world for using "agents" to negotiate for them. The division of labor between the service assistant and the client, and the characteristics of the contractual relationship between them are considered in this essay.

The final essay, by Jacqueline and Stewart Macaulay, provides a brief history of the rise and fall of transracial adoption in the United States as it traces the various alternatives and proposed solutions that have been put forth by the law, the social work profession, adoption agencies, and the black community to the problem of providing adequate homes for black children who cannot live with their biological parents. They review subsidized adoption schemes, describe the advocates and opponents of transracial adoption, probe the underlying values that have determined various adoption policies, assess which groups have had decision-making powers and how they exercised those powers, and finally offer criteria for deciding how prospective adoptive parents and homeless Black children might be united. The essay evaluates the worthwhileness of expert discretion as a tool for solving important social problems.

Before concluding, I would like to express a few thoughts about the content and organization of subsequent volumes that may appear in this series. While the essays that appear in this volume can be separated into four sections, each of which shares a common method and/or substantive theme, the editor did not plan for that to occur. For this volume, she contacted individual scholars and negotiated each contribution without regard for the overall package. What she wanted was thoughtful work on important issues that covered a wide range of topics in the field. That seemed an appropriate format for a first volume. But for the second and later volumes, other formats will be given serious consideration. For example, a volume might be composed of comparative studies, dealing with law and social institutions in different societies. Another might deal with a common substantive interest in criminal behavior and its control, or the function of law in social movements, conflict, and change. A volume organized around various methods for collecting and analyzing data might also be appropriate for a later time.

In this volume, the reader will find considerable variation in the length of the essays. More uniformity might be imposed on later volumes with an emphasis on fewer longer pieces or a greater number of shorter contributions. To a large extent, the critical and market reception that this first volume receives will influence the form, content, and organization of subsequent ones.

Rita J. Simon

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THE LESSONS OF SELF-ESTRANGEMENT: ON THE METHODOLOGY OF LAW AND DEVELOPMENT

Robert B. Seidman[1], BOSTON UNIVERSITY SCHOOL OF LAW

The Attorney-General of the United States, in his earlier incarnation as President of the University of Chicago, remarked to an entering law school class in 1974, that

> if law is a mediating discipline with respect to the craftsmanship which is useful and the relevance of what is perceived as current knowledge or opinion, then it is important that the higher learning in law search out those techniques and theories of knowledge most relevant to the correction or direction of law [Levi (14)].

This essay is a modest response to Professor Levi's call.

Its immediate concerns are the problems of law and development in the Third World. Its locus of concern is not accidental. Every country of course uses the legal order (that is, the rules promulgated by government

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officials, and their activities in their roles) as an instrument to induce social change. Nowhere, however, is its use so striking as in the poorer countries of the world, that are trying through the legal order[2] to transform their societies. The "correction or direction of law" in these countries lies on the urgent agenda.

The occasion for these reflections is a fascinating article by Professors David M. Trubek and Marc Galanter [Trubek and Galanter (29)], hereinafter "T-G." That article describes what its authors believe to be a general sense of self-doubt among scholars concerned with the issues of law and development. It proposes an explanation, and then suggests alternative solutions.

I take issue with them with respect to their explanations and solutions for the perceived difficulty. To explain why I do and what I would substitute, I must first summarize their article. In its nature, this paper is somewhat polemical. It expresses a sharp disagreement, going, as I see it, to the very roots of the enterprise. In a nutshell, I disagree with T-G about the "techniques and theories of knowledge most relevant to the correction or direction of law" of which Professor Levi spoke.

I

T-G are quite right to observe that law and development studies in this country are in crisis. Funding is almost dead. Student interest in courses not particularly relevant to bar exams is all but dead. Foreign students have dwindled to a trickle. Practically none of us who began the enterprise are left doing it as a full-time academic exercise, if at all.

But that is also the story of law and society studies in this country. Interest there, too, is dying. Scholars everywhere question the relevance of social science to legal studies.

T-G offer an explanation for the current malaise in law and development studies. Briefly restated (too briefly: their argument is elegantly put, with rich and intriguing detail), they argue that law and development studies in this country began with a model or paradigm of law in society, which they call "liberal legalism" [Trubek and Galanter (29), pp. 1070–1072]. This, they claim, was shared by "most" of the scholars in the field. It consisted of the following propositions:

1. Society is made up of individuals, voluntary groups and the state; the state is seen as "a process by which individuals, principally through their membership in . . . voluntary groups, formulate rules for mutual self-governance . . . and since individuals consent to the state, including its coercive features, state control furthers individual welfare."

2. "The state exercises its control over the individual through law—bodies of rules that are addressed universally to all individuals similarly situated." The state coerces violators, "but only in accordance with rules by which the state itself is constrained."

3. "Rules are consciously designed to achieve social purposes"—that is, the purposes of society as a whole, not merely limited groups within it. "Rules are made through a pluralist process which enables all individuals to secure rules favorable to them, while ensuring that the rules respect the vital interests of all others." "No single group . . . dominates the process of formulation of legal rules, and no special characteristic of individuals or groups, such as wealth or race, gives them systematic advantages or disadvantages in rule making."

4. These rules are enforced equally for all citizens, and in a fashion that achieves the purposes for which they were consciously designed.

5. The courts normally have the final say in defining the social meaning of the laws; they are the central institutions of the legal order. The "basic, typical, decisive mode of legal action" is adjudication (the application of rules by courts or court-like institutions). In so doing, the courts produce an autonomous body of learning. It is this body of learning which determines the outcome of adjudication.

6. The behavior of social actors tends to conform to the rules: officials are guided by the rules, not personal class, regional or other bases of decision-making; a large portion of the rules will be internalized by most of the population.

T-G understood "development" to involve not merely increased rationality in man's control of his world and increased material well-being, but also "greater equality, enhanced freedom, and fuller participation in the community" [Trubek and Galanter (29), p. 1073]. Law, following the paradigm of liberal legalism, held the promise of accomplishing all these at once. It was rational and purposive, and hence could achieve the "instrumental" goals of increased material well-being. If "law"—as defined by liberal legalism—were thus used, the other goodies would necessarily follow.

This paradigm was associated with a research agenda that focused on "instrumental" research designed to ascertain the legal changes required to achieve some specific developmental goals. The assumption that T-G say they made was that "the growth of an instrumental perspective would generate legal development, which would in turn foster a system of governance by universal, purposive rules, and would accordingly contribute to the enhancement of liberty, equality, participation and rationality" [(29), p. 1076]. Above all, they tell us that they assumed that "any activity that was designed to change the legal institutions of the Third World countries to make them more like those of the United States would be an effective and morally worthy pursuit." [(29), pp. 1079–80.] They assure us that they were *sincere*—as if anyone doubted that. "We believed in the model. Liberal legalism was not a cynical sham hastily constructed to be palmed off on the world's poor. It was, on the contrary, a clear reflection of the

basic ideas about the relationship between law and society and between the United States and the Third World that prevailed in United States universities in the late 1950's and 1960's" [(29), p. 1088].

It did not work that way. T-G assert that scholars (of course they mean themselves) "have come to see that legal change may have little or no effect on social economic conditions in Third World societies and conversely, that many legal 'reforms' only deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being."

That is to say, they came to believe on the basis of experience that the promises of legal liberalism were false, as well in the Third World as at home. The state does not represent all of us. It represents particular classes or elites pro tempore in control. It exercises its control only partly through general rules, but partly through arbitrary particularism. Government is at best only fitfully constrained by the law, as Watergate has driven home. The purposes of the rules are ineluctably the purposes of particular strata or classes. The pluralist dogma depends upon equal access, which is patently a myth. The rules are certainly not enforced equally for all citizens. The courts are peripheral to the legal order. The gap between the law-in-the-books and the law-in-action is systematic, not aberrational.

The paradigm having been overthrown, T-G find themselves self-estranged from their subject. They seek to find a solution for their malaise. They offer a set of alternative solutions [(29), pp. 1097–1100]. (1) Legal isolationism—i.e., to abandon the whole law and development enterprise, on the supposedly moral ground that the American lawyer has nothing to offer. (2) "A-legal developmentism"—i.e., to abandon the study of law in favor of those aspects of the developmental process that lie "outside the center of professional, legal concern, but seem at the heart of the effort to secure greater participation, equality and material welfare." (3) "Pragmatic problem-solving," i.e., to abandon the search for theories of law and development, and merely help solve problems as perceived by Third World people. (4) "Positivistic pure science"—i.e., "pure empirical research," devoid of any policy or moral purposes. (5) "Eclectic critique—i.e., to retain the whole vision of liberal legalism, but to treat its propositions as problematical rather than as factual statements of what is the case, and to use them as "critical standards." (They choose the last of these, but accept the others as possible solutions.)

T-G suffer the contemporary *Angst*. Stripped of the moral certainties, like all of us, they see themselves condemned, lost in an unending miasma of doubt and fear, threatened by visions of unending catastrophe, a lifework called into question, alienated from the very subject to which they have both dedicated fruitful professional lives. Of course they are self-estranged.

II

Their explanation for their self-estrangement is, I believe, insufficient. Like every explanation, it has a major premise, here explicit. If I were to "explain" (to propose a ridiculous example to make a point), the existence of plea-bargaining in courts by the assertion, "Policemen wear blue uniforms," the explanation would fail. It would fail because the implicit major premise is false (i.e., that the color of the uniform of the arresting officer determines the procedure used to determine the case). The validity of the major premise—the underlying hypothesis—in part determines the validity of the every explanation.

T-G take their major premise from T. S. Kuhn's monumental *The Structure of Scientific Revolutions:*

> Confronted with anomaly or crisis, scientists take a different attitude towards existing paradigms, and the nature of their research changes accordingly. The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research [(29) p. 1093].

Therefore, T-G tell us, they are estranged.

By the word "paradigm" Kuhn meant to suggest that "some accepted examples of actual scientific practice—examples which include law, theory, application and instrumentation together—provide models from which spring particular coherent traditions of scientific research [Kuhn (13), p. 10]. Included in that notion of "paradigm" is, of course, a general statement of the researcher's understanding of how things fit together ("theory")—the molecular theory of matter, for example. T-G follow not Kuhn's definition of "paradigm," but the currently fashionable one that identifies it with such a general statement. (Hereafter, I use the word "paradigm" in this second and more usual sense.)

Legal liberalism was such a paradigm. Unlike the equivalent sets of propositions in natural science, however, it was on its face normative as well, because it clearly suggested what ought to be the case as well as what is the case. That is inevitable in the social sciences. As Dewey has argued, every statement about what we *ought* to do is based upon some perception of what *is* [Dewey (5), p. 74]. Every statement of what is the case, therefore, can be understood as a truncated proposal to do something. Thus, T-G's propositions of liberal legalism led them to the belief that it would be a good thing to imitate U.S. legal institutions elsewhere in the world.

Their invocation of Kuhn is therefore both erroneous and revealing. It is erroneous not only because their definition of "paradigm" was very different from his, but also because Kuhn was discussing the physical

sciences—a distinction that T-G note but do not pursue. In those disciplines, there is for long periods a dominant paradigm within which what Kuhn calls "normal science" takes place. In social science, however, there are always competing paradigms. Adam Smith presented one model of capitalist society, Karl Marx another. Both have existed for generations. In the same way, all during the short day of law and development studies there were competing models. The model of legal liberalism was never held by every scholar in the field[3] [Trubeck and Galanter (29), p. 1062]. That there are always competing paradigms in social science should teach us all that we must justify the one we adopt, not assume its validity. Had T-G sought to justify legal liberalism, they would necessarily have treated it problematically, instead of taking its propositions for granted.

The reference to Kuhn is interesting for another reason. Kuhn argues that in hard science paradigms are not commensurable, that is, it is impossible to compare two competing paradigms by the use of the scientific method. (This proposition has been vigorously attacked [Phillips (18)].) The adoption of a new paradigm is therefore in Kuhn's view an act of faith, not of reason, even in the hard sciences. The discontent and malaise that accompany the time of paradigm change arise because scientists are then called upon to question their faith, not to determine by experiment and data whether propositions are false. Questioning one's faith leads to self-doubt and self-alienation.

T-G's anguish arises for the same reason. If they had by research falsified a middle-level hypothesis concerning law and development, as competent social scientists and lawyers no doubt they would have been delighted. Karl Popper has shown [Popper (20)] that we learn nothing from data that are *consistent* with a hypothesis. We learn nothing about the proposition that water boils at 100° C. by boiling yet another open pot of water at sea level, and solemnly measuring its temperature. We only learn when we attempt to falsify the proposition—by boiling it at 5,000 feet, for example, or in a closed pot. The spirit of inquiry requires us to seek falsification, and to abandon the notion that we can ever be *sure*.

Instead of treating the propositions of legal liberalism as problematic propositions, subject to disproof (i.e., "hypotheses"), however, T-G, fortified by what I believe to be their misreading of Kuhn, took them as articles of faith. Having, as they tell us, falsified them, they have in fact added to the sum total of knowledge. That ordinarily is an occasion for celebration, not self-doubt, discontent and *Weltschmertz*. The explanation for their anguish, however, is not merely that they are undergoing the heartache of paradigm change. Paradigm change for them led to anguish because they accorded a completely different epistemological status to ordinary hypotheses, and to those of the sort embodied in legal liberalism. A principal thrust