LEGAL TASKS FOR THE SOCIOLOGIST

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I shall comment here on the theoretical framework Professor J. H. Skolnick suggests for studies in the sociology of law and the adequacy of the bibliography in his *Social Problems* article "The Sociology of Law in America: Overview and Trends."[1] While I welcome Skolnick's emphasis on theory and the "larger philosophical issues," I think his theoretical orientation would unnecessarily constrict social studies of law.

We are all indebted to Professor Skolnick for undertaking the difficult task of charting our course. Understandably, any map drawn by a single individual will most clearly reveal the particular road taken by him. But it is our purpose here to share perspectives, and I trust that my comments on Professor Skolnick's paper will contribute to this objective.

Professor Skolnick tells us that "the most important work for the sociologist of law is the development of theory growing out of empirical, especially institutional, studies"[2] and that the "most general contribution that the sociology of law may make to social theory is that of understanding the relation between law and social organization."[3] With these broad generalizations I agree. But at the same time, Skolnick insists that "an utterly basic question" for the sociologist of law is "how does one perceive the existence of a legal system," or, "what is there about a

1. J. H. Skolnick, *The Sociology of Law in America: Overview and Trends*, Law and Society: Supplement to Summer, 1965 Issue of SOCIAL PROBLEMS 4 (1965) [hereinafter cited as Skolnick].

2. *Ibid.* at 24.

3. *Id.* at 37.

system of norms and rules – which exists whenever one is following any sort of model, even a blueprint – which makes it distinctively legal."[4]

It is apparent, however, that Skolnick thinks that Professor Philip Selznick has answered this question. He quotes Selznick's statement that to "understand the distinctively legal we must look to a special kind of obligation, an obligation to act in accordance with authoritatively determined norms."[5] And he hazards certain generalizations which are traceable to Selznick's work – that "not all rules are lawful rules, even though these have been created by a 'legitimate' polity" and that a "rule of law . . . not only suggests controls upon arbitrary use of authority, but also implies the construction of institutions prizing and supporting man's ability to use reason to rise above subjective desire."[6] Accordingly, Skolnick concludes, the primary task of the sociologist of law is to explore "the nature of legality and . . . the conditions under which it is most likely to emerge."[7]

I can think of no more fruitless task. For example, I do not see how empirical studies undertaken by sociologists of law can dispose of the question whether the Nazi genocidal laws should be regarded as "lawful" rules for all scholarly and practical purposes. Skolnick sees these laws as the "most dramatic example" of the "fact" that "not all rules are lawful rules."[8] (His less dramatic example of this "fact"[9] is not apt, because legislation declared unconstitutional for violating our Bill of Rights lost its legitimacy under our legal system.) I do not understand in what sense Skolnick uses the term "fact" when he refers to the "fact" that "not all rules are lawful rules." Obviously, he has chosen to define "lawful" and the "rule of law" in a particular way that suits his purposes but which others may regard as inadequate for their purposes.

It is sometimes argued that to define "law" to include unjust laws will, in fact, encourage obedience to unjust laws. But it is also argued that to define only just laws as "law" will have the same effect because it will habituate the people to assume that the existing legal order is always just. Whether popular disobedience is more likely if people refuse to regard an unjust law as "law" is, of course, a

4. *Id.* at 29.

5. *Ibid.* The quotation is from an article by Professor Selznick to be published in the International Encyclopedia of the Social Sciences.

6. Skolnick 38.

7. *Ibid.*

8. *Ibid.*

9. *Ibid.*

proper question for empirical investigation. I merely wish to emphasize that recognition as "lawful" of all "positive law" (which, in Selznick's words, includes all "those public obligations *that have been* defined by duly constituted authorities"),[10] even if it lacks "legality" in Selznick's sense, does not logically or otherwise imply a moral obligation to obey any particular legal rule or norm.

We may, for example, define and recognize the Nazi genocidal laws as "lawful" *under the Nazi legal system* and for this very reason condemn the Nazi "rule of law." We may even decide, once we acquire the power to do so, to punish the Nazi officials who executed these barbaric laws for violating the moral obligation to disobey them. Similarly, we may, if we wish, refuse to recognize a particular norm or rule as "lawful," because it is unjust, and yet be morally obligated to obey it. I am aware that at one point in his article on "Sociology and Natural Law" Selznick seeks to distinguish between his concept of "legality" and the concept of justice.[11] But soon he acknowledges that "at least some principles of justice are ingredients of the ideal of legality."[12] And yet he offers cogent reasons why the "positive law" should be obeyed even when it conflicts with the ideal of legality as he defines it.[13]

It is important, of course, to make our definitions explicit so that we understand each other. I might even be persuaded to make popular use of Selznick's definition if it were shown that this would have desirable consequences for society. But I think that the sociologist of law who seeks to demonstrate the superiority of a single definition of law for all scholarly and practical purposes is wasting his time. Certainly no such demonstration is required to enable the sociologist to study law as a "normative order," or to ascertain the "universal characteristics of man and concomitant principles of justice."[14] In short, it is not necessary to conduct a prior investigation into the nature of "legality" in order to join Selznick in the effort to establish "principles of criticism to be applied to existing positive law," based on "scientific generalizations, *grounded in* warranted assertions about men, about groups, about the effects of law itself."[15] I accept this excellent statement by Selznick of the objective of the sociology of law.

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10. P. Selznick, *Sociology and Natural Law*, 6 NATURAL L.F. 84, 99 (1961) (original italics).

11. *Id.* at 95. ("The ideal of legality has to do with the way rules are made and how they are applied, but for the most part it does not prescribe the content of legal rules and doctrines. The essential element in legality . . . is the governance of official power by rational principles of civic order." "Official action, even at the highest levels of authority,

I do not believe that I have said anything new. Morris R. Cohen said it all a long time ago. For more recent discussions of the issue, I would refer to Professor Julius Stone's *Legal System and Lawyers' Reasonings* (1964)[16] and his *Human Law and Human Justice* (1965)[17] and to an article by two of Professor Stone's colleagues, Messrs. Tammelo and Prott, entitled "Legal and Extra-Legal Justification."[18] "The very range of 'definitions' hitherto offered by distinguished thinkers," concludes Stone, "reflects the present belief that the search for specific *differentia* of law is not its most interesting or important aspect, and that excessive concentration on it may indeed be a diversion."[19] Stone reminds us that the "natural scientists have done well enough without an agreed formal definition of nature, and philosophers without a definition of philosophy."[20]

The absence of an agreed formal definition of "law" does not mean that lawyers do not know what they are talking about when they speak of the "legal" order or the "legal" system. They generally have in mind what Max Weber described as "state law" and Selznick definies as "positive law" – the rules regulating, or establishing the framework for, the behavior of the members of the society which are promulgated and enforced by the agencies of the state. Here too, I should make it clear that I do not object to Selznick's use of the term "law" to include what Max Weber called "non-state" law. Skolnick also adopts this latter use, quoting with approval Professor Lon Fuller's definition of "law" as "the [purposive] enterprise of subjecting human conduct to the governance of rules" and adding that this conception "includes the rules of a variety of institutions – corporations, clubs, churches, universities – as well as the polity itself."[21]

But I would argue that it is important to maintain Weber's distinction between "state" and "non-state" law, not only in the interest of clarity of thought but also

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is enmeshed in and restrained by a web of accepted general rules. Where this ideal exists, no power is immune from criticism nor completely free to follow its own bent.")

12. *Id.* at 99-100, 107-108.
13. *Id.* at 98-99.
14. *Id.* at 91-92.
15. *Id.* at 101 (original italics).
16. Particularly chapter 5, sections 2-6, pp. 165-185.
17. Particularly chapter 8, sections 10 ff.
18. 17 J. LEGAL ED. 412 (1965).
19. J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 166 (1964).
20. *Ibid.*
21. Skolnick 30.

because of the consequences that may attend the abandonment of the distinction. To illustrate my point, I shall refer to Skolnick's discussion of the significance of "private government" for the sociologist of law. For Skolnick, the emergence of the doctrine that private government "should be subject to the same restraints under the Constitution that apply to any agency of the federal or state government" constitutes "the core subject of sociological interest in private government."[22] While I agree with his estimate of the importance of the subject matter, it is confusing to state the problem in this manner.

As I have tried to show elsewhere, to equate the action of "private governments" with "state action" would have the consequence, among others, of making the Supreme Court of the United States, rather than the Congress of the United States, the supreme arbiter of national economic policy.[23] Those who would welcome such an outcome – which in my opinion would impair the role of the national legislature in our democracy – should argue for it on its merits. They should not obscure the issue by contending that this consequence must be accepted because it *logically* follows from their definition of "law" and their concept of "legality."

The insistence upon a particular conception of "law" also introduces a note of confusion into Skolnick's proposals for the study of the legal profession. Skolnick maintains that the "essential interest in the legal profession, for the sociologist of law, must be in the lawyer's distinctive capacities for developing a legal order, and in the conditions under which such capacities are advanced or impeded."[24] He then quotes with approval the following statement from Nonet and Carlin:

> As long as law remains a mere expedient for the settlement of disputes or the accommodation of conflicting interests, the lawyer's trade need hardly distinguish itself from any other occupation... A fuller professional development occurs when law is viewed as an *embodiment of values*.[25]

I am not certain that I understand these passages from Skolnick or Nonet and Carlin. I take it for granted that every lawyer participates in developing our legal order – for better or for worse – as he goes about his day-to-day tasks and that individual lawyers differ in their capacities to do their jobs. I do not see the

22. *Id.* at 28.

23. C. A. Auerbach, *Administered Prices and the Concentration of Economic Power*, 47 MINN. L. REV. 139, 187-190 (1962).

24. Skolnick 11.

25. *Ibid.*

distinction between "law" as a "mere expedient for the settlement of disputes or the accommodation of conflicting interests" and "law" as "an embodiment of values." Inevitably, in my view, values are embodied in any settlement of a dispute or accommodation of conflicting interests. We need studies that will reveal the lawyer's role in such settlements and accommodation – the sociologist's "essential interest in the legal profession" should thus be in what the profession *does*. Skolnick, Nonet and Carlin may share a particular vision of the values an ideal legal order should realize. But I do not see why it is necessary for all sociologists to share their vision in order to make significant empirical studies of the legal profession. Nor do I see why the legal "profession" is not worthy of the name if it fails to act as they think it should.

Reluctantly I have concluded that Skolnick's images of the practicing lawyer and law-teacher are not mine. Yet it is crucial for the future success of our common endeavors that we do not cling to mistaken notions of each other. Possibly, I readily acknowledge, empirical study is needed to decide who is mistaken. But permit me to point out where I differ with Skolnick.

Unlike Holmes, says Skolnick, "most practicing lawyers and law professors" do not cultivate "scholarly curiosity about the law as a social institution."[26] "Most practicing lawyers," he explains, "are interested in knowing better how to ply their trade."[27] "And similarly, most law professors care primarily about their stock in trade, which is in America the analysis of case law. . . . The lawyer is a practitioner and legal training stresses the logical analysis of judicial norms, a position associated with the philosophy of analytical jurisprudence."[28] While Skolnick wisely hedges his statements by speaking of "most" practitioners and "most" law professors, he has nevertheless, in my opinion, presented to our colleagues abroad an erroneous overall impression of the concerns of the practicing lawyer and law professor and of the state of legal education in America.

After all, the legal realists did triumph and their teachings, more than any other influence, are reflected in the curricula and methods of our law schools. Even the new analytical jurisprudence inspired by linguistic philosophy is finding it difficult to make its way in America. The bibliography which Skolnick has assembled for us is studded with the works of law professors and practicing lawyers. The pioneer

26. *Id.* at 6.
27. *Ibid.*
28. *Id.* at 7.

study of the right to privacy by Brandeis and Warren, which Skolnick thinks is still significant for sociologists,[29] was written when both were practicing lawyers. Indeed, every practicing lawyer must be a sociologist of law in order better to ply his trade. Unfortunately, almost always, he is an untrained one.

I object to Skolnick's characterizations only because their acceptance would result in underestimating the opportunities for fruitful collaboration with practicing lawyers (including judges) and law professors in sociological studies of law. Every practicing lawyer knows that the art of advocacy – before a court, a legislative committee, an executive or administrative agency – is founded, in large measure, upon the ability to describe and evaluate the factual consequences of the alternatives open to the tribunal. He is also aware that his own – and the tribunal's – knowledge of the social facts is inadequate. So Professor Stone has suggested as the province of sociological jurisprudence

> the broad area of the interaction between law and legal institutions on the one hand, and the attitudes and activities of men governed by these rules on the other – in brief, of the effect of law on men and of men on law.[30]

In this sense, I maintain, every practicing lawyer is interested in sociological jurisprudence. And every branch of law – private and public – is a potential subject for sociological study on behalf of which the energies of the law professor, the practitioner and the judge can be enlisted. Our problem, in truth, is to devise priorities and determine strategies for investigation.

My complaint, therefore, is that Skolnick's horizon is too limited – as is his bibliography. The empirical studies cited are concentrated in the fields of the criminal law and criminology, the legal profession, the Chicago Jury Project and racial desegregation. Not a single work cited deals with the legislative or executive process and the administrative process is represented only by a few studies in criminal law administration. The focus of attention is the judicial process. Indeed, at times, Skolnick seems to exclude all other areas from the sociologist's province. For example, he thinks that only those "policy studies" are "most central" in the sociology of law which "reflect back upon the working of the legal order."[31] To illustrate his point he states: "Studies in delinquency rehabilitation are of interest to sociology of law to the extent that they lead to an understanding of adjudicative

29. *Id.* at 6.

30. Stone, *op. cit. supra* note 18, at 20.

31. Skolnick 23.

behavior. If the main contribution relates to the efficiency of correctional officials, the interest of such studies – no matter their quality – would be mainly criminological."[32] But why so? Why could not studies of the efficiency of correctional officials "reflect back upon the working of" a particular criminal code? Or form the basis for generalizations about the administration of the criminal law?

It has taken the law schools a long time to discover that legislative, administrative and executive processes are also part of the "legal order." Are sociologists now to retrace our steps by taking "adjudicative behavior" as their exclusive concern? Studies of the legislative, executive and administrative processes merit the highest priority in any list of tasks to be done in the sociology of law. For if one agrees with Skolnick, as I do, that the "one broad topic" that can be said "to characterize the future of the sociology of law . . . is legal development and change,"[33] then the study of such change requires knowledge of its principal instrument in the modern world – the legislative, executive and administrative processes.

We have a number of studies in this area which should be included in any bibliography on the sociology of law. I should like to mention a few that are particularly known to me, but do not wish to imply that they are all models for the sociologist.

Skolnick points out that sociologists of law in America "seem increasingly interested in making jurisprudential generalizations within the context of historical trends."[34] Such generalizations should be sought in any study of the impact of law upon social change and of social change upon the legal order. But if this is to be the case, we must not ignore the rich source of empirical data which consists of the legal records developed for purposes of law-making and law-application by state and federal judges, executives and legislators – cases, statutes and administrative and executive regulations and decisions. Professor Willard Hurst has shown us to what imaginative use these records may be put. His volumes are storehouses of "jurisprudential generalizations within the context of historical trends" which should be of great interest to all sociologists of law.

Recently, Arnold Rose called for research in the "social process by which a legislative statute is formulated and passed."[35] We have a few such studies – by political

32. *Ibid.*

33. *Id.* at 37.

34. *Ibid.*

35. A. Rose, *Some Suggestions for Research in Sociology of Law*, 9 SOCIAL PROBLEMS 281 (1962).

scientists and practicing lawyers — which should not for that reason alone be excluded from a bibliography on the sociology of law.[36] Furthermore, is there reason to define the province of the sociology of law so as to exclude the work of Bentley,[37] Truman,[38] Gross,[39] Key,[40] Lipset,[41] Latham,[42] Eulau and his co-workers[43] and others I shall mention in footnotes?[44] Should the studies of voting behavior be excluded?[45]

Should we also exclude the studies of the administrative process by Selznick,[46]

36. S. BAILEY, CONGRESS MAKES A LAW (1957); NEWMAN & A. MILLER, THE CONTROL OF ATOMIC ENERGY (1948); E. E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF (1935).

37. A. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES (1908).

38. D. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

39. B. GROSS, THE LEGISLATIVE STRUGGLE (1953).

40. V. O. KEY, POLITICAL PARTIES AND PRESSURE GROUPS (1945).

41. S. M. LIPSET, THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE (1963); and POLITICAL MAN, THE SOCIAL BASES OF POLITICS (1960).

42. E. Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AMER. POL. SCI. REV. 376 (1952).

43. J. C. WAHLKE & H. EULAU, eds., LEGISLATIVE BEHAVIOR: A READER IN THEORY AND RESEARCH (1959); H. EULAU, S. ELDERSVELD & M. JANOWITZ, POLITICAL BEHAVIOR: A READER IN THEORY AND RESEARCH (1956); H. Eulau et al., *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AMER. POL. SCI. REV. 742 (1959).

44. C. HORSKY, THE WASHINGTON LAWYER (1952); M. McDONALD, THE STUDY OF POLITICAL PARTIES (1955); L. MILBRAITH, THE WASHINGTON LOBBYISTS (1963); K. SCHRIFTGISSER, THE LOBBYISTS (1951); M. SHUBIK, READINGS IN GAME THEORY AND POLITICAL BEHAVIOR (1954); D. Derge, *The Lawyer in the Indiana General Assembly*, 6 MIDWEST J. POL. SCI. 19 (1962); D. LUCE & I. ROGOW, *A Game Theoretic Analysis of Congressional Power Distribution for a Stable Two-Party System*, 1 BEHAVIORAL SCIENCE 83 (1956); and Shapley & M. Shubik, *A Method for Evaluating the Distribution of Power in a Committee System*, 48 AMER. POL. SCI. REV. 787 (1954).

45. See, *e.g.*, B. BERELSON, P. LAZARSFELD & B. MCPHEE, A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN (1954); A. CAMPBELL, G. GURIN & W. MILLER, THE VOTER DECIDES (1954); A. CAMPBELL, P. CONVERSE & D. STOKES, THE AMERICAN VOTER (1960); and Wallace, *Some Functional Aspects of Stability and Change in Voting*, 69 AMER. J. SOC. 161 (1963).

46. P. SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION (1957); TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION (1949); and *Foundations of the Theory of Organization*, 13 AM. SOC. REV. 25 (1948).

Presthus,[47] Lane,[48] Latham,[49] Bernstein,[50] Redford[51] and Caves[52] for example? Skolnick does not mention any of the vast number of books and articles dealing with organizational or decision-making theory. True, few of these works are concerned with administrative or executive agencies of government. But some work has been done on the process of decision-making within the administrative agencies of the federal government which should be of interest to sociologists of law.[53]

We do not but should have a study of the federal bureaucracy of the quality of Professor Morris Janowitz's study of the professional soldier.[54] But a beginning has been made and our bibliography should note it.[55]

47. R. PRESTHUS, THE ORGANIZATIONAL SOCIETY: AN ANALYSIS AND A THEORY (1962); *Weberian and Welfare Bureaucracy in Traditional Society*, 6 BEHAVIORAL SCIENCE 148 (1961); *Behavior and Bureaucracy in Many Cultures*, 19 PUB. ADM. REV. 25 (1959); and *The Social Bases of Bureaucratic Organization*, 38 SOCIAL FORCES 103 (1958).

48. R. E. LANE, THE REGULATION OF BUSINESSMEN (1954); *Law and Opinion in the Business Community*, 17 PUB. OPIN. Q. 239 (1953); *Businessmen and Bureaucrats*, 32 SOCIAL FORCES 145 (1953); *Why Businessmen Violate the Law*, 44 J. CRIM. L. 151 (1953); and *Government Regulation and the Business Mind*, 16 AMER. SOC. REV. 163 (1951).

49. E. LATHAM, THE POLITICS OF RAILROAD COORDINATION, 1933-1936 (1959).

50. M. H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955).

51. E. S. Redford, *CAB General Passenger Fare Investigation*, in INTER-UNIVERSITY CASE PROGRAM; NATIONAL REGULATORY COMMISSIONS: NEED FOR A NEW LOOK (1959); and ADMINISTRATION OF NATIONAL ECONOMIC CONTROL (1952).

52. CAVES, AIR TRANSPORT AND ITS REGULATORS (1962).

53. See, *e.g.*, C. A. Auerbach, *The Internal Organization and Procedure of the Federal Trade Commission*, 48 MINN. L. REV. 383 (1964); N. Boyer, *Policy Making by Government Agencies*, 4 MIDWEST J. POL. SCI. 267 (1960); Forehand and H. Guetzkow, *Judgment and Decision-Making Activities of Government Executives as Described by Superiors and Co-Workers*, 8 MANAGEMENT SCIENCE 3 (1962); GLOVER & C. LAWRENCE, A CASE STUDY OF HIGH LEVEL ADMINISTRATION IN A LARGE ORGANIZATION (Office of the Assistant Secretary of the Air Force for Management, 1960); *Improvement in the Conduct of Federal Rate Proceedings*, Report of the Committee on Rulemaking in Support of Recommendation No. 19, and *Licensing of Domestic Air Transportation by the Civil Aeronautics Board*, Report of the Committee on Licenses and Authorization in Support of Recommendations No. 20 and No. 21, in SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SEN. DOC. NO. 24, 88TH CONG., 1ST SESS. (1963); Nagel & Curris, *The Exercise of Procedural Discretion by the Regulatory Agencies*, 17 AD. L. REV. 173 (1965); S. Nagel & Lubin, *Regulatory Commissioners and Party Politics*, 17 AD. L. REV. 39 (1964); and S. Scher, *The Politics of Agency Organization*, 15 WESTERN POL. Q. 328 (1962).

54. M. JANOWITZ, THE NEW MILITARY: CHANGING PATTERNS OF ORGANIZATION (1964); and THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT (1960).

55. See, *e.g.*, M. H. BERNSTEIN, THE JOB OF THE FEDERAL EXECUTIVE (1958); P. T. DAVID & POLLOCK, EXECUTIVES FOR GOVERNMENT: CENTRAL ISSUES OF FEDERAL PER-

Even in the area of the judicial process the behavioral approach should not be exclusively represented by Professor Glendon Schubert and the small brave band venturing into the new world of jurimetrics. The work of Professors Ulmer,[56] Murphy and Pritchett,[57] Schmidhauser,[58] Kort,[59] Nagel,[60] Spaeth,[61] Snyder,[62] Peltason[63]

SONNEL ADMINISTRATION (1957); S. B. SWEENEY & T. J. DAVY, (eds.), EDUCATION FOR ADMINISTRATIVE CAREERS IN GOVERNMENT SERVICE (1958); F. H. DeLong, *Who Are the Career Executives?* 19 PUB. ADM. REV. 108 (1959); W. Pincus, *The Opposition to the Senior Civil Service*, 18 *id.* at 324 (1958); Smith, *The Academic Man as Regulatory Commissioner*, 68 PUB. UTIL. FORT. 145 (1961); Smith, *Should Regulatory Commissioners Come from Staff Personnel?*, 66 *id.* at 871 (1960); Smith, *Professional Administrators as Regulatory Commissioners*, 64 *id.* at 257 (1959); Smith, *Laymen as Regulatory Commissioners*, Pt. I, 63 *id.* at 673 (1959), Pt. II, 63 *id.* at 750 (1959); Smith, *Businessmen as Regulatory Commissions*, 31 J. BUS. 132 (1958); Smith, *Accountants as Regulatory Commissioners*, 59 PUB. UTIL. FORT. 93 (1957); Smith, *Engineers as Regulatory Commissioners*, Pt. I, 60 *id.* at 718 (1957), Pt. II, 60 *id.* at 846 (1957); and Smith, *Lawyers as Regulatory Commissioners*, 23 GEO. WASH. L. REV. 375 (1955); B. P. Van Riper, *The Senior Civil Service and the Career System*, 18 PUB. ADM. REV. 189 (1958); and Warner, Van Riper, Martin & Collins, *A New Look at the Career Civil Service Executive*, 22 *id.* at 188 (1962).

56. S. Ulmer, *Quantitative Analyses of Judicial Processes: Some Practical and Theoretical Applications*, 28 LAW AND CONTEMP. PROB. 164 (1963); *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352 (1963); *Supreme Court Behavior in Racial Exclusion Cases: 1935-1960*, 56 AMER. POL. SCI. REV. 325 (1962); *Supreme Court Behavior and Civil Rights*, 13 WESTERN POL. Q. 288 (1960); *The Analysis of Behavior Patterns on the United States Supreme Court in Civil Liberty Cases for the 1958 Term*, 22 J. POL. 629 (1960); *Polar Classification of Supreme Court Justices*, 12 S. C. L. Q. 407 (1960); and *An Empirical Analysis of Selected Aspects of Law Making of the United States Supreme Court*, 8 J. PUB. L. 414 (1959).

57. W. MURPHY, ELEMENTS OF JUDICIAL STATEGY (1964); W. MURPHY & C. H. PRITCHETT (eds.), COURTS, JUDGES AND POLITICS (1961); C. H. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960 (1961); CIVIL LIBERTIES AND THE VINSON COURT (1954); and THE ROOSEVELT COURT (1948).

58. J. Schmidhauser, *Judicial Behavior and the Sectional Crisis of 1837-1860*, 23 J. POL. 615 (1961); and *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959).

59. F. Kort, *Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions*, 28 LAW & CONTEMP. PROB. 143 (1963), and *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 AMER. POL. SCI. REV. 1 (1957). See also F. Fisher, *The Mathematical Analysis of Supreme Court Decisions: The Use and Abuse of Quantitative Methods*, 52 AMER. POL. SCI. REV. 321 (1958), and F. Kort, *Reply to Fisher*, 52 *id.* at 339.

60. S. Nagel, *Testing Relations Between Judicial Characteristics and Judicial Decision-Making*, 15 WESTERN POL. Q. 425 (1962); *Ethnic Affiliation and Judicial Propensities*, 24 J. POL. 92 (1962); and *Political Party Affiliation and Judges' Decisions*, 55 AMER. POL. SCI. REV. 843 (1961).

61. H. Spaeth, *Judicial Power as a Variable Motivating Supreme Court Behavior*, 6

and Grossman,[64] as well as their critics,[65] demands our attention and evaluation.

As I indicated above, the practicing lawyer, the judge and the law professor are most interested in investigations of the social impact of particular legislative, administrative and executive rules, decisions and practices. A number of such studies have been made and should be noted.[66] For example, should not the Kinsey studies[67] be included?

MIDWEST J. POL. SCI. 54 (1962); and *An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behavior*, 5 *id.* at 165 (1961).

62. E. Snyder, *Political Power and the Ability to Win Supreme Court Decisions*, 39 SOCIAL FORCES 36 (1960); and E. Snyder, *Uncertainty and the Supreme Court's Decisions*, 65 AMER. J. SOC. 241 (1959).

63. J. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS (1955).

64. J. Grossman, *Role-Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter*, 11 J. PUB. L. 285 (1963).

65. See *e.g.*, T. Becker, *An Inquiry into a School of Thought of the Judicial Behavior Movement*, 7 MIDWEST J. POL. SCI. 254 (1963); W. Berns, *Law and Behavioral Science*, 28 LAW & CONTEMP. PROB. 185 (1963); W. Mendelson, *The Neo-Behavioral Approach to the Judicial Process: A Critique*, 57 AMER. POL. SCI. REV. 593 (1963); J. Roche, *Political Science and Science Fiction*, 52 AMER. POL. SCI. REV. 1026 (1958); and M. Wiener, *Decision Predictions by Computers: Nonsense Cubed – and Worse*, 48 A.B.A.J. 1023 (1962).

66. See *e.g.*, W. BEANEY, THE RIGHT TO COUNSEL (1955); F. BEUTEL, STUDY OF THE BAD-CHECK LAWS IN NEBRASKA (1957); R. S. BROWN, LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES (1958); Conard (*Allocation of Cost of Automobile Accidents*); W. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY (1954); C. A. Auerbach, *Administered Prices and the Concentration of Economic Power*, 47 MINN. L. REV. 139 (1962); E. Barrett, *Police Practices and the Law from Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962); W. Beany & Beiser, *Prayer and Politics: The Impact of* Engel *and* Schempp *on the Political Process*, 13 J. PUB. L. 475 (1965); H. Cairns *et al.*, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962); Goldblatt & Cromien, *The Effective Social Reach of the Fair Housing Practices Law of the City of New York*, 9 SOCIAL PROBLEMS 365 (1962); M. Jahoda & S. Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 YALE L. J. 295 (1952); C. Morris & J. Paul, *The Financial Cost of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962); G. Patric, *The Impact of a Court Decision: Aftermath of the McCollum Case*, 6 J. PUB. L. 455 (1957); M. Rosenberg & Sovern, *Delay and Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959); F. J. Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AMER. POL. SCI. REV. 777 (1959); and G. Stigler, *Administered Prices and Oligopolistic Inflation*, 35 J. BUS. 1 (1962). It would be proper to cite here also the numerous works of many economists dealing with the impact of the antitrust and regulatory laws and decisions upon the American economy.

67. GEBHARD, GAGNON, POMEROY & CHRISTENSON, SEX OFFENDERS (1965); A. KINSEY *et al.*, PREGNANCY, BIRTH AND ABORTION (1958); A. KINSEY *et al.*, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); and A. KINSEY *et al.*, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

I am certain that I have not exhausted the additional studies that ought to be listed in a bibliography on the sociology of law. The works of Professors Vose and Krislov, for example, also occur to me.[68] At any rate, what I would include reflects what I regard as proper grist for the sociology-of-law mill. And I would be disturbed if Skolnick excluded the studies I have cited solely because he thought none of them had any value for the kind of theory he thinks the sociologist of law should try to elaborate.

Yet, in spite of the numerous works I have cited, I agree with Skolnick that we should not assume that there already exists "a large body of social science findings directly relevant to lawyer-like concerns."[69] But I would counsel my colleagues not to approach the behavioral scientist – as my friend Kenneth Davis seems to have done – with the assumption that he has nothing to contribute and a belligerent "show me" attitude.[70] The problem, once again, is to devise priorities and strategies for investigation. Julius Stone urges that the "contributions to understanding the law" offered by the social sciences "must be marshalled and organized around the problems which confront the lawyer."[71] I agree; but the sociologist similarly will be interested only in problems that have theoretical significance for him. Arnold Rose tells us sensibly to "get together and hammer out researchable questions of interest to both" lawyers and social scientists.[72] Apparently, this is easier said than done.

For example, Skolnick concludes that "there is little that is exciting . . . either theoretically or philosophically" about the findings of the Chicago Jury Project –[73] our most ambitious joint undertaking to date. Certainly, the Chicago Jury Project was marshalled and organized around a problem of significance for the lawyer. I am not competent to say whether the Project could have been organized so as to yield findings that are theoretically exciting to the sociologist. If it could have been it is a pity that it was not so organized. But even if it could not have been so organized the Chicago Jury Project yielded information of great value for any intelli-

68. C. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959); C. Vose, *Litigation as a Pressure Group Activity*, 282 ANNALS 20 (1958); and S. Krislov, *Constituency Versus Constitutionalism: The Desegregation Issue and Tensions and Aspirations of Southern Attorneys General*, 3 MIDWEST J. POL. SCI. 75 (1959).

69. *Skolnick* 9.

70. Davis, *Behavioral Science and Administrative Law*, 17 J. LEG. EDUC. 137 (1963).

71. Stone, *supra* note 18, at 19.

72. A. Rose, *Some Suggestions for Research in Sociology of Law*, 9 SOCIAL PROBLEMS 281 (1962).

73. *Skolnick* 10.

gent decision about the future of the jury system – a subject of lively current debate. From the point of view of a reform-minded law professor it was worth undertaking. And sociologists contributed much to make it worthwhile. If Skolnick is right projects of this sort in the future may have to rely upon the services of reform-minded sociologists or, if worse comes to worse, purchase the services of sociologists.

I know of no easy way to reach agreement that a particular research subject and research design will be significant for our society, will center on a problem of importance to the lawyer and will promise findings that are theoretically exciting to the sociologist. Skolnick and I do not even seem to agree about the merits of Dean Pound's theory of interests,[74] which I think is of enduring theoretical importance for the sociologist of law. It enables us systematically to view the legal order of any particular society as a source of data about the values authoritatively chosen by that society. Thus it offers a significant framework for a comparative analysis of the legal orders of different societies. I suggest reading the third part of Julius Stone's *The Province and Function of Law* (1950) and its successor volume, *Social Dimensions of Law and Justice* (1966). On a modest scale I have used Pound's theory to sketch the impact of law on social change in the United States.[75]

My objective is not so much to urge the reading of these works – though I do – but to stress the point that if the promise of findings that are theoretically exciting is to be the *sine qua non* of the sociologist's participation in the study of the legal order – and I am not arguing that it should not be – then sociologists must communicate their theoretical objectives to reform-minded law professors in sounder and more understandable fashion than they have done to date.

In my opinion these theoretical objectives will themselves have to be formulated, tested and refined in the light of past, present and future work of the kind that I regard as falling within the province of the sociology of law. Thus to me, at this juncture, the most heartening aspect of the work going forward at Berkeley, Wisconsin and Northwestern is not its present theoretical underpinnings but the very fact that some sociology departments and law schools have close working relationships.

For the same reason we owe thanks to the founders of the Law and Society Association for making it possible to bring together all the academic disciplines which are or should be interested in the study of the legal order.

74. See *Skolnick* 6.

75. C. A. Auerbach, *Law and Social Change in the United States*, 6 UCLA L. REV. 516 (1959). See also C. A. Auerbach, *On Professor H. L. A. Hart's "Theory and Definition in Jurisprudence,"* 9 J. LEGAL ED. 39 (1956).