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THE NEW LOOKS IN LAW

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A few years ago, Dr. I. I. Rabi, a Nobel laureate in physics, told me at lunch that one of the big differences between law and science is that, in his words, "In science we build bridges to the future; in law, you build them to the past." I kept munching on my jello as I searched for a retort, or at least a response, and here I propose to report the results of the quest to this point.

No doubt most of us would admit that the law has not until now accented a future-oriented look. This is understandable, for in its very nature law is reactive. It tends to focus on treating yesterday's ills, not on preventing tomorrow's. That is probably what led Dr. Rabi to his remark about "bridges to the past." That is what accounts for other barbs, summed up in the jibe that law is like a bird which flies backwards, because it does not care where it is going but wants to see where it has been.

The time has arrived for this backwardness to stop. Looking ahead may not prevent disaster, but failing to look ahead will guarantee it. Already, technology, population and human impatience have compressed the space that separates random lunacy from general catastrophe to a fearfully short distance. This planet has very little margin for error if it is to survive for long. In these times anticipation is a mortal necessity, and law must do its share.

Happily, there are signs of new perspectives for law—perspectives that come from facing forward and looking outward, in contrast to the traditional legal position that was to face backward and peer inward. This change will have practical impact: it will increase law's capacity to serve society. It will also have intellectual impact: it will affect the way law is taught, studied and thought about.

Perhaps the flavor of the change can be suggested in a word—the word "findings." Whereas in the past lawyers have been nearly exclusively committed to "thinkings," they are now also interested in findings. In this they share a general tendency of modern man. All of us have become more and more dependent upon findings and facts as science and the media flood our awareness of the world with torrents of data, including quite a number that are correct.

Whether the subject is the trend in paid admissions at County Stadium, the Dow-Jones stock averages, the health of the bald eagle population, Mickey Mantle's lifetime slugging capacity, Teddy Kennedy's popularity, or your cousin's chances of getting into Princeton—whatever the subject, someone has some findings and data.

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As an aside, it is worth noticing that the data usually come to us in the language of numbers, which is itself a pregnant datum for a profession that has lived by words.

One result of this information revolution has been that people have been freer to reject old wives' tales and assorted hand-me-down superstitions. Even the English World-is-Flat Society had to admit not long ago after looking at snapshots from outer space that the earth does have a roundish look. Now the members will have to revise their geography a little, and maybe they will even touch up their history, which I'm told recounts that Columbus left Spain with four ships, not three. The Society reputedly holds that the fourth just kept sailing when it got to the edge.

The information explosion has bred a healthy skepticism that cuts into many of the ancient scabs of superstition that encrust the body of civilized society, and has exposed the festering nonsense inside. Systematic inquiry has penetrated domains of human belief that have been closed to critical examination as far back as history recalls.

This penetration is going ahead in law at accelerating speed and is challenging many of law's easy assumptions about matters of social fact. We are also witnessing a massive challenge to the law's *values,* but this is not, in my opinion, based upon any systematic or coherent inquiry. What it is based upon is a complex question that all of us will be trying to answer for the rest of our lives.

At any rate, our concern this evening is with the way many of the law's assumptions about matters of fact are coming under challenge. One result will be the revision of legal rules and practices to reflect the discarding of legal assumptions of the "world-is-flat" variety. A more important result will be a shift in our manner of looking at law and thinking about it. We will come under increasing pressure to embrace the scientific method as a necessary complement to the classical legal method in our approach to our profession's work.

I see the law succumbing to the pressure and think the development is not only welcome but overdue. It will mean harder work, for I believe it will call on us to master a radically different process of intellectual justification—a new logic of explanation. And, no doubt, in doing so we shall have to tear down a few old structures of legal dogma—but they are shanties anyway, and no one will miss them.

Let us turn to a case that exemplifies the tension between the law's penchant for assumption and science's approach to the investigation of social reality.

Hawkins v. United States,[1] decided in 1958 in the U.S. Supreme Court, is a squalid case to carry so lofty a theme, but it does. The Gov-

[1] 358 U.S. 74 (1958).

ernment charged James Hawkins with transporting a 17-year-old girl from Arkansas to Oklahoma for immoral purposes in violation of the Mann Act. Actually, she had lived in Dogpatch, Oklahoma. The District judge took the sordid business very much to heart and after Hawkins was found guilty sentenced him to five years imprisonment.

In the Supreme Court Mr. Hawkins complained bitterly that his wife had been used as a witness against him at the trial, in violation of the common law rule that immemorially excluded one spouse's testimony against the other.

The conviction was unanimously reversed. Justice Black wrote for the Court in a fashion that is a model of the law's mind at work in the classical manner. He declared that "reason and experience" require the Court to uphold the rule barring the lady from testifying.

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now. . . . But the Government argues that the fact a husband or wife testifies against the other voluntarily is strong indication that the marriage is already gone. Doubtless this is often true. But not all marital flare-ups in which one spouse wants to hurt the other are permanent. The widespread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved. . . . Adverse testimony given in criminal proceedings would, we *think*, be likely to destroy almost any marriage.[2]

Justice Black went on to fortify his thinking man's position by asserting that to abandon the exclusionary rule would violate the "persistent instincts" of centuries of the common law.[3]

Mr. Justice Stewart joined his brothers in voting for reversal, but he could not accept the majority's fears that marital bliss would vanish if the spousal privilege were not enforced. He pointed out that 19 states and England had repealed or substantially modified the rule and, picking up Black's phrase, he said: "Surely 'reason and experience' require that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquility."[4]

He urged, in effect, that there was a better way to tune in on society's experience than through the seat of the judge's hunches or thinkings:

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[2] *Id.* at 77-78 (emphasis added).
[3] *Id.* at 79.
[4] *Id.* at 81-82.

> Before assuming that a change in the present rule would work such a wholesale disruption of domestic felicity as the Court's opinion implies, it would be helpful to know the experience in those jurisdictions where the rule had been abandoned or modified.[5]

Is Stewart not right? Is it not clear that if the court's decision rests on the supposititious impact of a legal rule upon human behavior, and it has empirical sources of evidence bearing on that issue, it ought not to disregard them? The practice of relying on intuition to resolve fact questions is what makes Russian roulette so risky a business.

Perhaps Justice Black did not mean to be taken seriously when he invoked experience to prove that the husband-wife privilege must not be discarded. Perhaps his true reliance was on a value reason—that it is simply indecent and unworthy to permit a wife to propel her man to prison by testimony against him in a criminal case. If so, Justice Black would have served justice as well, and law better, if he had been frank in saying that. Courts ought to keep their reasons aboveboard, not conceal them in unverified assumptions. Otherwise the public will soon come to believe that the law's values are no more trustworthy than its disproven assumptions. And when public confidence in law falters, the society is in trouble.

The point I make here is that in legal definitions—whether by courts or legislatures—values and assumptions are both involved, and they ought to be separately identified and separately considered.

"But not so fast," you will say. "How do you propose to go about comparing the level of marital bliss in the states that have or have not the spousal privilege that *Hawkins* was so keen for?" Is the best technique to use questionnaires and interview surveys asking married people about their felicity indicators in the "have" states compared with the "have not" states? Is comparing divorce rates the way to find out? Shall we ask the social scientists to rig up a controlled experiment on domestic tranquility? Would it be relevant to find out how often, in fact, one mate does testify against another in criminal cases in the 19 "have not" states?

In other words, granting it would be helpful to check out Black's assumption, as Stewart urges, *how* could it be done?

That is not an easy question, and it deserves more than an off-hand answer. In my opinion the state of the art of survey research is well enough advanced so that some useful evidence could be obtained about the impact of repeal of the *Hawkins* privilege if the law seriously wants and needs the evidence. Even if my facetious suggested questions are

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[5] *Id.* at 82, n.4.

not on the right track, there are two points to be made before we write off the venture as not worth the effort.

First, please notice that the need to specify criteria for systematic study of marital tranquility makes lawyers *think* harder about what Justice Black meant by a phrase that rolled so trippingly off his tongue.

Second, even if lawyers prove to be capable of specifying satisfactorily the questions they want answered and find that present-day social science cannot deliver responses with enough valid and credible evidence to help, that is no reason to give up on scientific research. This kind of empirical inquiry is still an infant industry, and with infants, a certain amount of patience is healthy. A story goes that Faraday was explaining to a friend a device that in the end embodied one of his basic discoveries on electromagnetism. The friend asked, "Yes, but what use is it?" "No use," said Faraday, "it's like a baby."

Never mind the immaturity and imperfections of the science of social inquiry. Lawyers will want to understand and use it, with increasing urgency. It offers a way to observe the world outside—sometimes to gauge the impact of law in action; sometimes to determine the nature and extent of colliding purposes that law must take account of.

The science of empirical inquiry offers lawyers plenty of scope for stimulating intellectual activity: in formulating the problem for research, in designing indicators or criteria, and in interpreting data from the field.

Earlier I said that the use by lawyers of scientific methods of testing social experience will involve us in a different kind of intellectual activity and that this will complement the traditional legal methods. Let me spell that out.

The intellectual qualities that legal method accents are power of analysis, care in making distinctions, brilliance in dialectic, imaginativeness in synthesis, ability with rhetoric. When the legal scholar writes an article or treatise, he generally offers it to the market place of ideas with the following sort of warranty: "I have consulted the authorities I deem relevant, have analyzed and synthesized their essential contents and have arrived at my theory or conclusion. My analysis, reasoning and argument are all set out and should persuade you to my way of thinking. Have I not achieved a brilliant insight?"

Scientists use a different process of justification—at least, in the gathering, assembling and interpreting of data prior to the place where they begin to argue for the significance or meaning of their findings. One may be bent on merely describing a segment of reality. Another may be out to test a previously developed hypothesis about causality or correlation in the form, "If X, then Y." (For example, if policemen may not interrogate at station houses without *Miranda*-style warnings,

the rate of convictions for crime will fall. If news media print accusations and statements about defendants before trial, the impartiality of the jury will be jeopardized. If pretrial discovery is conducted, the case is more likely to settle without trial. The latter hypothesis is dubious on the basis of a nationwide survey of Federal pretrial discovery, conducted by the Columbia Project for Effective Justice.)[6]

In conducting the research to test his hypothesis, the scientist follows systematic and institutionalized procedures of investigation. These prescribe, usually with some rigor, how he must go about observing the universe, population or subject of his inquiry. If his research is quantitative and the population too large for total embrace, he must sample. There are known and generally accepted procedures for sampling, based on probability principles, with ranges of potential error that are understood and allowed for.

With the data in hand, the scientist presents and analyzes them, once more according to generally accepted procedures and rules. The effort is to objectify the process by which relevant materials are assembled and analyzed. When he has performed these steps, the scientist throws down a challenge quite different from the lawyer's. He says, "Go thou and do likewise in collecting and assembling the data. Follow the systematics of observation and recording and the rules for interpretation of the data. You will reach the same results I reached, I promise you."

Science insists on results that are verifiable by others. So the investigator must make tracks that his colleagues can follow or replicate independently. This places large importance on the how of research and not alone on the what or the product.

Lawyers have no fondness for the question of how research is conducted. Everyone knows how to use the indices, digests, and the rest of the library. There is no point in including discussions of methodology in a law review article. Until very lately, you would not have found in the reviews any discussions of methodology of the kind that abound in the social science literature. Scientists care about heuristics; lawyers usually are turned away by it.

I do not pretend that the legal and the scientific styles of thought and justification never meet, but that in general any meeting that occurs takes place on the lawyer's home ground and involves their shared practices in using speculation, logic, inference, judgment and other reflective intellectual processes that are more characteristic of doctrinal manipulation than data gathering. When law teachers have been saying all these years that legal education seeks to teach students "to think like lawyers," they have meant it literally. What I submit

[6] Rosenberg, *Changes Ahead in Pretrial Discovery,* 48 F.R.D. 479, 488-89 (1968); W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 91-100 (1968).

here is that we must also teach them to observe and find out like scientists, or we shall not be doing our job for them or for the law.

In short, legal education will have to embrace, as a complement to legal method, the scientific logic of explanation or justification. Most law teachers will find themselves quite ignorant of scientific method and its use in social research and will want to learn about them. Happily, they have a splendid opportunity under a special program recently set up under the acronym SSMILE (Social Science Methods in Legal Education), co-sponsored by the Association of American Law Schools and the Law and Society Association. Each summer since 1967, a month-long institute has been held at the University of Denver College of Law for about 20 law professors, with the aim of immersing them in the theory and practice of social research.

Almost before the teachers can become prepared to teach them, programs and courses on "law and society" or "law and social research" are starting to sprout at undergraduate levels in law schools. The movement toward these subjects will doubtless get into full swing after the December, 1969, annual meeting of the Association of American Law Schools. About 2000 of the nation's law teachers will there take part in a many-sided program built around the theme, "Contemporary Social Research, the Law and the Law Schools." I expect that the law professors will depart from the meeting with a keen sense of the need to master the systematics of social research about law.

In stressing the utility of social science, I do not mean to neglect its limits. Much of its literature strikes me as excessively concerned with social and moral philosophizing, with captious attacks on various of our imperfect institutions, and with generalized hair-tearing about the inhumanity of man. Such sport may qualify as social, but is it science?

In my opinion, the attribute that gives social scientists their greatest value is their capacity, concededly limited at this stage, to explain and perhaps to predict social phenomena. Prediction is the applied art of anticipating, and anticipation is the mortal necessity I mentioned at the outset. The social scientists' greatest failing has been their eagerness to prescribe medicaments they have not tested for social maladies they have not fully investigated, let alone fully understood. They cannot hope to enjoy public confidence as major resources of needed knowledge if they respond with their predilections when asked for their findings.

In today's restless world, the stakes that ride on law's success in managing social problems are large. And there is one need above all that shadows law whenever it ventures to try to improve the human condition. It was expressed two years ago by the President's Crime

Commission, which carefully surveyed the administration of criminal justice in this nation and concluded that there are many needs in this area, but of all of them the greatest is the "need to know."[7]

Lawyers are by nature and temperament problem-solvers. They are more anxious to eradicate social evils than to fathom their underlying dynamics. But we are all becoming aware, as we face one crisis after another in society, that one simply cannot apply knowledge one does not have, no matter how urgent the need for it. The first priority is to get the knowledge.

In a mass society, a handicraft system of investigating law-related social problems is no more useful than a handicraft system of producing automobiles. When the issue was whether a person who promised to answer for the debt of another should be held liable without a writing, a court could decide the issue without going outside the system of values that appeared in the decided cases. But if the issue is whether increasing the penalty for using heroin will curb its use by the young, nothing in the cases and no amount of gazing inward for moral imperatives will provide the answers.

Today, assuring the internal symmetry of law is not our great concern. Our concern is with the rules in operation and the law in action. We have to know how effective law is in relation to the people and the problems it is meant to address. We have to know enough to write laws that will look ahead. We must anticipate in law. We must build bridges to the future.

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[7] President's Commission On Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 273 (1967).