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Law, Morality, and Scientific Method: A Review Article

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Book Review

LAW, MORALITY AND SCIENTIFIC METHOD: A REVIEW ARTICLE

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I.

I have been asked by the editors of the Nebraska Law Review to prepare a critical review of *Parental Authority: The Community and the Law* by Julius Cohen,[a] Reginald Robson,[b] and Alan Bates [c].[1] The interest of the editors was not in an expository account of the book's contents but in a *critique* of the research project as a whole. I shall therefore assume that my readers are acquainted with the book (or will shortly become so).

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1 Rutgers University Press, 1958.

This much about the book may perhaps be said. It is the result of a study designed to apply polling techniques to ascertain the moral sense of the community in a selected area of family law. The investigators were all members of the faculty of the University of Nebraska, Professor Cohen[2] in law and Professors Robson and Bates in sociology. The area studied was the state of Nebraska; the subject matter was certain child-parent relationships as they actually exist in law compared with the views of respondents on what they thought the law *ought to be*. The result, as might be expected, disclosed marked discrepancies. The study indicates the nature and extent of the discrepancies and points to certain factors that might account for them.

This is a pioneering venture. So far as I know it is the first sustained effort to utilize scientific method to measure what is thought to be moral sentiment in the law. At first sight this may puzzle many readers. In what way does the study, they may ask, differ from any other public opinion poll? We shall return to this question in the sequel. Meanwhile, we should bear in mind, that any attempt whatever to gather statistical data in the determination of a legal problem is itself exceedingly rare.[3] Indeed, the question whether *moral sentiment* can ever be probed by scientific method is one of the methodological problems which the investigators had first to face and determine for themselves before the project got under way. This issue is and will remain polemical. Reference to it will be made later in this article.

The quickest way into the heart of the book is to look briefly at the issues confronting the respondents. They are the following:[4]

1. Should the law allow parents to supervise the child's earnings?
2. Should the law allow parents to treat earnings of the child as their own property?
3. Should the law allow parents to prevent the child from attending college?
4. Should the law allow parents to control the religious affiliation of the child?

[2] Now a member of the faculty of Rutgers Law School.

[3] Professor Frederick K. Beutel's, Some Potentialities of Experimental Jurisprudence, Univ. of Neb. Press, 1957 is an instance. The jury study of the University of Chicago Law School is the most ambitious project of the sort yet undertaken. At this writing none of its major results have been published.

[4] Chap. IV.

5. Should the law allow parents (in their own interest) to block the career choice of their twenty-year-old sons and daughters?
6. Should the law allow parents (in their own interest) to block a child's choice of career? —by age of child?
7. Should the law allow parents (in the interest of the child) to block the career choice of twenty-year-old sons and daughters?
8. What should be the minimum legal age for marriage (if any)?
9. At what age (if any) should parental consent for marriage be required?
10. Should the law allow parents to refuse medical aid to a child when it is recommended by competent medical authority?
11. Should the law allow parents to transfer custody of a child without legal supervision?
12. Should the law allow parents to disinherit children?
13. Should a child have legal claims against his parents for parental wrong to the child?
14. Should a child have legal claims against a third party for disruption of family relationships?
15. Who should be legally responsible for property damage or bodily injury caused by a child?
16. Who should have legal responsibility for financial support of indigent parents?
17. Who should be legally responsible for financial support of legally emancipated but indigent children?

Of these seventeen issues, the community agreed with the law in five only, namely: Parental authority to supervise earnings of the child; parental authority over gifts; parental right to refuse medical aid for the child; and the reciprocal obligations of parent-child support. In all other cases there was substantial divergence between what the respondents thought the law *ought to be* and what the law *appears in fact to be.*

To my mind, the existence of this divergence is in and of itself sufficient justification for the study. Indeed, it would not matter to me what kind of serious inquiry was undertaken in this area. That the authors chose to utilize the methods of social science is, however, for me, a source of deep satisfaction—not alone because of the results obtained, but also because of the immense importance of the interdisciplinary experience gained.

I wish the authors had been in a position to do two additional things: (1) a free running account of the problems met and overcome in the process of merging the professional competences of a lawman with sociologists and (2) a manual for sociolegal research. Perhaps the second is already contained at length in the book itself. Still a rule of thumb précis or simplified guide for setting up a pilot model and testing it, for setting up the final model, for training interviewers and the like would be of great practical consequence. Even more important would be a running account of the difficulties that are to be expected in interdisciplinary research between lawyers and social scientists. Though perhaps the most trying difficulties are temperamental ones, yet much trouble arises from the basic differences in the professions. We would be very grateful indeed if the authors could see fit to undertake either or both of these tasks.

II

The book is very apt to arouse controversy though not indeed among social scientists who are likely to regard it as just another public opinion poll. In this I think they would be mistaken. It is no light matter for a social scientist to attempt sociolegal research in company with a law trained investigator. Experience indicates that presently it takes one to three years' intensive preliminary work before the investigators can even come to terms. Despite the accelerated pace at which interdisciplinary research has grown in this country since World War II, there has been no notable easing of the difficulties which arise when law and social science are brought together. Workers in the various fields of physical science find that they have an immense fund of common professional experience and received ideals to smooth the way to collaboration. They are bound by common ties of scientific method, by common techniques (mathematics and controlled data gathering), and by tacit understanding of what in general is to be excluded from scientific consideration (morality, values, the worthwhileness of the undertaking). Moreover, perhaps most important of all, their subject matter is relatively simple and manipulable. They deal in the main with nonhuman nature.

On the other hand, the lawyer and the social scientist have none of these things in common. Law is an art, not a science. Its chief aim is justice, not truth. It is an indiscriminate mixture of science and morality, fact and value. These are organic elements of the body of the law and any scientific investigator who would examine them must accept them as such. The social scien-

tist, for his part, faces equally serious dilemmas. He is supposed to be a scientist, but most of the body of scientific technique available is of little use in investigating the highly complex character of human behavior. To maintain scientific "distance" and to keep his balance in the infinitely complex field of human behavior the social scientist is presently required to exhaust almost all of his energy in keeping his activities in scientific control. If he succeeds in doing this, it is no matter that the results are relatively trivial. Another way of saying the same thing is to say that his all-important problem is *method.* At this point he runs head on into the lawman who has a well developed method of research, perfected through millenia, a method which has little in common with scientific method, but which is intensely practical and which demonstrably does work. To collaborate, each party must sacrifice much that is vital to him.

Thus, the reader trained in social science must exercise his imagination in order to see what is unique in this study. *Not the outcome, but the very fact that it was done at all is the point.*

When we come to consider the effects of this book on the legal community, the picture changes. The legal community is very likely to raise serious objections not only to any inferences the authors explicitly or implicitly draw from their data but also to the very undertaking itself.

Lawmen are particularly sensitive to the charge that they have little idea of the social consequences of legal dispositions and even less of the real wants, claims and interest of those whom law governs. When it is suggested that these matters can be remedied by resort to social science investigation the result is apt to be a blanket condemnation of social science and all its works. And indeed it may seem the height of absurdity to ask 1000 random Nebraskans what they think the law ought to be in an isolated area of family relations under circumstances in which their completely irresponsible verbal replies are solemnly taken down, processed in batches, and announced as the moral sense of the community. As idle, we might surmise their saying, as to ask 1000 random grasshoppers in which direction they think they ought to jump next—north, east, south or west? For what difference can it possibly make what answers are given—in either case. Out of 1000 respondents to a verbal inquiry, more rather than less *say* they think the law ought to be other than it is. But neither they nor the investigators are prepared to do anything about the situations involved. It would be pure guess to assume that the majority of the respondents want the law to be changed

now or in the future. And the investigators are careful to say that they do not draw that inference from their data. Indeed, no necessary inferences respecting action can be drawn from the results of the poll. What then is the justification for having undertaken it?

In reply one might be tempted to retort that the application of scientific techniques to the question of what people think the law ought to be is a game as idle as that which Galileo played when he rolled little metal balls down a polished inclined plane. Newton's struggle to tie the rate of fall of an apple from a tree with the motion of the planets around the sun was an equally idle pursuit. But such "cosmic" objections and answers would really be beside the point. For law knows and admires lofty philosophical and scientific speculation and has done so for ages. The sting of the controversy is nearer home. It involves law's distrust of non-interested, noncontested verbal responses. Law believes that only *interested* verbal responses are worth serious consideration, and interested responses must be subject to some species of verification or at least probing.

To meet part of this objection, the present investigators undertook to ask the respondents to give *reasons* for their answers. Not much could be done with the reasons, but at any rate the innovation is one that the legal community must welcome. This is the type of probing it has long been accustomed to. It would feel still better, we may suppose, if something of consequence to the respondents hung on their answers. But this is too much to ask of a pioneering effort. Meanwhile there are other objections that lawyers are likely to make not so much to the undertaking as to what it purports to be.

In Chapter I the authors announce that theirs is a study of *The Moral Ingredient in Law*. Throughout the book they speak of "the moral sense of the community." They point out that it is everywhere recognized that law deals with the same general area of human behavior as does morality. They note that in many legal situations it becomes the duty of the court to determine what are obviously moral questions (moral turpitude is but one of them). And they refer to the fact that the relation of morality to law is a central part of every system of jurisprudence.

The authors anticipate objection from lawyers on the ground that polling techniques are infeasible at least so far as adjudication is concerned. I think they answer adequately the objection that assuming that the test of public opinion on a question of legal morality is desirable, yet it is not feasible to use the methods of

social science for this purpose. The answer is this: the methods of social science are better than the intuitive guesses or wild hunches of the trier. *If he can in fact get the benefits of this method he ought to accept them.*

There is another objection of a more serious sort offered to the device of testing public opinion on what the law ought to be. The objection is that attributed by the authors to Professor Edmond Cahn in his book entitled, *The Moral Decision.*[5] This can be summed up in the following words: the act of deciding a moral issue in law belongs to him who is called judge. It is an individual matter. To attempt to apply an empirical measuring rod to the moral ingredient would destroy it.

The objection is serious because it goes to the very heart of the authors' enterprise; no matter how well their work is done, its effect if admitted is devastating. All other objections are of no consequence unless this one is met. Do the authors meet it? Peripherally, but not head on.

It is an underlying assumption of the authors of this work that every value determination in the law is a moral decision. When the respondents to this poll, for example, stated that they did or did not think that parents ought to be liable for the torts of their children, the authors assumed that the respondents *had made a moral judgment.* Indeed, every one of the answers to the questionnaire was assumed to be a moral judgment. "For what," say the authors, "is the moral sense but another name for the values of the community" (p. 189). Yet there is mention (at p. 190) of "the morally indifferent," and an example given, namely, "whether there should be two or three signatures to a will" (p. 190). Now, just offhand, it is hard to see on the basis of the undertaking in this book why questions of allotment of property rights within the family should be moral questions, but the problem of the number of subscribing witnesses (a device to forestall fraud) should be nonmoral. If there is any virtue in the fact of subscribing witnesses at all, then the question of the best rules for preventing fraud in matters of testation, while not exigent nor perhaps even interesting, has some slight moral flavor about it. I do not doubt for one moment that moral ingredients lay around and about the intrafamilial problems these authors studied. The question is: *did the investigators succeed in isolating out and weighing these moral factors?* Is what their statistics represent really and truly a measure of *moral* forces in the community?

[5] (1955) 310, 315; cf. Cohen et al, pp. 10-11.

As I see it, the only reason why the authors have to answer this question is because they raised it themselves. There is surely no reason why they could not have reported that they had a collection of *value judgments* on the law without specifying that these value judgments were also *moral ones.* And the great benefit of this sociolegal study would remain. We would have a serious scientific poll of community value preferences in a very important area of family law. This alone would have justified the enterprise and its costs in time and money.

It is also apparent that the characterization of the data as a test of the *moral* sentiment of the community is nothing that could be judged as coming out of the results of the test, not, in other words, an inference from the data. It is a philosophical, or more narrowly, a jurisprudential assumption. It assumes that an unspecifiedly large number of value judgments in law are moral judgments (all but the vaguely undifferentiated "morally indifferent" ones). Now, it is this assumption that I should feel called upon to challenge if I thought it important to do. I do not believe it is important, for two reasons. In the first place, the work stands without the assumption that (almost) all value judgments are moral. In the second place, the authors do not make the assumption explicitly and avowedly, although it is perfectly obvious that they are free to identify value preferences with morality if they choose to do so.

One who *does* assume that every value judgment is a moral one and that morality in law can be measured by any scientific technique which can be used to test value judgments in law accepts the extreme hypothesis of positivism. This states that all moral judgments are judgments of *preferences.* As such they need only the logic of decision theory and the methods of statistical analysis to measure them.

I do not think this is the case. And yet I myself am on record with the statements in the form of jurisprudential postulates that "Every social (legal) experiment involves ultimately a question of legal control" and "Every question of control involves a moral choice." From these two statements I should be forced to admit a third: "Every legal experiment involves a moral choice." I should now be willing to go further and assert that "Every legal decision involves a moral choice."

From this it follows that I believe that every answer given by each respondent in the authors' study *involved a moral choice.* But I cannot agree that they made *only* moral choices. They also made a number of other choices as well, choices involving values

not moral ones: choices of political value, economic value, historical value, personal value, religious value, whatnot. Indeed, I am not now prepared to say how one does go about measuring moral values. But what I do know is that value measurements such as were undertaken by the authors here are absolutely necessary in order that eventually moral values can be isolated out of their present confused mixture in the value matrix of human behavior.

I believe that law is not morality and morality is not law. Presently, each is an undifferentiated mixture of itself and the other. No one sees any dividing line, no one knows when in law he speaks of morality or when in morality he really speaks of law. To go further, I believe that law is an undifferentiated mixture of science and morality. Its concern with facts is scientific or at least smacks of a scientific inquiry. Its concern with generalized norms of behavior smacks of moral inquiry. I believe that scientific method should resolutely be applied to this area of confusion. The only test the scientist should submit to is his own method. He should study legal behavior with the finest instruments science can devise. And in the best traditions of science he should push relentlessly ahead not stopping to consider that that which he processes may be the stuff of morality. It matters not to him what kind of stuff it is so long as he follows strict scientific procedure in studying it. These injunctions of course entail risk. They entail the risk that the scientist may destroy what he would wish merely to study. They also entail the risk that the power the scientist creates may be worse for the human race than the happy state of impotence which prescientific innocence permitted. These matters are the affair of scientific conscience. They are matters of the first importance. But precisely because they are so vital I would invite the social scientist, as Professor Cohen here has done, to venture into the area of legal control of human behavior. For law, unlike physical science, knows how to contain power. It may be presumptuous of us, but I think that for the present at least we can assure the social scientist that the power he creates in bringing scientific method to law will not be delivered over to the enemies of mankind intent on the destruction of the human race.