who is innocent and who shall be punished. Perhaps these same factors underlie the purge "trials" in totalitarian states.

If, as Mr. O'Brian suggests, we are suffering from a mass neurosis, the appropriate therapy, as in the treatment of an individual's neuroses, is one calculated to produce a realistic understanding of the problem. In an individual, a concern for security that is disproportionate to any actual danger is a symptom of emotional illness. The individual whose energy is bound up in defenses against fancied threats is handicapped in effectively mobilizing his psychic energy against the problems of the real world. The drive for security tends to produce greater insecurity. The loyalty and security program is based upon a far-reaching misconception of the danger to the national safety. The threat does not arise from the eccentric, the unorthodox or the dissenter. Yet such individuals are the subjects of the cases reported by Mr. Yarmolinsky. Because the loyalty and security program is misdirected, it has tended to heighten insecurity. Enormous sums of money and the brain-power of countless individuals have been invested for a return that is negligible in terms of the national safety. The value of an effective counter-intelligence corps would far exceed that of the much publicized, highly politicized loyalty and security program. An essential prelude to any reform of the program is an accurate and objective description of the true magnitude of the danger of treason, espionage, sabotage and subversion. As Mr. O'Brian puts it, we need "to appraise more accurately the extent of the danger."[44] Steps appropriate to meeting these hazards can then be taken. In 1948, Mr. O'Brian pointed out that if we are going to investigate men's beliefs and associations, "we must pay the price for it." "Are we prepared to do this?" he asked. "And is the result worth while?"[45] These questions, which strike at the heart of the matter, are as pertinent today as they were eight years ago.

ABE KRASH†

COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND. By Samuel A. Stouffer. Garden City, New York: Doubleday and Company, 1955. Pp. 278. $4.00.

THIS is a detailed report on a sociological survey of attitudes toward civil liberties done in the summer of 1954 under the auspices of the Fund for the Republic. Although the major findings of the survey have been widely publicized, perhaps there is still room for discussion of some of their implications for lawyers and legal theorists.

If the study is accurate, a sizable proportion of the American public are in favor of sharply curtailing the civil liberties of Communists and other "radicals." More than half of the interviewees in a representative national sample

44. NATIONAL SECURITY AND INDIVIDUAL FREEDOM 46.
45. O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 609 (1948).
†Member of the District of Columbia Bar.

of almost five thousand felt that an admitted Communist should be fired from a job as a store clerk (68 per cent), a radio singer (63 per cent), a defense plant worker (90 per cent), or a college teacher (89 per cent); that he should be denied the right to give a speech in the community (68 per cent); that a suggestion to remove his books from the public library should be supported (66 per cent); that he should lose his citizenship (77 per cent); and that he should be put in jail (51 per cent).[1] More surprising is the fact that almost as many of the representative interviewees would put similar restrictions on atheists, or at least on the advocacy of atheism. A person wishing to speak in the community against churches and religion would be denied that right by 60 per cent of the sample; if he had written a book expressing such views, 60 per cent would favor its removal from the public library; and 84 per cent would forbid him to teach at a college or university.[2] Even a partisan of government ownership for all railroads and big industries would be denied the right to advocate his views in a public speech, to have his book on the subject in the public library, and to teach in college—by 31, 35 and 54 per cent respectively.[3]

Findings like these not only help explain recent legal limitations on civil liberties; they even raise the question why our laws in this area have remained as liberal as they are. If these really are the views of the nation, why haven't they been fully implemented in law? The answer should be important for legal theorists and civil libertarians alike.

Some possible reasons for the discrepancy between public attitudes and legal sanctions regarding civil liberties are indicated in Professor Stouffer's report. For one thing, some of these attitudes have become widespread only in recent years. The present study covers a short time span during which attitudes remained relatively stable; but it refers to relevant earlier findings, many of which show a trend against civil liberties. The percentage of people who would deny socialists the right to publish newspapers, for example, went from 25 before World War II to 45 in 1953.[4] Perhaps the law tends to lag behind public opinion on these matters.

Another factor seems to be that these problems are not particularly prominent among the day-to-day concerns of the vast majority of people. Asked at the beginning of the interview, "What kinds of things do you worry about most?" only 1 per cent of the cross-section mentioned anything having to do with Communists or civil liberties in this country.[5] Even "probe" questions failed to raise the proportion beyond 6 per cent.[6] Most people appear to be preoccupied with personal problems such as health, family and finances. Perhaps this helps explain the fact that the "less tolerant" views of the majority have not been fully implemented.

1. Pp. 40-44.
2. Pp. 32-33.
3. Pp. 29-30.
4. P. 56.
5. P. 59.
6. P. 70.

Stouffer, incidentally, presents this finding as evidence that there is no "national anxiety neurosis";[7] but his optimism on this score may be questioned. What would be the result of a severe crisis which forced such issues to the personal attention of people having these "latent tendencies"? It seems to me likely that they would try to translate their views into action, particularly if the crisis were sudden enough to prevent reflection and change of opinion. Stouffer presents evidence of a slight positive correlation between degrees of interest and of tolerance,[8] but there is little reason to suppose that currently uninterested opponents of civil liberties would be transformed into proponents if their interest in these issues were suddenly aroused.

A third factor accounting for the divergence of law and public opinion is suggested by the striking contrast between the attitudes of community leaders and those of the general population. Stouffer arranged to have a number of prominent persons interviewed in each of the 123 middle-sized (10,000 to 150,000 population) cities in his sample. These leaders proved far more tolerant in the opinions they expressed than did the cross-sectional samples in the same cities or in the nation as a whole.[9] The difference is especially marked for newspaper publishers, community chest chairmen, library board chairmen and local bar association presidents; but it even holds for commanders of American Legion posts and DAR regents—who, though least tolerant of the fourteen types of leaders sampled, rank well above the cross-sections. Some of the leaders—party chairmen and mayors, for example—are directly involved in making local policy; but even those who are not, such as presidents of labor unions, chambers of commerce, women's clubs, school boards and parent-teacher associations, no doubt influence political policies more than the average person. It therefore becomes important to determine whether these leaders really mean what they say.

Just why community leaders express more tolerant views is uncertain. It may be that they have more education than the average (the book, in a rare instance of omission, fails to provide information on this point); we know from data on the cross-section that better-educated people tend to show greater tolerance. Perhaps, again, people tend to select leaders who feel not as they themselves do but as they believe they ought. It may also be that local leadership provides a kind of experience and sense of responsibility that strengthens liberal tendencies. Or it may be that leaders who are polled as "prominent members of the community" learn to make utterances, even on confidential questionnaires, that reflect more nearly the prevailing ideology than their own action tendencies. If, however, these responses do reflect the direction of leaders' influence in our public life, partisans of civil liberties may well owe our Babbitts a greater debt than they have heretofore acknowledged.

* * *

7. Pp. 57, 87-88.
8. *E.g.*, pp. 118, 133.
9. Pp. 51-52, *passim*.

These findings revive a jurisprudential dragon which, though often wounded, has never been slain. When the people in a democratic society differ from the law (and the judges) on normative issues, which shall prevail? Of course, not all moral ideals in a culture become laws, but when the ideals are considered important for social survival and when informal sanctions fail to enforce them adequately, there arises a pressure for their enactment into law. Yet in our legal system even beliefs strongly held by the majority have not always become law. Where minority pressure groups have failed to offset a majority view, the courts have often accomplished the same result, by tempering, interpreting or striking down the enactments of majority-controlled legislatures.

Once, there was a jurisprudential justification for such judicial action in the idea that law was above society, something fixed and immutable which need only be "discovered" by the judge. Recently, this view has been shown to be unsatisfactory in a variety of ways, particularly by the demonstration that the substance of law is in fact continually being adapted to changing social forces. If such adaptation is a fact, runs the argument, why not reject the pose of stare decisis and strict constitutional interpretation in favor of a view of the law as a flexible instrument of social policy? This would permit the law to adapt to new social requirements without the embarrassment of legal fictions and tortured reinterpretations.

This modern view seems to me to remove the old criterion of decision without adequately replacing it. A uniform criterion is certainly needed to ensure consistency and predictability in the law, but as Northrop has pointed out,[10] the older jurisprudence has been followed by several new ones that lack this requisite. Some of them provide no criterion for decision, while others leave judicial decisions "completely relativistic and arbitrary."[11]

One possible criterion is found in the set of ideas known as "sociological jurisprudence." These have in common the view that judicial decisions are guided by the actions of men in society and by the cultural norms or mores of the society. Sumner, for example, doubted that law that diverged from the mores could be effectively sanctioned.[12] Underhill Moore sought to show that judicial decisions on stop-payment orders were modulated to prevailing commercial practices.[13] Proponents of this view often go beyond the observation that the law *is* affected by the mores, to contend that law *ought to be* affected and even determined by the mores. Ehrlich expressed his enthusiasm for this idea in the term "living law," which for him connoted the whole of what social scientists have described as culture.[14]

---

10. Northrop, *Cultural Values*, in ANTHROPOLOGY TODAY: AN ENCYCLOPEDIC INVENTORY 668 (Kroeber ed. 1953).

11. *Id.* at 673.

12. SUMNER, FOLKWAYS *passim* (1906). For example, "legislation, to be strong, must be consistent with the mores." *Id.* at 55. For a critique, see MYRDAL, AN AMERICAN DILEMMA 1048-57 (1944).

13. Moore, Sussman & Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks*, 42 YALE L.J. 817 (1933).

14. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Moll transl. 1936).

In a democratic society there is much to be said for the suggestion that the mores should be the criterion of law. A judicial system that gets too far from the earth may, like the mythical giant Antaeus, lose its strength and its capacity to protect society. In the 1930's, this seemed to many liberals to have occurred. The Supreme Court was criticized by Thurman Arnold,[15] for example, on the ground that it was preserving an archaic law for the sake of a few against the wishes and needs of the majority. In support of their specific criticism, liberals advanced the more general principle that the deeply felt beliefs of the masses on matters of societal welfare, constituting as they do the mores, should be embodied in law.[16]

Application of this very principle to civil liberties in the 1950's would, however, produce a conclusion to which few liberals would willingly subscribe. Stouffer reports that the masses lean toward stricter controls not only of Communists, but of other deviant groups as well. If these attitudes persist and become intensified into mores, will liberals be willing to accept the conclusion that such mores ought therefore to be reflected in law? More likely, those who

15. ARNOLD, THE FOLKLORE OF CAPITALISM (1937).

16. An interesting use of the mores concept was made in establishing "moral turpitude" and "good moral character" under the Immigration Act of 1917, §§ 3, 19, 39 STAT. 875, 889, as amended, 8 U.S.C. §§ 1182(a)(9), 1251(a)(4) (1952), and the Nationality Act of 1940, § 307(a)(3), 54 STAT. 1142, as amended, 8 U.S.C. § 1427(a) (1952). In United States *ex rel.* Iorio v. Day, 34 F.2d 920 (2d Cir. 1929), Judge Learned Hand wrote an opinion for the Second Circuit Court of Appeals reversing a deportation order based on an alien's concealment of a violation of the Prohibition Act. Hand's principal argument was that this violation did not constitute moral turpitude because "we cannot say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place; nor can we close our eyes to the fact that large numbers of persons, otherwise reputable, do not think it so, rightly or wrongly." *Id.* at 921. After the same court wavered over the rule in United States *ex rel.* Berlandi v. Riemer, 113 F.2d 429 (2d Cir. 1940), Judge Hand reasserted it in affirming an order admitting an alien to citizenship despite a natural law marriage to his niece. Here he stated the test as whether "the moral feelings, now prevalent generally in this country, [would] be morally outraged" at the appellee's conduct. United States v. Francioso, 164 F.2d 163 (2d Cir. 1947).

The same rule led him in Repouille v. United States, 165 F.2d 152 (2d Cir. 1947), to dismiss an order naturalizing an alien who had been convicted of euthanasia because "we feel reasonably secure in holding that only a minority of virtuous persons would deem the practice morally justifiable. . . ." *Id.* at 153. But the rule leaves him uneasy because "in the absence of some national inquisition, like a Gallup poll, that is indeed a difficult test to apply. . . . " *Ibid.* Dissenting from Hand's decision, Judge Frank questioned the court's estimate of "generally accepted moral conventions." *Id.* at 154. If the mores are to be used as a test, Judge Frank asserted, the parties should at least have "the opportunity to bring before the judge's attention reliable information on the subject" in the court of original jurisdiction. *Id.* at 155. But Frank suggests that "the correct statutory test (the test Congress intended) is the attitude of our ethical leaders." *Id.* at 154. It is interesting that in this instance Judge Frank prefers the attitude of the ethical leaders to that of the masses. One doubts that his reasons are given fully in the contention that the former is more easily ascertained—after all, there *are* Gallup polls—or that the Congress intended this test. Perhaps his position is affected by concern about the social consequences that would result from the implementation of currently prevailing mores.

have favored this tenet of sociological jurisprudence will retreat from it in the face of its unacceptable implication. It would be nice if the retreat were a withdrawal to a prepared position, but where might such a stand be made? It would be ironic if liberals and realists found themselves forced to return to stare decisis.

Perhaps social science will prove of some assistance in solving a problem it has helped to create. Although social scientists are expected to be "value-free" in their work, they are not precluded from using their methods to provide more precise descriptions of sets of values. It is toward that sort of description that much of the work of Northrop and McDougal has been directed.[17] Eventually a formulation may emerge that is sufficiently precise and compelling so that it can be accepted as a criterion for decision. Given such a criterion, judges might construe their task as trying to decide cases in terms of the maximum contribution to the overriding values of the society. In this they might be aided, as in the *Segregation Cases*,[18] by estimates of social scientists as to the social consequences of various decisions. These functions are at least implicit in legal realism, whose proponents call for decisions made consciously in terms of social consequences (though they often neglect to specify which consequences or how to ascertain them).

If jurisprudence had a value criterion and a means of measuring decisions against that criterion, judges would have a basis other than stare decisis or an arbitrary exercise of power for resisting particular trends in public opinion. Ultimately, of course, values must be accepted by the community if they are to stand. A temporary divergence of law from particular mores may be possible: a permanent divergence from many mores can in Western societies be shown by experience to be unstable and by definition to be undemocratic.

But jurisprudence may find a rational justification for temporary divergence. This justification might well include an obligation on the part of those who support the divergence to work for its elimination—for instance by helping to make public attitudes more favorable to civil liberties. A useful step along these lines would be the isolation and explanation of the phenomenon of tolerance.

It is in this connection that the Stouffer report provides us with much useful information, for it offers a detailed analysis of factors that are correlated with tolerance. Stouffer finds more tolerance among the better educated, the community leaders, younger people, men, Northerners, residents of cities, non-

17. NORTHROP, EUROPEAN UNION AND UNITED STATES FOREIGN POLICY (1954); NORTHROP, THE TAMING OF THE NATIONS (1952); Northrop, Book Review, 63 YALE L.J. 1209 (1954); Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 *id.* at 1430 (1950); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 *id.* at 915 (1952).

18. Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

churchgoers, and persons who minimize the dangers of Communism.[19] We must still learn, of course, whether, why and how these characteristics affect tolerance, but this is a start.

One may question some of these findings on methodological grounds. The interviews themselves may have dwelt on the threat theme so heavily as to elicit spuriously less tolerant reactions from the more suggestible interviewees.[20] The subjects may also have been frightened in some degree by the persistence with which they were sought for questioning (at least five and sometimes ten personal calls were made to ensure that as many as possible of those selected for the sample were interviewed), though if this was a factor it was missed in the observations of the experienced professionals who did the interviewing.[21] Another point of doubt concerns the "scale" of tolerance used to grade the responses. This scale has real value in summarizing data and ensuring reliability, but it tends to class undecided respondents in the less tolerant category.[22] Closer analysis than Stouffer provides might have shown that women, non-leaders, farmers, and others are merely more undecided, not affirmatively more intolerant. Finally, there is the perpetual problem, which the author discusses candidly, of relating expressed opinions to affirmative actions.

Granted all of these reservations, Stouffer's data still provide us with an important starting point for an analysis of the phenomenon of tolerance. It suggests further study aimed at verifying and explaining the relationships indicated here. If we understood better the origins of tolerance, we might expend our efforts more effectively in working to develop the kind of population that could resist simultaneously the Communist threat and the threat to our civil liberties. Stouffer's book is a signal contribution to the task.

RICHARD D. SCHWARTZ†

THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES. By Richard Hofstadter and Walter P. Metzger. New York: Columbia University Press, 1955. Pp. xvi, 527. $5.50.

ACADEMIC FREEDOM IN OUR TIME. By Robert M. MacIver. New York: Columbia University Press, 1955. Pp. xiv, 329. $4.00.

ACADEMIC freedom has been the subject of an extraordinary amount of recent discussion, especially since the University of Washington cases in 1948 pre-

19. Pp. 51, 93, 112, 116, 117, 134, 135, 144-46, 201, 206, 207.

20. The interview schedule is given on pp. 250-61. Incidentally, the atmosphere of threat might also have been enhanced by the period in which the interviews were conducted, just after the Army-McCarthy episode.

21. Pp. 240-43.

22. Pp. 262-69.

†Assistant Professor of Sociology, Yale University.