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The Admissibility of Social Science Evidence in Person-Oriented Legal Adjudication

IRA P. ROBBINS*

INTRODUCTION

The law is an illimitably visaged phenomenon; it pervades the human experience. Whatever one's definition of law—be it “the word of him, that by right hath command over others,”¹ “nothing else than an ordinance of reason for the common good, made and promulgated by him who has care of the community . . . ,”² “the enterprise of subjecting human conduct to the governance of rules,”³ or “[t]he prophecies of what the courts will do in fact, and nothing more pretentious”⁴—it undeniably bears upon the human species in its every operation.⁵ One would therefore expect that any inquiry which might increase our understanding of the human condition would also be useful to the law. Yet this expectation has not been fulfilled; investigations in the law often have rejected meritorious evidence procurable from another expanse of cognition—that of social science.⁶

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¹ T. HOBBS, *LEVIATHAN; OR THE MATTER, FORME, & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL* 109 (A. Waller ed. 1935).

² THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part II, First Part, Question 90 (D. Sullivan ed. 1952).

³ L. FULLER, *THE MORALITY OF LAW* 122 (rev. paperback ed. 1969).

⁴ Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 461 (1897). In this connection, Chief Justice Hughes once observed: “the Constitution is what the judges say it is” Speech before the Elmira Chamber of Commerce, Elmira, N.Y., May 3, 1907, in C. HUGHES, *ADDRESSES OF CHARLES EVANS HUGHES 1906-1916*, at 179, 185 (2d ed. 1961); *accord*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) Marshall, C.J. (“It is emphatically the province and duty of the judicial department to say what the law is.”); K. LLEWELLYN, *THE BRAMBLE BUSH* 12 (1951 ed.) (“What these officials [judges, sheriffs, clerks, jailers, lawyers] do about disputes is, to my mind, the law itself.”). The list of definitions in the text is by no means intended to be all-inclusive.

⁵ The foregoing statements do not necessarily presuppose a philosophy of universal law, although universal law is one of the jurisprudential foundations of this article. They merely betoken the point that actions, activities, and experiences cannot be seen wholly apart from the law.

⁶ “Social science” has been defined as “the study of people living together in groups, as families, tribes, communities, etc.” and “any of several studies, as history, economics, civics, etc., dealing with the structure of society and the activity of its members.” WEBSTER'S *NEW WORLD DICTIONARY* 1351 (2d College ed. 1970). Rose adds that the term comprises “those theoretical disciplines which seek to understand and predict human behavior in terms of general principles empirically tested.” Rose, *The Social Scientist as an Expert Witness*, 40 *MINN. L. REV.* 205, 206 (1956). The term

This is not to say that the law has not trifled with social science in the past, often to the benefit of both.⁷ And certainly it cannot be doubted that scientific ideas and technological development have had immeasurable effects upon conceptions of law. For instance, Patterson has noted that the invention of the automobile, followed by urban traffic

"sociology" can be distinguished as "the science of human society and of social relations, organization, and change; specif. the study of beliefs, values, interrelationships, etc. of societal groups and of the principles or processes governing social phenomena." WEBSTER'S NEW WORLD DICTIONARY, *supra*; at 1352. Thus, "social science" is the more general term, and the term embraced by this article. But the relationship occasionally has been muted in semantics:

The situation in the social sciences is this: on the one hand a motley collection of sciences or quasi sciences which though they have the same objects are not aware of their kinship or of the unity of facts with which they are concerned; on the other a sociology, aware of this unity, but hovering over them from on high and incapable of influencing their procedure.

Durkheim, *La Sociologie en France Au xix^e Siècle*, 13 REVUE POLITIQUE ET LITTÉRAIRE 609, 647 (1900), translated and quoted in Ginsberg, *Introduction to L. HOBHOUSE, SOCIOLOGY AND PHILOSOPHY*, at xiii (1966); see also Hobhouse, *Editorial*, 1 SOC. REV. 1, 8 (1908):

Properly considered General Sociology is neither a separate science complete in itself before specialism begins, nor is it a mere synthesis of the social sciences consisting in a mechanical juxtaposition of their results. It is rather a vitalising principle that runs through all social investigation nourishing and nourished by it in turn, stimulating inquiry, correlating results, exhibiting the life of the whole in the parts and returning from the study of the parts to a fuller comprehension of the whole.

⁷ For example, there today exists the Law and Society Association, which publishes a journal entitled the *Law and Society Review*. Other journals relating law with society and the social sciences are the *Columbia Journal of Law and Social Problems*, *Law and Contemporary Problems*, *Law and the Social Order*, *Wisconsin Law Review* (which, since 1970, regularly has devoted a section to "Law and Society"), and *Yale Review of Law and Social Action*. Such journals are not unique to this country. Foreign journals include *Revista de Ciencias Jurídicas y Sociales* (2 vols. 1923-1924) and *Revista Jurídica de Ciencias Sociales* (54 vols. 1884-1937) (Argentina); *Annales du Droit et des Sciences Sociales* (3 vols. 1933-1936) and *Archives de Philosophie du Droit et de Sociologie Juridique* (9 vols. 1931-1939) (France); *Revista de Derecho y Ciencias Sociales* (13 vols. 1927-1941) (Paraguay); *Revista de Ciencias Jurídicas y Sociales* (19 vols. 1918-1936) (Spain); *Revista de Derecho y Ciencias Sociales* (9 vols. 1914-1921, continued as *Revista de Derecho Jurisprudencia y Administración*) (Uruguay). In addition, the directory of the American Association of Law Schools now records more than 170 law school teachers offering courses in "Law and Society." See generally Carlin, Howard & Messenger, *Civil Justice and the Poor*, 1 LAW & SOC'Y REV., June 1967, at 9-12. See also REPORT OF THE SPECIAL COMMISSION ON THE SOCIAL SCIENCES OF THE NATIONAL SCIENCE BOARD, NATIONAL SCIENCE FOUNDATION, KNOWLEDGE INTO ACTION: IMPROVING THE NATION'S USE OF THE SOCIAL SCIENCES 33-34 (1969) [hereinafter cited as NATIONAL SCIENCE BOARD]. These two factors alone do not establish an unequivocal connection between law and social science. But they do indicate that there is a common ground—that of affiliations, legal or otherwise—from which each commences inquiry. This common ground was recognized by Justice Holmes in 1897: "For the rational study of the law," he wrote, "the black-letter man may be the man of the present, but the man of the future is the man of statistics." Holmes, *supra* note 4, at 469; see also Hazard, *Law School "Law" and Sociological Research*, 50 DENVER L.J. 403 (1974).

congestion, the highway toll of death, injury, and damage, and the flight to the suburbs gave rise to the need for new laws; that improved medical knowledge has been used in the formulation of new legal norms;⁸ and that the development of the computer has had far-reaching implications for many aspects of business, and for legal research.⁹ When acknowledged and acted upon, *social* scientific studies can have legal effects just as scientific advances do. Such studies typically can be classified as follows, according to the subject matter with which they deal: legal institutions; legal processes; legislation and public policy-making; and impact or evaluation.¹⁰ Yet in light of the information that has been derived from such investigations, one cannot but wonder why the fruits of social science studies have not been put to fuller use in the law.

This article presents the case for the admission of social science evidence in legal adjudication.¹¹ Particular types of social science evidence are not only relevant to particular types of legal judgments, but they may be the best or the only evidence that exists or, at the least, evidence pertinent to judgments which require all the relevant evidence that can be provided. Applying the traditional justifications for excluding such evidence might result in unwarranted injustice nurtured by the rules of our legal system.

THE LEGISLATIVE-ADJUDICATIVE DISTINCTION

There has been an intense endeavor both in social science and the law to illuminate social and legal issues, and to view the individual in

⁸ E. PATTERSON, *LAW IN A SCIENTIFIC AGE* 3 (1963); see B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 1, 2 (1928). See generally Store, *Knowledge, Survival and the Duties of Science*, 23 AM. U.L. REV. 231 (1973).

⁹ E. PATTERSON, *supra* note 8, at 12 n.21; see Dickerson, *The Electronic Searching of Law*, 47 A.B.A.J. 902 (1961); Freed, *Prepare Now for Machine-Assisted Legal Research*, 47 A.B.A.J. 764 (1961).

¹⁰ Cairns discusses four "points of contact" between the social sciences and law: analyses of the nature of law undertaken by sociologists; the "sociological method" as a tool in lawmaking and legal analysis; sociological analyses of sociolegal institutions; and the theory of cultural change as an aid to the changed material culture. H. CAIRNS, *LAW AND THE SOCIAL SCIENCES* 124-68, 262 (1935). Hart and McNaughton view the contacts differently: the after-the-event determination of adjudicative facts; the application of uncertain or disputed law to disputed facts; and the framing of a legislative enactment. Hart & McNaughton, *Evidence and Inference in the Law*, 87 DAEDALUS, Fall 1958, at 41, 43, 52, 58; see also note 11 *infra*. Of course, there necessarily is some degree of overlap within each of these sets of categories.

¹¹ The first issue of the *Law and Society Review* listed five topics upon which the future issues would concentrate: social science evidence in legal adjudication; issues of legal policy in social science perspective; methodological problems and techniques; research opportunities and reports; and programs of sociolegal training. Schwartz, *From the Editor . . .*, 1 LAW & SOC'Y REV., Nov. 1966, at 6, 7. Even this journal has notoriously neglected the first of these topics.

relation to the sociolegal system. Most past and current social scientific studies, for example, have concerned themselves with the observation and analysis of existing and previously existing sociolegal microcosms. And studies now are developing concerning the prediction of future social structure, and with it new forms of conflict resolution and new institutions of order.¹² Thus it can be stated that there are many descriptive and predictive studies of legal systems. But equally important for purposes of the beneficial coexistence of the two areas of inquiry is the predictive aspect of social science research as it relates directly to the individual, the basic component of any legal order. Such research, when it has made its way into the judicial setting, usually has done so under the guise of "legislative facts"—facts which inform the tribunal's judgment in developing law or policy—rather than "adjudicative facts"—which simply are the facts in a particular case as applied to the parties involved.¹³

Consider the cases of *Beauharnais v. Illinois*¹⁴ and *Brown v. Board of Education*.¹⁵ In *Beauharnais*, the petitioner was convicted for distributing on the streets of Chicago leaflets attacking the moral character of black people, in violation of a statute which outlawed exhibiting in a public place any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion [which] exposes [such citizens] to contempt, derision or obloquy"¹⁶ Writing for the Supreme Court in upholding the statute, Justice Frankfurter stated:

It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his

¹² Cf. Yegge, *President's Message*, 3 LAW & Soc'y REV. 484, 485 (1969).

¹³ [A]djudicative facts are those . . . that normally go to the jury They relate to the parties, their activities, their properties, their businesses. Legislative facts . . . help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take. . . .

. . . [F]indings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence.

2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03, at 353 (1958). See also Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952-59 (1955); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942). In *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953), the Supreme Court articulated the distinction between adjudicative and legislative or "non-evidence" facts when it said: "[I]n devising a remedy the Board is not confined to the record of a particular proceeding." It should be noted, however, the distinction is by no means without ambiguity. See *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

¹⁴ 343 U.S. 250 (1952).

¹⁵ 347 U.S. 483 (1954).

¹⁶ ILL. REV. STAT. ch. 38, § 471 (1949), quoted in 343 U.S. 250, 251 (1952).

racial or religious group in the community.¹⁷

Yet only one and one-half years later, the Court in *Brown*—deciding that state supported segregation of white and black children in tangibly equivalent public schools, solely on the basis of race, denied to black children the equal protection of the laws—unanimously cited in support of its decision just such social scientific studies.¹⁸

Whatever the justification for this sudden turn,¹⁹ it is safe to say that evidence derived from the social sciences is here to stay, at least for certain purposes. This observation is especially valid for cases involving various forms of economic activity,²⁰ wherein the Supreme Court had acknowledged the judicial utility of extralegal empirical studies long before *Brown*.²¹ Such cases include litigation in antitrust,²² breach of contract,²³ false advertising or misbranding,²⁴ trademark and unfair

¹⁷ 343 U.S. at 263.

¹⁸ See 347 U.S. at 494-95 n.11.

¹⁹ I do not mean to say that *Beauharnais* and *Brown* are not distinguishable, nor that the social science studies in each are the same or even similar. I merely note the apparent change in attitude of the Court as to the reception of social science evidence in non-economic cases, when only one seat changed hands in the interim. (Earl Warren replaced Fred M. Vinson in 1953.) This article is not directed at dissecting this transition. For such material see P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* (1972); Cahn, *Jurisprudence, Annual Survey of American Law*, 30 N.Y.U.L. REV. 150 (1955).

For other social science material concerning the desegregation debate, see Clark, *The Social Scientist as an Expert Witness in Civil Rights Litigation*, 1 Soc. PROB. 5 (1953); Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224 (1960); Gregor, *The Law, Social Science, and School Segregation: An Assessment*, 14 WEST. RES. L. REV. 621 (1963); Lewis, *Parry and Riposte to Gregor's "The Law, Social Science, and School Segregation"*, 14 WEST. RES. L. REV. 637 (1963); Rose, *supra* note 2, at 212-14; van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960).

²⁰ See Zeisel, *The Law, in THE USES OF SOCIOLOGY* 81 (P. Lazarsfeld, W. Sewell, & H. Wilensky eds. 1967).

²¹ Such usefulness was first recognized in *Muller v. Oregon*, 208 U.S. 412 (1908). Note the following remark made in 1968:

Today one might suppose that the social sciences were plainly welcome in the house of the law. Certainly law's receptivity to economic theory has increased However, as we enter areas that are more sensitive, evidence of progress is less clear. Noting the to-do touched off by Chief Justice Warren's citation of social and behavioral studies in the famous footnote 11 in *Brown v. Board of Education*, one would scarcely have supposed that by then almost fifty years had elapsed since the filing of the first Brandeis brief.

Cavers, *First Academic Symposium: Law and the Social Sciences*, in *THE PATH OF THE LAW FROM 1967*, at 44, 45 (A. Sutherland ed. 1968).

²² E.g., *United States v. E.I. Du Pont De Nemours & Co.*, 177 F. Supp. 1 (N.D. Ill. 1959) (impact on market value of stock); *United States v. E.I. Du Pont De Nemours & Co.*, 118 F. Supp. 42 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956) (economic realities of market situation).

²³ E.g., *R.K.O. Radio Pictures, Inc. v. Jarrico*, 128 Cal. App. 2d 172, 274 P.2d 928 (1954), *cert. denied*, 349 U.S. 928 (1955) (public conventions and morals); *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 221 P.2d 73 (1950) (similarity between two radio programs).

²⁴ E.g., *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382 (7th Cir. 1953), *rev'd in part*,

competition,²⁵ and infringement and unfair competition²⁶—cases in which the social scientific methodology of public opinion or poll research has sometimes been employed.²⁷ This is not to say that all methods of

348 U.S. 940 (1955) (misleading drug advertising); *Bristol-Myers Co. v. FTC*, 185 F.2d 58 (4th Cir. 1950) (misleading toothpaste advertising).

²⁵ *E.g.*, *Anheuser-Busch, Inc. v. Bavarian Brewing Co.*, 264 F.2d 88 (6th Cir. 1959) (secondary meaning of "Bavarian" beer); *Standard Oil Co. [Indiana] v. Standard Oil Co. [Ohio]*, 141 F. Supp. 876 (D. Wyo. 1956), *aff'd*, 252 F.2d 65 (10th Cir. 1958).

²⁶ *E.g.*, *Hawley Products Co. v. United States Trunk Co.*, 259 F.2d 69 (1st Cir. 1958) (secondary meaning of hand luggage design); see generally Note, *Consumer Polls as Evidence in Unfair Trade Cases*, 20 GEO. WASH. L. REV. 211 (1951).

There also is a miscellaneous group of cases, which includes validity of traffic regulations, *e.g.*, *Eighth Ave. Coach Corp. v. City of New York*, 170 Misc. 243, 10 N.Y.S.2d 170 (Sup. Ct. 1939), *aff'd without opinion*, 259 App. Div. 870, 20 N.Y.S.2d 402 (1940), *aff'd*, 286 N.Y. 84, 35 N.E.2d 907 (1941) (relationship among bus route, passengers, and revenue to bus company); libel, *e.g.*, *Las Vegas Sun, Inc. v. Franklin*, 74 Nev. 282, 329 P.2d 867 (1958) (estimation of subject in eyes of the community); and safety of working place, *e.g.*, *Baldassarre v. West Oregon Lumber Co.*, 193 Ore. 556, 239 P.2d 839 (1952) (percentage of employees requesting safety device).

²⁷ The need for some such method was recognized by Judge Frank, dissenting in *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969, 974 (2d Cir. 1948). The court held that a manufacturer of girdles who sought to do business under the name of "Miss Seventeen" was guilty of unfair competition with the magazine *Seventeen*. Judge Frank, in dissent, responded that the court, to inform itself adequately, should have a staff of investigators like those supplied to administrative agencies. Since it had no such staff, he had "questioned some adolescent girls and their mothers and sisters"—persons he had chosen "at random"—and had "been told uniformly by [his] questionees that no one could reasonably believe that any relation existed between plaintiff's magazine and defendants' girdles." *Id.* at 976. Judge Frank continued:

I admit that my method of obtaining such data is not satisfactory. But it does serve better than anything in this record to illuminate the pivotal fact [of secondary meaning]. . . . [P]laintiff or the trial judge might have utilized, but did not, "laboratory" tests, of a sort now familiar, to ascertain whether numerous girls and women, seeing both plaintiff's magazine and defendants' advertisements, would believe them to be in some way associated.

Id. at 976-77 (footnote omitted). See generally Blum & Kalven, *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science*, 24 U. CHI. L. REV. 1 (1956); Cantwell, *Public Opinion and the Legislative Process*, 40 AM. POL. SCI. REV. 924 (1946); Cohen, Robson & Bates, *Ascertaining the Moral Sense of the Community*, 8 J. LEGAL ED. 137 (1955); Cohen, Robson & Bates, *Ascertaining the Moral Sense of the Community: A Reply to Professor Schwartz*, 8 J. LEGAL ED. 469 (1955); A. DICEY, *The Relation Between Law and Public Opinion*, in LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 1-16 (2d ed. 1930); Kennedy, *Law and the Courts*, in THE POLLS AND PUBLIC OPINION 92 (N. Meier & H. Saunders, eds. 1949); Schwartz, *Ascertaining the Moral Sense of the Community: A Comment*, 8 J. LEGAL ED. 319 (1955); Waterbury, *Opinion Surveys in Civil Litigation*, 17 PUB. OPIN. Q. 71 (1953).

For judicial treatment of approaches to survey methodology, see, *e.g.*, *Sears, Roebuck & Co. v. Allstate Driving School, Inc.*, 301 F. Supp. 4 (E.D.N.Y. 1969); *American Luggage Works, Inc. v. United States Trunk Co.*, 158 F. Supp. 50 (D. Mass. 1957), *aff'd sub nom.* *Hawley Products Co. v. United States Trunk Co.*, 259 F.2d 69 (1st Cir. 1958); *R.K.O. Radio Pictures, Inc. v. Jarrico*, 128 Cal. App. 2d 172, 274 P.2d 928 (1954), *cert. denied*, 349 U.S. 928 (1955). With respect to survey evidence and challenge to the accuracy of the data underlying the tabulations, see *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963, 1964); H. BARKSDALE, *THE USE OF SURVEY RESEARCH*

social science research are the same.²⁸ Each, however, employs empirical analysis to determine perceptions, and each is a predictive method which can and does influence the law. *Brown* and other cases demonstrate that inferences are made beyond the statistical sample contributing the data, and that these inferences yield legislative-type determinations, even in the adjudicative setting. When, however, the issue has been purely adjudicative—that is, “who did what, where, when, how, and with what motive or intent”²⁹—predictive social science evidence has been rejected more frequently. It may be that courts view pure adjudicative controversies as susceptible to “right” and “wrong” answers and consider social science evidence unhelpful in deciding these cases because of the uncertainty involved in applying the general conclusions adduced from this evidence to the particular case. In contrast, where matters of broad social policy are in issue, say, the effect of segregation on the quality of education, clear-cut answers are rare, and social science evidence is useful at least to suggest the direction the law should take. A narrower “adjudicative” setting may involve only the parties before the court, yet it is precisely in such a case that all relevant information is needed in order to reach an appropriate decision. Although so-called “judicial lawmaking” may not be required, it is submitted that the court should not ignore social science evidence simply to avoid reversal.

RELEVANCY OF SOCIAL SCIENCE TO PERSON-ORIENTED LEGAL ISSUES

The Meaning of “Person-Oriented” Adjudication

Within the context of adjudicative disputes are two types of legal controversies—those which are act-oriented and those which are person-oriented. The former include the who, what, where, when, and how

FINDINGS AS LEGAL EVIDENCE 115-23 (1957); Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322 (1960).

Where both parties introduce survey research having antithetical conclusions see *Pollak v. Public Util. Comm'n*, 191 F.2d 450 (D.C. Cir. 1951), *rev'd*, 343 U.S. 451 (1952); *Oneida, Ltd. v. National Silver Co.*, 25 N.Y.S.2d 271, 286 (Sup. Ct. 1940). Where a party seeks to introduce summaries of voluminous data, compare *United States v. Mortimer*, 118 F.2d 266, 269 (2d Cir. 1941), with *Hartzog v. United States*, 217 F.2d 706, 710 (4th Cir. 1954); see also *Zacher v. United States*, 227 F.2d 219, 227-28 (8th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956); *Tri-Motors Sales, Inc. v. Travelers Indem. Co.*, 19 Wis. 2d 99, 119 N.W.2d 327 (1963); cf. UNIFORM COMPOSITE REPORTS AS EVIDENCE ACT, 9A UNIFORM LAWS ANNOT. 314 (1957); UNIFORM RULES OF EVIDENCE 70(1)(d).

²⁸ Compare, for example, opinion sampling with stimulus-response research in psychology.

²⁹ Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

issues before the court; the latter involve the issues of motive, attitude, and intent. The focus here is upon the person-oriented legal controversy as one area of the law amenable to the reception of social science evidence, since it is this area which traditionally has exhibited perhaps the most subjective considerations confronted by the courts.³⁰

These person-oriented issues must be confronted by the courts in situations of the following types: domestic relations (child custody, divorce, state custody over potentially delinquent juveniles), restraint of liberty (mitigation of sentence, deportation, detention of predicted bail-jumpers and peace-breakers, commitment of dangerous mentally ill persons), and other cases involving evaluation of the mental state or character of one or both parties to the lawsuit. In each of these situations, social science evidence can aid in yielding a more intelligent decision, because "though adjudication is an apt procedure for judging the conformity of acts to required standards, it is not an apt procedure for judging persons."³¹

Domestic Relations

In the area of domestic relations, Fuller points out:

³⁰ See Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1623-24 (1966); L. Fuller, *The Justification of Legal Decisions* (paper presented at the World Congress on Philosophy of Law and Social Philosophy, Brussels, Belgium, Aug. 30-Sept. 3, 1971) (The title of this paper was assigned to the whole session of the Congress. Professor Fuller informally has indicated that had he chosen a title for the paper that would describe the content of his own contribution, he would have selected: *Interaction Between Law and the Social Context into Which It Is Projected*).

Note that even in the context of the act-oriented judgment the law cannot assure perfect correctness of result, because of the shortage of time, nonexpert sources of and evaluators of evidence, and procedural rules. See Hart & McNaughton, *supra* note 10, at 46, 49, 51-52; cf. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961).

³¹ Fuller, *Some Unexplored Social Dimensions of the Law*, in *THE PATH OF THE LAW FROM 1967*, at 57, 64 (A. Sutherland ed. 1968). The National Science Board would go even further: "Even where great gaps of knowledge remain . . . , the social scientists' experience can offer valuable intuitive understanding and special insight." NATIONAL SCIENCE BOARD, *supra* note 7, at xi; see also *id.* at xii, xvii. Although such insights may not be scientifically verifiable, they still might lead to the formulation of new theories and methods of evaluation.

It should be noted that the National Science Board study focuses on social action programs. *Id.* at 3. Nevertheless the concepts generally underlying the connection between law and social science are applicable to the present article. The Report explains that the social sciences should be used "when they are relevant to understanding and dealing with significant problems in our society." *Id.* at 1; see generally G. LYONS, *THE UNEASY PARTNERSHIP: SOCIAL SCIENCE AND THE FEDERAL GOVERNMENT IN THE TWENTIETH CENTURY* 265-310 (1969); ADVISORY COMMITTEE ON GOVERNMENT PROGRAMS IN THE BEHAVIORAL SCIENCES, NAT'L RESEARCH COUNCIL, *THE BEHAVIORAL SCIENCES AND THE FEDERAL GOVERNMENT* (1968); Thomas, *The Relation of Research to the Social Process*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* 175 (Brookings Inst. ed. 1931)

A married couple have separated and are disputing which of the two shall have custody of their only child. They take their case to court. After hearing some inclusive arguments on both sides, the judge would be likely to cut through the usual adjudicative forms, talk with the child out of the presence of the parents, meet and discuss the problem with each of the parents separately, and then make up his mind as to which of the parents was most suited to raise the child. In the ordinary law suit this sort of judicial conduct would constitute a gross impropriety. But in the ordinary law suit the issue to be decided is some such question as, "Did Jones, or did he not, steal Smith's purse?"—not the question, "Just what sort of fellow is Jones anyway?" Indeed, much of the law of evidence and procedure is designed to direct attention away from that question.³²

Social scientists have provided quite useful information about the fundamental issue for custody decisionmaking—how the child is likely to fare under alternative custody arrangements. Among the factors important to this determination are the consequences of choosing either parent, the unfitness of a parent, the effects of removing both parents, and the extent to which the parents' and the child's wishes are to be taken into consideration. Yet for most of these questions, direct evidence is lacking.³³ Of course, there is evidence which is indirectly relevant, such as the subjective reports of psychiatrists and psychiatric social workers wherein recommendations are based in part upon particularized assessments of the parties involved.³⁴ In fact, the Uniform Marriage and Divorce Act of 1970 plainly allows for consideration of such evidence in child custody cases.³⁵ But the law has yet to turn its concen-

³² Fuller, *supra* note 31, at 64.

³³ Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 LAW & SOC'Y REV. 167, 170 (1969); *see also id.* at 198.

³⁴ *Id.* at 170.

³⁵ Compare UNIFORM MARRIAGE AND DIVORCE ACT §§ 402, 404 (emphasis added): [Best Interests of Child.]

The court shall determine custody in accordance with the best interests of the child. The court shall consider *all relevant factors* including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

[Interviews.]

- (b) The court may seek the advice of professional personnel whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon

trated attention to the accurate evaluation of this mass of psychological data.⁸⁶

The problems are similar in the divorce process, where legal institutions are called upon to resolve family discord, yet are often empowered to do nothing more than sever the marriage for grounds unrelated to the underlying marital conflict.⁸⁷ It is submitted, however, that courts should strive for a more creative approach by allowing divorce, for example, only upon the consideration of all relevant evidence bearing upon the actual conflict involved. Such evidence would usually be comprised of psychological, psychiatric, or psycho-social data.⁸⁸

Restraint of Liberty

With regard to the restraint of liberty, consider these excerpts from the remarks of Judge Caverly on sentencing, in the renowned Leopold and Loeb kidnapping-murder trial:

The court . . . feels impelled to dwell briefly on the mass of data produced as to the physical, mental and moral condition of the two defendants. They have been shown in essential respects to be abnormal; had they been normal they would not have committed the crime. It is beyond the province of this court, and it is beyond the capacity of humankind in its present state of development, to predi-

request. Counsel may examine as a witness any professional personnel consulted by the court.

with MICH. COMP. LAWS ANN. § 722.23 (Supp. 1974) (emphasis added):

Sec. 3. *Best interests of the child, definition.*

"Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:

(a) The love, affection and other emotional ties existing between the competing parties and the child.

(f) The moral fitness of the competing parties.

(g) The mental and physical health of the competing parties.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) *Any other factor* considered by the court to be *relevant* to a particular child custody dispute.

⁸⁶ What social science might even do in the judicial context is attempt to standardize psychological opinions, in order to facilitate comparisons of a particular personality.

⁸⁷ Perhaps at the heart of the problem is the fact that the breakup of the marriage relationship requires the attorney to play a dual role—both legal advocate and personal counselor—yet most are "neither trained nor adequately recompensed" for this purpose. Bohannon & Huckleberry, *Institutions of Divorce, Family, and the Law*, 1 LAW & Soc'y REV., June 1967, at 81, 100-01 (1967); see note 91 *infra*.

⁸⁸ Other social science disciplines, such as economics, anthropology, and political science, would not be directly relevant to person-oriented legal judgments. But in the broader sense they would pertain to the overall context in which the individual psyche exists.

cate ultimate responsibility for human acts.

At the same time, the court is willing to recognize that the careful analysis made of the life history of the defendants and of their present mental, emotional and ethical condition has been of extreme interest and is a valuable contribution to criminology. And yet the court feels strongly that similar analyses made of other persons accused of crime will probably reveal similar or different abnormalities. The value of such tests seems to lie in their applicability to crime and criminals in general.

Since they concern the broad question of human responsibility and legal punishment and are in no wise peculiar to the individual defendants, they may be deserving of legislative but not judicial consideration. For this reason the court is satisfied that his judgment in the present case cannot be affected thereby.

Under the pleas of guilty, the duty of determining the punishment devolves upon the court, and the law indicates no rule or policy for the guidance of his discretion. In reaching his decision the court would have welcomed the counsel and support of others. In some states the legislature, in its wisdom, has provided for a bench of three judges to determine the penalty in cases such as this. Nevertheless, the court is willing to meet his responsibilities. [Each defendant was sentenced to life imprisonment for murder, and to 99 years for kidnapping.]³⁹

What is unusual about this opinion is that traditionally the law has hesitated to limit individual discretion in sentencing, since "the factors that come into play . . . are so manifold and possibly so idiosyncratic that it is difficult to make general rules about sentencing."⁴⁰ Yet here the judge disavowed any opportunity to use his complete discretion and, in fact, deferred responsibility to the legislature. By rejecting the discussion of the defendants' mental states, he apparently sought counsel not to determine the proper sentence, but instead to share responsibility for imposing it. Because of "abnormalities" existing in other persons (*accused of crime!*), he refused to consider the *particular* idiosyncracies

³⁹ Reprinted in W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* 718-19 (1972).

⁴⁰ Zeisel, *Methodological Problems in Studies of Sentencing*, 3 *LAW & Soc'y REV.* 621 (1969). "Instances in which the ordinary courts of law assume the function of passing judgment on persons are rare, though an important exception exists where the judge has the duty of setting an appropriate sentence for a person convicted of crime." Fuller, *supra* note 31, at 64. See generally M. FRANKEL, *CRIMINAL SENTENCES; LAW WITHOUT ORDER* (1973); ADVISORY COMMITTEE ON SENTENCING AND REVIEW, *PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES* (tentative draft 1967); Hayner, *Sentencing by an Administrative Board*, 23 *LAW & CONTEMP. PROB.* 23 (1958); Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 *F.R.D.* 55 (1966); Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, 27 *FED. PROBATION* 6 (1963).

of the defendants he confronted.

This illustration is not suggested to be the typical case; rather, it is presented to demonstrate the gravity of the problem. If relevant factors can be ignored, and expressly so, in a case widely viewed by the public, then the possibilities for serious injustice are critically inherent in less publicized decisions. And deference to the legislature likewise is inappropriate. The fact that knowledge is in a continual state of maturation is no reason for the court to defer to and rely exclusively on the legislature to take account of new developments. The court's duty is to confront the case before it as of the given time, including in its deliberations all relevant information then available.

Any gain in our knowledge of the determinants of behavior would appear to permit a more fair and rational sentence. . . . By striving for understanding in the broadest manner possible under the circumstances, we are likely to deal with behavior in accordance with our secure knowledge of what that behavior means and what approach to the problem will best balance the humanistic and social interests involved.⁴¹

Relevance and the Federal Rules of Evidence

At the foundation of each of the two subsections above is the idea that in order to attain an understanding of the person, one should study that person's mental processes.⁴² By attempting to master our understanding of emotional states, personalities, and various other facets of individual behavior,⁴³ we can accord greater accuracy to person-oriented

⁴¹ Willis, *Psychiatric Testimony, Trial Gamesmanship, and the Defense of Insanity*, 5 SAN DIEGO L. REV. 32, 55 (1968). Consistent with this view is the MODEL PENAL CODE § 210.6 (Proposed Official Draft, 1961):

(4) *Mitigating Circumstances* [in murder case].

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(f) The defendant acted under duress

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

⁴² Willis, *supra* note 41, at 55-56. See note 38 *supra*.

⁴³ See *Rollerson v. United States*, 343 F.2d 269, 272 (D.C. Cir. 1964) (sanity of defendant at time of robbery); cf. Note, *Civil Commitment of the Mentally Ill*, 79 HARV. L. REV. 1288 (1966). I do not discuss the special intricacies of the insanity defense. While such area certainly is related to this entire discussion, it is not necessary at this

legal judgments. Psychiatry clearly is applicable; but other branches of knowledge are equally important.

What evidence is relevant has recently been elucidated by the newly enacted *Federal Rules of Evidence*, which discuss "relevant evidence" in terms of both logical and legal relevance.⁴⁴ Relevant evidence is defined as

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.⁴⁵

Whether social science evidence meets this standard primarily depends upon one's interpretation of the expression "more probable or less probable." But commentators have persuasively argued that these words connote a sense of approaching the actual truth in a nonobjective manner, rather than by weighing items of evidence on a percentage scale to determine their admissibility.⁴⁶ This is especially so when one considers the qualifying term "any tendency," which indicates that the concept of relevance is analagous to a spectrum, and not a clearly distinguishable dichotomy, between truth and falsity. Thus, in an area as acutely subjective as that of person-oriented judgments, any objection to evidence which might tend to resolve the controversy should go only to the weight of that evidence, and not to its admissibility.⁴⁷

But the *Rules* also recognize that there must be methods to assure the fairness of the proceedings. So, stating the contrary of the common

time to penetrate these complexities. Since the scope of this article comprises broad sections of the law—or of society, depending upon one's perspective—the subject of the insanity defense is included within the concept of the person-oriented legal judgment. Note that I am not suggesting an alternative to the defense of insanity. Rather, if this defense is employed, I would allow for additional relevant evidence either in corroboration or in rebuttal.

⁴⁴ RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, reprinted in 65 F.R.D. 131-70 (1975) [hereinafter cited as FED. R. EV.]. See Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 407-10 (1952).

⁴⁵ FED. R. EV. 401.

⁴⁶ Weinstein & Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43, 59-60 (1969); Ball, *supra* note 30, at 813; Hart & McNaughton, *supra* note 10; see Michael & Adler, *The Trial of an Issue of Fact: I*, 34 COLUM. L. REV. 1224, 1252 (1934).

⁴⁷ *E.g.*, Neely v. United States, 300 F.2d 67, 73 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962) ("objection that an item of evidence is subject to conflicting inferences goes to its weight rather than to its admissibility"); United States v. Schigani, 289 F. Supp. 43, 56 (E.D.N.Y. 1968) (The court's function in determining relevancy is "only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted. If it may affect that evaluation it is relevant and, subject to certain other rules, admissible. . . . Even, therefore, if a juror decides that the probability is only 40% that the [evidence is reliable], it may help him determine whether the material proposition is more probably true than not.").

law approach, the *Rules* provide that evidence should be admitted unless some good reason exists to exclude it.⁴⁸ These reasons for exclusion come under the caption of legal relevance, which is a practical standard for the admissibility of evidence, balancing its probative value with a variety of competing policy considerations. As stated in the *Rules*,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.⁴⁹

It is submitted that this standard does not present an overwhelming obstacle to the admission of social science evidence in person-oriented legal adjudication for two major reasons. First, the standard is not simply one of logical relevance versus the harmful consequences that might flow from admission of the evidence. Rather, it is that those consequences must *substantially outweigh* the probative value of the evidence. But since person-oriented adjudications directly concern evaluations of individual mentalities, evaluations which at present are necessarily subjective, the necessity for all logically relevant evidence is clear. Second, the *Rules* explicitly provide for safeguards which can be used to minimize any unfair prejudice, confusion of the issues, or misleading of the jury.⁵⁰

One of these precautionary devices—devices that also aid in disclosing the reliability of the evidence—is that of a limiting jury instruction, which could be used in cases of doubt about legal relevance.⁵¹ A second safeguard is a provision allowing for the use of expert testimony to assist the trier of fact with scientific or other technical knowledge.⁵²

⁴⁸ The common law approach is discussed in 1 J. WIGMORE, EVIDENCE § 8(a) (3d ed. 1940).

⁴⁹ FED. R. EV. 403. "Legal" relevance is to be distinguished from "conditional" relevance, in which the probative value of the evidence depends upon the existence of another fact. *Id.* 104(b).

⁵⁰ The remaining auxiliary policy considerations mentioned in Rule 403—undue delay, waste of time, and needless presentation of cumulative evidence do not seem to be as significant as prejudice, confusion, or misleading factors. For example, the second conjunction—"or"—in Rule 403 denotes the separateness of these groups of factors. One should observe, however, that even in jury cases, certain person-oriented issues, *e.g.*, child custody and sentencing, are solely in the court's domain. Thus, in such cases legal relevancy poses a negligible problem.

⁵¹ See FED. R. EV. 106.

⁵² R. EV. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In conjunction with this, and to defend against both financial burden and shopping for experts, the Rules provide for the appointment *sua sponte* or on the motion of any party of a court-appointed expert witness.⁵³ Such a witness must advise all parties of his findings; any party may take his deposition; any party or the judge may call him to testify; and he is subject to cross-examination by all parties, including the party calling him as a witness.⁵⁴ Thus when social science testimony is presented to the court by a private expert witness, many of the customary problems associated with its admission can be overcome.

The same is true if the evidence is presented by some way other than expert testimony. The parties, for example, might stipulate as to its admission. In such a case, any objection on the ground of prejudice would be waived, and problems of confusion of the issues or misleading of the jury still could be controlled by limiting instructions, or by a court-appointed expert, or both. Or the evidence conceivably might be subject to judicial notice. In this case, the situation also is controllable. While the *Rules* deal with judicial notice only of adjudicative facts⁵⁵ which contain a high degree of indisputability,⁵⁶ evidence regarding the propriety of taking judicial notice presumably could still be taken from

⁵³ FED. R. EV. 706. "The ever-present possibility that the judge *may* appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services." PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES § 706, Advisory Committee's Note (Supreme Court Draft, Nov. 1972) (emphasis in original).

⁵⁴ FED. R. EV. 706(a).

⁵⁵ FED. R. EV. 201(a); see note 10 *supra*. On the effects of judicial notice of legislative facts, see Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 161-63 (1973); see also Note, *Judicial Notice in the Proposed Federal Rules of Evidence*, 1969 WASH. U.L.Q. 453, 455-56.

⁵⁶ FED. R. EV. 201(b). An interesting comment recently has been made in a case rejecting the admission of polygraph evidence, which the judge considered to be social-scientific in nature:

The Court may take judicial notice that the physical sciences exceed the social sciences, including clinical psychology, in terms of experimental quantification and verifiability. Indeed, the uniqueness of the human psyche still provokes debate as to whether the study of human behavior can approach scientific standards as understood in the physical disciplines.

United States v. Wilson, 361 F. Supp. 510, 513-14 (D. Md. 1973). This raises the issue of the reliability of the types of evidence which I propose should be admissible in cases dealing with person-oriented legal judgments. This subject is only indirectly discussed in this article, because there are varying degrees of reliability with different types of social scientific methods. The point, however, is that reliability is a component of relevance, and, therefore, should only be considered in determining the weight of the evidence. See generally *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) ("Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized . . .").

expert witnesses.⁵⁷ A difference from the provisions for expert testimony in other situations, however, is that this evidence would not be presented to the jury.⁵⁸ Hence problems concerning the jury would be avoided, with the court instructing the jury in a civil case that they must, and in a criminal case that they may, "accept as conclusive any fact judicially noticed."⁵⁹

Thus, when in the context of person-oriented adjudication, doubt arises as to whether the search for truth will be helped or hindered by the interjection of particular social science evidence, one might bear in mind the words of an eminent nineteenth century Georgia jurist:

Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact . . . , however remotely relevant, or from whatever source derived, which would assist [in determining the issues].⁶⁰

THE PHILOSOPHICAL FOUNDATION: A
UNIVERSAL VIEW OF KNOWLEDGE

While it is important to collect and analyze all relevant data, we must realize that courts as well as other decisionmaking bodies must act on incomplete or inconclusive data. Therefore, assumptions cannot be avoided. But if the process is a conscious one, it may be possible to identify particular assumptions and to estimate their reliability.⁶¹ To this end, social science evidence may be relevant to *all* types of adjudication.

This neoteric attitude reached the Supreme Court of the United States in 1958.⁶² In *Hawkins v. United States*,⁶³ involving a prosecution under the Mann Act, the Supreme Court reversed a conviction in which the trial judge refused to apply the common law rule excluding one spouse's testimony against the other. Justice Black, for the majority, proclaimed that the effect of discarding the rule would be "to destroy almost any marriage," basing his conclusion on "reason and experi-

⁵⁷ FED. R. EV. 201(e):

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

⁵⁸ FED. R. EV. 201(g).

⁵⁹ *Id.* 201(e).

⁶⁰ *Johnson v. State*, 14 Ga. 55, 62 (1853) (Lumpkin, J.).

⁶¹ See C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 76 (1966).

⁶² See Rosenberg, *Methods of Reasoning and Justification in Social Science and Law*, *Comments*, 23 J. LEGAL ED. 199, 201 (1970); Rosenberg, *The New Looks in Law*, 52 MARQ. L. REV. 539 (1969).

⁶³ 358 U.S. 74 (1958).

ence."⁶⁴ Animadverted Justice Stewart: "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 tranquillity."⁶⁵ He called for a study of the actual impact on marital harmony in the many states which had adopted the contrary rule,⁶⁶ in order to verify the postulate upon which the majority operated. In effect, Justice Stewart argued that if by empirical inquiry social science could unearth legal and other assumptions, then adjudication would become a more consciously objective function.⁶⁷ The significance of this proposition is that since perception of "reality"—which is based upon momentary "truths"⁶⁸—is directly related to the quality of information upon which ultimate "facts" are formulated,⁶⁹ then the assumptions which found such perceptions must continually be verified.⁷⁰

⁶⁴ *Id.* at 78, 79; see 8 J. WIGMORE, EVIDENCE §§ 2227-45 (McNaughton rev. ed. 1961).

⁶⁵ 358 U.S. at 81-82.

⁶⁶ *Id.* at 82 n.4; compare *Branzburg v. Hayes*, 408 U.S. 665, 736 n.19 (1972) (Stewart, J., dissenting) ("We must often proceed in a state of less than perfect knowledge . . ."). Such studies also would be helpful with regard to other rules in the domestic relations rubric. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 197 (1973) (statute proscribing abortion held unconstitutional: "despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are 'good' . . ."); *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70 (1962) (interspousal immunity for negligent torts); *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65 (1962) (interspousal immunity for intentional torts); *Commonwealth v. Jones*, 1 Pa. D. & C.2d 269, 275 (Lehigh County Ct. 1954) (rebuttable presumption that a wife's drinking is invited by the husband is "based upon human experience.").

⁶⁷ This argument was not a novel one to legal philosophical thought. Cardozo wrote of the forces of which judges avowedly avail to shape the form and content of their judgments. *Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But . . . [d]eep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.*

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921) (emphasis added); see H. MAINE, *ANCIENT LAW* 4, 7 (3d ed. 1888); see also Hart & McNaughton, *supra* note 10, at 63; Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 233 (1931).

⁶⁸ See R. WEST, *CONSCIENCE AND SOCIETY* (2d ed. 1950). "Our whole thought fabric is relative not in the old sense that reality is dependent upon being known, but in the sense that it only includes such facets of reality as our faculties can grasp. These facets may be quite correctly appreciated and yet our use of them in the interpretation of reality might be defective for lack of other facts." L. HOBHOUSE, *supra* note 6, at 308 n.1; see note 89 *infra*.

⁶⁹ See D. HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* §§ IV, V, XII (Hendel ed. 1955); see generally A. CASTELL, *AN INTRODUCTION TO MODERN PHILOSOPHY* 169-257 (2d ed. 1963); L. HOBHOUSE, *supra* note 6, at 301; J. HOSPERS, *AN INTRODUCTION TO PHILOSOPHICAL ANALYSIS* 159-220, 379-448 (1953); N. KLAUSNER & P. KUNTZ, *PHILOSOPHY: THE STUDY OF ALTERNATIVE BELIEFS* ch. 5 (1961); P. WHEELWRIGHT, *THE WAY OF PHILOSOPHY* 24-42 (rev. ed. 1960).

⁷⁰ This raises the question of whether it is possible to make such continual verification. One might argue that if an assumption can be verified, then it no longer is an

Fundamentally, we are confronted with the nature of science and of the law, both of which originated in primitive religion and developed academic perspectives in recent centuries.⁷¹ Each is similar to and different from the other. "The common elements in both have been an effort to be wholly rational, to organize and institutionalize the search for truthful data, and, above all, to seek truthful data as the basis for judgments."⁷² Both also seek to secure "agreement among different individuals with respect to certain kinds of questions and problems."⁷³ As for the dissimilarities, one is the method of inquiry. The legal method relies primarily upon testimony refined in an adversarial setting. In

assumption. Thus such a process would pave the way to an infinite regression of assumptions. My response is that assumptions once "verified" are assumptions nonetheless, albeit presently more accurate ones, since the procedures for verification are based upon current knowledge and information. Consequently, the process of continual verification would open the path to an infinite progression of assumptions, with the assumptions becoming more objective—that is, subject to being accepted by the most modern methods—as the states of art and science develop over time.

⁷¹ Loevinger, *Law and Science as Rival Systems*, 19 U. FLA. L. REV. 530, 535 (1967); see H. MAINE, *supra* note 67; see also Rosenberg, *The New Looks in Law*, 52 MARQ. L. REV. 539, 540 (1969). I do not mean to say that science is indistinguishable from social science. It is not; but at the root, each employs a similar approach to discovering information—empirical analysis.

⁷² Loevinger, *supra* note 71, at 533; see also Loevinger, *Science and Legal Thinking*, 25 FED. B.J. 153 (1965).

Patterson has written that "[t]he scientific analogy is, for legal philosophy, an intellectual bridge from a science to the legal order." E. PATTERSON, *supra* note 8, at 24. See also S. AMOS, *THE SCIENCE OF LAW* (9th ed. 1909); H. CAIRNS, *THE THEORY OF LEGAL SCIENCE* (1941); B. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 40 (1931) and B. CARDOZO, *supra* note 8; R. CLARKE, *THE SCIENCE OF LAW AND LAWMAKING* (1898); J. CONANT, *ON UNDERSTANDING SCIENCE* 22 (1951); A. EINSTEIN, *THE WORLD AS I SEE IT* 135-37 (1949); K. GAREIS, *INTRODUCTION TO THE SCIENCE OF LAW* (3d rev. ed. A. KOCOUREK transl. 1911); H. KELSEN, *PURE THEORY OF LAW*, ch. 3 (2d rev. ed. M. Knight transl. 1967); A. KOCOUREK, *AN INTRODUCTION TO THE SCIENCE OF LAW* 202 (1930); E. NAGEL, *THE STRUCTURE OF SCIENCE* 485-98 (1961); O. HOLMES, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899), reprinted in *COLLECTED LEGAL PAPERS* 210 (1920); Pound, *Juristic Science and Law*, 31 HARV. L. REV. 1047 (1918); Pound, *Law and the Science of Law in Recent Theories*, 43 YALE L.J. 525 (1934).

One should not overlook that the law repeatedly has been perceived as a social science. For example, although the Social Science Research Council, formally organized in 1923, included no member from the legal profession, whereas fellows from the areas of anthropology, economics, history, political science, psychology, sociology, and statistics were included, *THE SOCIAL SCIENCE RESEARCH COUNCIL, DECENNIAL REPORT, 1921-1933*, at iii (1934), it soon was made clear that the law was a social science "in aim if not in achievement." Rose, *supra* note 6, at 206. Commented Pound in 1933:

[W]e seek a certain unification of the social sciences. Jurisprudence is no longer held self-sufficient. Economics, sociology, ethics, psychology, as well as politics and philosophy, are to be drawn upon; law is to be studied as part of the whole process of social control.

Pound, *The Ideal and the Actual in Law—Forty Years After*, 1 GEO. WASH. L. REV. 431, 436 (1933); see Hazard, *supra* note 7, at 408; Maechling, *Legal Research and the Problems of Society*, 21 J. LEGAL ED. 86, 89 (1968); cf. Stone, *supra* note 8.

⁷³ Loevinger, *supra* note 71, at 534.

science the method primarily is experimental, statistical, value-free, and clinical.⁷⁴ Another difference is that “[w]hile science seeks to analyze and predict phenomena, law seeks to classify and control conduct. . . . [T]he function of science is descriptive and that of law is prescriptive.”⁷⁵

This is not to say that no problems in the law are subject to empirical study and analysis. On the contrary, person-oriented legal judgments constitute one example amenable to such investigation. As Loevinger appropriately has asserted, “The fundamental point that lawyers, as well as scientists, must understand is that both the dialectic method of law and the empiric method of science are merely means of gathering and helping to organize data”⁷⁶ And the information from each of these two data sources is complementary rather than mutually exclusive, allowing for diverse types of information to be applied to particular inquiries. But the law has withstood recognition of this significant premise.

The case of *Maxwell v. Bishop*⁷⁷ exemplifies this judicial reluctance. Maxwell, a black man, was convicted of raping a white woman in Hot Springs, Arkansas. Appealing for the second time to the United States Court of Appeals for the Eighth Circuit upon denial of his habeas corpus petition, he alleged, *inter alia*, that the Arkansas law⁷⁸ was unconstitutionally applied and enforced against him in violation of the equal protection and due process clauses of the fourteenth amendment. The basis of Maxwell’s argument was that in Arkansas, pursuant to long-standing custom and practice, blacks convicted of this crime against white women usually were sentenced to death, while white men convicted of rape, and black men convicted of raping black women, typically were not sentenced to death.⁷⁹ The application for the writ of habeas corpus alleged that since the previous disposition by the same court, new evidence had become available on this issue—a systematic study of Arkansas rape convictions during a 20-year period, which had been conducted in the summer of 1965 as part of a study of the application of the death penalty for rape in 11 Southern States. The study required the work of 28 law students throughout the summer, the expenditure of

⁷⁴ *Id.*

⁷⁵ *Id.* at 535.

⁷⁶ *Id.* at 541.

⁷⁷ 398 F.2d 138 (8th Cir. 1968), *vacated and remanded on other grounds*, 398 U.S. 262 (1970).

⁷⁸ Arkansas Statute 41-3403 provided for the death penalty at that time. For a history of the statute, see 398 F.2d at 139 n.1.

⁷⁹ Brief for Petitioner at 2, *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968).

more than \$35,000, and numerous hours of consultative time by expert criminal lawyers, criminologists, and statisticians.⁸⁰

In reviewing the petition, Judge (now Justice) Blackmun recognized the possible values of social science data in litigation but was reluctant to bridge the gap from traditional rejection to modern acceptance of social science methods useful in legal adjudication:

We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice.

. . . .

We therefore reject the statistical argument in its attempted application to Maxwell's case. Whatever value that argument may have as an instrument of social concern, whatever suspicion it may arouse with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial. Although the investigation and study made by Professor Wolfgang in the summer of 1965 is interesting and provocative, we do not, on the basis of that study, upset Maxwell's conviction and, as a necessary consequence, cast serious doubt on every other rape conviction in the state courts of Arkansas.⁸¹

There were indications that had the Wolfgang study included the county of the *Maxwell* trial in its sample the Court would have had a more difficult time affirming the conviction.⁸² Nonetheless, it is submitted that the Court missed the evidentiary boat, especially in light of Maxwell's argument:

On three previous occasions . . . courts have held that [the petitioner did not make a sufficient showing of racially discriminatory capital sentencing under Arkansas' rape statutes] notwithstanding that on each successive occasion the evidence tended in the direction of more depth and completeness. If nothing else, petitioner's failure thus far to convince the courts of his proof, demonstrates how difficult it is for Negro litigants generally and those without

⁸⁰ Petition for Habeas Corpus ¶ 7(b); see Brief for Petitioner at 7, 10-19, 21-23 n.10, *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968). Deposition by Written Interrogatory of Dr. Marvin E. Wolfgang (taken September 15, 1967) and Exhibit 4, *Abrams v. Smith*, No. 5151 (Liberty County, Super. Ct., Ga.), on file with N.A.A.C.P. Legal Defense and Education Fund, Inc., 10 Columbus Circle, New York, N.Y. General summaries of the study can be found at 398 F.2d at 141-48; see also Note, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 STAN. L. REV. 1297 (1969).

⁸¹ 398 F.2d at 147-48.

⁸² *Id.* at 147 ("what we are concerned with here is Maxwell's case and only Maxwell's case . . .").

means particularly, to make the courts see "the reality of the world, indeed . . . the segregated world," *Brooks v. Beto*, 366 F.2d 1, 12 (5th Cir. 1966), in which they live. . . . Petitioner, with this submission has made every effort that he could, has mustered all the resources available to him to make "the law . . . see what all others see."⁸³

The examination of "what all others see" is a problem of perspective, requiring, in this exploration for knowledge and understanding, that interdisciplinary investigation become the keystone.⁸⁴ To the extent that it can aid in the understanding of legal issue, a social-legal or psycho-legal jurisprudence should be of interest to every practicing lawyer.

At its base, this interest is essential to the integrity of our legal system.

[S]ince law in the end always deals with human beings, there would seem to be almost no area in which the influence and findings of the social and behavioral sciences might not be used to explain and improve the law in its daily operation upon the members of our society.⁸⁵

To the response that this multidisciplinary approach is too recent to demand more than cautiously gradual acceptance, notice that it has had early juridical support. For example, in his *Path of the Law* in 1897, Holmes wrote:

⁸³ Brief for Petitioner at 44-45, *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968); see Fahr & Ojemann, *The Use of Social and Behavioral Science Knowledge in Law*, 48 IOWA L. REV. 59, 60 (1962) (emphasis in original):

This reluctance by lawyers to adopt social and behavioral science evidence can be explained on several grounds, not all of them complementary to lawyers or to the scientists concerned. But leaving aside those who *will* not see, there remain many who recognize the potentialities of these disciplines but remain dubious as to applying them to legal matters.

See also note 88 *infra*.

The analogy to sight and seeing in Maxwell's petition probably originates in Burns, *To a Louse*, in POETICAL WORKS OF BURNS 43, 44 (Cambridge ed. 1974):

O wad some Power the giftie gie us
To see oursels as ithers see us!
It wad frae monie a blunder free us,
An' foolish notion:
What airs in dress an' gait wad lea'e us,
An' ev'n devotion!

⁸⁴ One commentator views interdisciplinary investigation as "a matter of deep logical necessity." Scriven, *Methods of Reasoning and Justification in Social Science and Law*, 23 J. LEGAL ED. 189 (1970).

⁸⁵ Fahr & Ojemann, *supra* note 83, at 59. This is not to rule out other areas of inquiry. Interdisciplinarity refers not only to law and social science, but to any mixture of the social sciences, or to any study of the "general aspects" of the law. See note 6 *supra*.

It is through [the more general aspects of the law] that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.⁸⁶

The law is not an "isolated island in *vacuo*";⁸⁷ it is a mere scintilla of all that exists, a single branch of the vast tree of knowledge in the wider forest of truth, with its own special perspective and awareness.⁸⁸ While no area of knowledge deals with its objects of inquiry in their full substance, certain properties are selected in an effort to establish relationships among them. The finding of such principles is the ultimate goal of all rational inquiry,⁸⁹ the endeavor to bring all relevant perspectives to bear upon the issue sought to be resolved. If the law is perceived as one aspect of society which relates to all mankind, then the law can constitute a quintessential orientation for interdisciplinary collaboration, from which one can "enlarge the field of vision within the limits of which decisions must be made."⁹⁰ Writes Rosenberg:

[T]here 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.⁹¹

⁸⁶ Holmes, *supra* note 7, at 478.

⁸⁷ Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622 (1916).

⁸⁸ See Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 621 (1916) ("[The law] must assimilate society before society will assimilate it; it must become organic to remain a living organ."). See also H. CAIRNS, *supra* note 10, at xiv, 266; E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW, §§ 4.63-64, esp. 546-48 (1953); R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 238 (5th ed. 1943); H. TAFT, LEGAL MISCELLANIES: SIX DECADES OF CHANGES AND PROGRESS 100-11 (1941); Fuller, *supra* note 31, at 59, 69; Parsons, *Law and Sociology: A Promising Courtship?*, in THE PATH OF THE LAW FROM 1967, at 47, 54 (A. Sutherland ed. 1968); Radbruch, *Legal Philosophy*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 140 (W. Wilk transl. 1950).

⁸⁹ Lazarsfeld, *Evidence and Inference in Social Research*, 87 DAEDALUS, Fall 1958, at 99, 100 (1958); see also Holmes, *supra* note 7, at 458; cf. Ball, *supra* note 30, at 830. Even if only an individual truth exists, it has not yet been discovered. Therefore, in his ignorance, man still may have varying interpretations of the world, based on the variety of then-existing "truths." See generally G. BARNETT & J. OTIS, CORPORATE SOCIETY AND EDUCATION: THE PHILOSOPHY OF ELIJAH JORDAN (1961); E. JORDAN, FORMS OF INDIVIDUALITY: AN INQUIRY INTO THE GROUNDS OF ORDER IN HUMAN RELATIONS (1927); E. JORDAN, THE GOOD LIFE (1949); M. OTTO, THE HUMAN ENTERPRISE (1940); J. RANDALL, THE MAKING OF THE MODERN MIND (rev. ed. 1940); Dewey, *The Meanings of Philosophy*, in INTELLIGENCE IN THE MODERN WORLD: JOHN DEWEY'S PHILOSOPHY (J. Ratner ed. 1939); Russell, *The Value of Philosophy*, in PROBLEMS OF PHILOSOPHY (M. Fisher, G. Murray, J. Thompson & W. Brewster eds. 1919).

⁹⁰ K. MANNHEIM, IDEOLOGY AND UTOPIA 169 (1936); see Ohlin, *Partnership with the Social Sciences*, 23 J. LEGAL ED. 204, 207 (1970).

⁹¹ Rosenberg, *supra* note 71, at 539; cf. Ehrenzweig, *Psychoanalytic Jurisprudence*:

Perhaps in the future we will be able to determine an individual's motives, attitudes, and intent from his actions, appearance, and gestures alone. But then, as now, the courts should undertake the responsibility of accepting relevant evidence from fragments of the universe other than those of which the legal tradition has heretofore approved. With these perspectives brought to bear upon the inevitable legal judgment, the law—more intelligently conceived and executed⁹²—can help to clear a more direct route toward truth and understanding, as well as toward the doing of justice.⁹³

CONCLUSION

It is the task of courts to decide. Understandably, there must be protections regarding the evidence which is used to support such decisions. But at least as important is the recognition that all evidence relevant to the issues in the proceedings must be admitted. To the extent that there are adequate safeguards, there is no problem with the admission of relevant evidence. To the extent that safeguards might be less than adequate, the scale still should tip in favor of admission of the evidence, with any objection going only to its weight, keeping in mind that the purpose of our judicial proceedings is to determine the truth in the controversy before the court. This analysis applies to *all* adjudication, but holds especially true in cases involving person-oriented adjudication—that is, adjudication concerning individual motives, attitudes, and intent—wherein ultimate determinations necessarily are highly subjective.

One source of information pertinent to such judgments is social

A Common Language for Babylon, 65 COLUM. L. REV. 1331, 1343-46 (1965). Of course, it will be necessary for lawyers to surmount their own confusion as to the methodology, uses, and consequences of such evidence. One reason, no doubt, for the substantial non-acceptance of social science evidence by the legal fraternity is that lawyers, for the most part, are neither trained nor capable of handling it. See *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95 (S.D.N.Y. 1911) (Hand, J.), *modified on other grounds*, 196 F. 496 (2d Cir. 1912); Auerbach, *Legal Tasks for the Sociologist*, 1 LAW & SOC'Y REV., Nov. 1966, at 91, 97; Loevinger, *supra* note 71, at 539, 541, 550-51; Hart & McNaughton, *supra* note 10, at 57; *Symposium on Social Research and the Law*, 23 J. LEGAL ED. 1 (1970); see also Riesman, *Law and Sociology: Recruitment, Training and Collegueship*, 9 STAN. L. REV. 643 (1957); Watson, Foote, Levin & Kalven, *Law School Developments*, 11 J. LEGAL ED. 73-99 (1958); cf. Kayton, *Can Jurimetrics Be of Value to Jurisprudence?*, 33 GEO. WASH. L. REV. 287 (1964); Loevinger, *Jurimetrics: Science and Prediction in the Field of Law*, 46 MINN. L. REV. 255 (1961); *A Symposium: Social Science Approaches to the Judicial Process*, 79 HARV. L. REV. 1551 (1966); Tapp, *Psychology and the Law: The Dilemma*, PSYCHOLOGY TODAY, Feb. 1969, at 16.

⁹² Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 225, 234 (1960).

⁹³ See *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring).

science, which investigates, among other things, issues underlying the disputes which comprise person-oriented adjudication. Therefore, relevant social science information should not be rejected out of hand. "Facts" are only relative; "assumptions" which underlie these facts change over time. Thus, to the extent that these assumptions can reliably be verified with the theories and methods available to current knowledge, a court is obliged to accept such verification. To do any less is to ignore the precepts of our jurisprudence.