LAW AND PSYCHOLOGY How the Twnin Might Meet: Contact Points The ...
Touster, Saul
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pg. 3

LAW AND PSYCHOLOGY

How the Twain Might Meet

by Saul Touster

The relating of social science to social policy is an immense dramatic panorama, one of whose most important sections is the relation of psychology to law. Professor Touster of the University of Buffalo Law School here states the issues clearly and exemplifies by the concept of parenthood a practical logic for dissecting other categories of legal problems.

To appraise a single expert is difficult enough, as a recent journal pointed out:

> Before we can treat an expert as an expert we must be sure of two things: *First*, the subject matter as to which he expresses his opinion must be one with respect to which there is conceded to be a specialized body of knowledge which can be acquired only by study and training, and which is not possessed by the ordinary run of men; *Second*, the knowledge must be knowledge in a substantial sense. That is to say, there must be some reasonably objective standard of certainty. . . .
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> Another qualification which the judgment of the expert must have is that it be addressed to a problem which is solvable within his own field. Thus, the physician is no expert when he advocates euthanasia. Nor is the engineer an expert on the question whether a tunnel between Staten Island and Long Island is desirable.
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> No one doubts that the question involves some problems of engineering, but it cannot be answered without the solution of a host of problems about which the engineer knows no more than the ordinary citizen.[1]

The problem is complicated when two types of expert treat with the same matter. Anyone entering *interdisciplinary* work will be quickly made aware of difficulties beyond the particular subject of study. These are difficulties, I believe, which can best be described as ones of "translation." A lawyer, like any "expert," brings to a problem a body of knowledge based upon innumerable assumptions, many of which are unstated and many of which may even be unknown to him. It is this condition that allows him to communicate easily with another lawyer. And so, psychologist with psychologist. This is, perhaps, both the function and explanation of professional jargon. When, however, a lawyer must communicate with a psychologist, his body of knowledge and his assumptions must, in some measure, be articulated and tested so that a common language might be found. Sometimes—to use a term from the vocabulary of all the social sciences—this is described as a problem of "frames of reference." But the term "frames of reference" hardly does justice to those feelings of strangeness, and perhaps even hostility, the lawyer feels when he enters the psychologist's world. The organization, the purposes, the values, the techniques of psychology are so different from those of the law that one is confronted with a language that literally needs translation. I realized this quite acutely when recently I accepted an invitation to speak to a group of psychologists on the topic of what the psychological sciences could do for the law. I very quickly found that I was engaged in the problem of "frames of reference."

Let me give you a rather prosaic example of what I mean when I say we speak different languages. A brilliant young man, with an I.Q. of 180, enters college on the G.I. Bill with the ambition of becoming a physicist. He also has an interest in music. He gets his bachelor's degree and enters graduate school as a Ph.D. candidate in physics. After a year he fails out and decides to study music. Hearing this story, consider how different will be the questions asked by men in different fields. The psychotherapist might ask why the boy failed out of school in the sense of what were the personal, family, environmental factors which led to his choice and to his failure. The teacher of physics might ask why such a student failed in the sense of what is wrong with the teaching of physics on the graduate level that it cannot engage the interest and commitment of a boy of such capacities. The lawyer might be confronted with the question of whether the schooling in music might be considered continuous with his education in physics so that he might continue with benefits under a G.I. Bill. A minister might find an occasion for consolation.

Not only will these questions or views be stated in different forms, but they will motivate the people involved to direct their energies into different

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channels. Each will ferret out facts relevant to his particular questions, each will relate to the student in a way necessary to his own ultimate objective. One might be interested in helping the student "find" himself; another in helping the physics department reform itself; and another in bringing home a lesson in morality. Although we might discover some common denominator in all these approaches, the numerator will be different, the fraction of the great reality which each of these men are dealing with will be different. And even among psychologists, will the frames of reference be the same? Will the psychologist interested in I.Q. validity studies respond to the case in the same way as the learning theorist, as the therapist? Obviously not.

Contact Points

Perhaps the easiest way to begin relating the major frames of reference of law and psychology is to outline the points at which they may come in contact with each other. *First*: in the conduct of a law suit, an issue of a technical nature may arise in which a psychologist's testimony is relevant to the determination of the issue. In this case, the testimony of the psychologist would be useful and necessary, just as is the testimony of metallurgists, radiologists, art dealers and innumerable other specialists when issues of fact are raised in their respective fields. *Second*: psychology and the other social sciences can obviously contribute a great deal to the study of the law as an institution. How lawyers and litigants, witnesses and jurors, behave, and why, and what factors influence them, are legitimate subjects for research, and the findings may reveal a great deal about human psychology, or prove helpful in explaining and reforming legal institutions. The same can be said of the study of various aspects of the legal process itself. For instance, psychology has contributed a great deal already to testing the validity of various rules of evidence. Presumptions which the law established when our knowledge of human psychology and our logical tools were not so well developed have been subjected to rigorous tests. Psychology has taught us much about testimony—about perception, memory, verbal clarity. Continued studies in this area may be especially helpful. (I always say "may" because the findings of social science will not necessarily have a direct bearing upon the objectives of the legal institutions involved. There may be factors at work which militate *against* the views or conclusions of the social scientist, as I will discuss later in more detail.) *Third*: psychology and the other social sciences can provide guidance and aid in the making and administering of laws. Let me give some examples. Assume for a moment that a state wanted to utilize the services of psychologists with respect to the making and enforcement of traffic regulations. It might find that a specialist in learning could be of great help in setting up schools for drivers. The services of a specialist in interviewing methods might establish more effective procedures for the conduct of police investigations of accidents, or better forms for accident reports. Being concerned with the safety of vehicles, the state might employ a specialist in perception to determine the vision requirements of vehicles, or of the road structure, or of traffic signs. The state might even consider—as one legislative commission recently did—the views of psychologists and psychiatrists with respect to accident proneness, or relating pathologic personality traits to highway accidents.

The Conflicting Contexts

Although these stories of the way the social scientist can help the law begin happily, they seem never to end happily. Research, reports, recommendations are made with a high degree of commitment and enthusiasm, and are received by the legislators or administrators with an equal good will, and yet they are often filed in some drawer and make no impact on the subject. Why? Although in any particular case the factors may be varied, the basic reason (although complex in application) seems to me to be quite simply stated. *The questions asked, the values expressed, and the factors considered in a law-making context are not the same as those present in a research context.*

Let us take this matter of what the psychologist could do in the field of traffic enforcement. The first decision that must be made is obviously whether or not the state wants to spend the money for such research studies. This is a decision which, in the most basic sense, is one of value judgment, of allocating resources to various social goods. From experiments that have been made in Connecticut and New Jersey in traffic enforcement, I understand that the accident rate could be significantly reduced by strict enforcement of the speed limit, by heavy penalties, and by peremptory and long term suspensions of licenses for certain violators. This could be done, however, only at certain costs. It would require a larger state police force with a consequent increase in expenditures. And what does that involve? Not only must you consider whether to take the money from a school budget or a welfare budget, or whether to increase taxation with a consequent impact on the state's economy, but you must ask whether you *want* a larger police force, an issue of serious consequences above and beyond traffic enforcement.

Next, let us take the judgment of setting the speed limit to be enforced. If it were determined that with a 50 mile per hour speed limit, the projected accident figures on a hypothetical highway would be 5,000 accidents, 720 injuries and 26 deaths, when at 70 miles an hour (all other things being equal) there would be 3,000 accidents, 500 injuries and 50 deaths—that is, at the higher speed there are fewer accidents but more deaths—how do you make your judgment? Do you decide that the saving

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in life at the lower speed is worth the increased number of accidents and non-fatal injuries? How do you weigh accident, injury and death against the rate of transportation across the highway, the saving of 20 minutes in a journey of 2 hours for thousands of people?

If we take the question of the manner of investigating an accident, we touch other problems that the law has continuously been concerned with. We have in this country the constitutional right not to be compelled to give evidence against ourselves, that is, the privilege against self-incrimination. It may be determined that for the purposes of fact-finding by a state agency interested in determining the causes of accidents, or for the purposes of fault-finding in order to suspend licenses, drivers involved in accidents ought to be interrogated by the police and forced to give a complete account of the accident on threat of losing their license. The value of finding the causes of accidents would have to be weighed seriously against the value society places on the privilege against self-incrimination. I am not suggesting which values weigh more heavily, but I want to emphasize that no amount of research or fact-finding can do away with the necessity of making such value judgments. What research can do, however, is to give us a clear picture of social costs, of the consequences of alternate choices. But research cannot replace choices, that is "politics," and I speak of politics here in its highest sense.

Paternity Cases as Examples

To dramatize the conflict between scientific determinations and legal determinations, paternity cases might prove helpful. The medical sciences have developed blood typing tests by which it can be determined that a particular person is *not* the parent of a particular child. Assuming for the moment that the tests are given a number of times and by independent experts, (that is, where mistakes and collusions are out of the question) the results of these tests are as positive as any proof we could hope for. And yet some courts, seemingly senselessly, do not always accept the results of these tests as conclusive. They will sometimes allow the test results to be introduced into evidence along with other evidence, leaving it for the jury to determine the question of whether this man was the father of this child. Why? Because the question asked and the values weighed in the legal action are different from the question asked and the values at stake when a scientist is determining a scientific issue.

Paternity was put in issue in a case, a number of years ago, where a young actress in Hollywood charged a famous producer with being the father of her child. Assume for a moment that blood tests established that the producer was *not* (biologically) the father of the child; assume also that in addition to such evidence, testimony was received that the producer had had continual sexual relations with the girl, had set her up in an apartment but when she became pregnant broke off the relationship and discontinued his support of her. I recently asked a law school class why, in the face of the scientific proof, a jury might decide that the producer was the father of the child. Their answers were illuminating. One suggested that a person responsible for the moral fall of a girl should be held accountable, even though his particular act did not result in conception. (This is a kind of "assumption of the risk" theory not uncommon in the law.) Another suggested that a decision against the producer would be useful in discouraging the abuse and exploitation of innocent and unprotected girls by powerful men. Another thought that since the producer had the pleasures, he should pay the price. (This last point reflects, perhaps, the waggish comment by a learned authority that we apply the principles of commercial law: if the maker can't be bound, the first endorser will.) Insofar as these comments give expression to the complex values the law is concerned with in a paternity proceeding, they seem to me justified.

But it must be noted that "paternity" may be placed in issue in many different legal contexts, in which different social values will impinge upon the decision-making process. It may be raised where a child's property rights or legitimacy are at stake; in citizenship proceedings; where a parent's right to custody or visitation, or his duty of support, is in question. Are we to be bound by the scientific proof where a child, the apparent offspring of a long married couple, is claimed to have been fathered not by the husband-father who has raised him but by a stranger? If the issue were the husband's rights of visitation, might we not say that though he is not the genetic father he is the "nurturing" or family father which the law contemplated when it provided for visitation by a father. Obviously the law defines paternity in a way different from genetics. For the geneticist the biologic factor is critical. For the law, a multiplicity of factors comes into play, each issue requiring the most subtle weighing of values.

The Place of Legal Fictions

An objection may be made that the law ought to articulate the values influencing its decisions so as to make clear that the particular determination is not of the issue of "paternity" but of the general issue: "Should this person pay for the support of this child under all the circumstances?" This is, of course, possible, but, as I will suggest later, there are grave dangers to such an approach. Nonetheless, this raises the whole problem of the *real* reasons behind decisions or rules of law, the unstated values subsumed under traditional concepts. It seems to me that it is in this process, in the search for the real reasons behind rules of law and in their articulation, that psychology can do a great deal for the law. Mr. Justice Holmes, probably the greatest legal theorist this country has produced, had some interesting things to say about this as early as 1881.

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"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[2]

And then he goes on to deal with specific legal principles:

"Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the *unconscious* result of *instinctive* preferences and *inarticulate* convictions, but none the less traceable to views of public policy in the last analysis."[3]

And when he proceeds to describe the way in which the law develops, he sounds surprisingly like a psychologist:

"Hitherto this process has been largely *unconscious*. It is important, on that account, *to bring to mind* what the actual course of events has been. If it were only to insist on the more *conscious* recognition of the legislative function of the courts, as just explained, it would be useful. . . ."[4]

Thus, Justice Holmes' view of the objectives of the study of the law is this: making conscious what is unconscious, making articulate what is inarticulate, making rational what is instinctive. The great advances made in psychology have not only developed tools for investigating the unconscious and bringing its material to the levels of consciousness, but it has so conditioned the public view of human motivation that what once were considered taboo areas are now considered legitimate subjects for inquiry. This would also be true of the revolution in thinking effected by the classic sociologists who have led us to distinguish between the ostensible or avowed reasons for society's acts, and other reasons which are probably truer, more critical.

To return to the paternity case, one might ask why the law does not accept the *real* reasons and instead of asking a jury to determine whether or not the defendant is the father of the child, to ask it whether under all the circumstances they believe morally and socially it would be better to require the defendant to support the child. In other words, why the fiction that the jury is finding the *fact* of paternity? Legal fictions have many good uses and this exemplifies one of them. One of the major objectives of the law is *predictability*—providing guides to conduct, apprizing men of the risks they take by their actions. If we allowed a jury in all paternity cases to be guided merely by their moral dispositions or social attitudes, we would make this area completely unpredictable. The law uses the fiction that the jury is merely weighing evidence on the ultimate issue of paternity. This is useful in impressing the jury with the gravity of their finding, so that only the very strongest moral and social considerations (supported by *some* evidence of sexual relations) would lead to a verdict contrary to the scientific proof. It also keeps the door sufficiently *closed* to prevent just *any* defendant who happened to be a scoundrel from being held responsible for the support of children of just *any* innocent girl.

But of course the process of making ourselves conscious of the social policies behind rules of law, behind the law itself, is a task for all the social sciences—and I include in the term social sciences the study of law itself. Although, as I have pointed out, it is critical to translate from one frame of reference to another, I think it would perhaps be sounder to say that each problem will require its own frame of reference. Lawyers and psychologists working on one problem may find themselves with more in common than the psychologists and sociologists working on another problem. That is, they will be conditioned more by the problem at hand than their theoretical prepossessions. And this would seem to me to be a good thing. For if the social sciences are to help in this "articulation" process they will have to be characterized by a scientific skepticism not only in viewing the law and the problem the law is dealing with, but in viewing themselves. The social sciences must subject *themselves* to a reciprocal skepticism, to a critical inquiry into their own methods, their own values, their own limitations before they can realize their potential in social problem-solving. What is to be feared is that one orthodoxy—inflexible legal thinking which has no use for the social sciences—will be replaced by another orthodoxy—inflexible social science methodology. In the area of mental health, for example, the relations of law and psychiatry, of psychiatry and psychology, of mental health and public finance, raise the most subtle and complex problems of "politics" as I have used the term—problems which are not solvable in terms of any specialty, of any particular field of knowledge. They are solvable, if at all, only by asking larger questions than any one discipline is usually willing to ask: What kind of society do we want to live in? What style of man do we want to create? Or smaller questions outside the realm of theory: Should we build a mental hospital here? Should we increase property taxes to pay for it?

Law and psychology, like all the social sciences, are a part—an important part—of those social forces which formulate the questions for us and put a premium on certain kinds of answers. That is, they are part of those forces that create the values to be served. But they are not by any means controlling, and with respect to any specific question for which society turns to the law for an answer, and the law turns to psychology for help—well, in this situation, both law and psychology are, as it were, handmaidens whose autonomy is severely limited by the social values they serve. Their efficacy will ultimately depend on the degree to which they can reflect creatively those values in their work.

NOTES

[1] Butler, "The Rising Tide of Expertise," *Fordham Law Review* 19 (1946).

[2] *The Common Law* (1881), p. 1.

[3] *Ibid.*, pp. 35-6 (emphasis added).

[4] *Ibid.*, p. 36 (emphasis added).

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