Some Comments on the Law and Behavioral Science Project at the University of Pennsylvania Law School Developments

Harry Kalven Jr.
I am afraid I will find myself following the time-honored rule of all discussants, which is to talk not about the papers, but about something else.

As Mr. Foote’s and the other papers point up, undoubtedly this is a high point in the periodic flirtation between law and social science. Other, major research projects are under way at Columbia, Yale, and my own school. The journals have begun to set forth a budding critical literature in this area in the recent papers by Cavers, Riesman, Cohen, Robson, Schwartz, Cahn and Hurst. And there are even such phenomena as the presence of Brainerd Currie, Frank Newman, Clarence Morris, and next year David Cavers at Palo Alto.

The Pennsylvania project occupies a quite crucial role in the fate of work like this in the future. It is one of the key projects by which the utility and promise of such work will be judged. In general, I am enormously pleased and impressed with the sense of activity, energy, resourcefulness in overcoming of difficulties, and finally the affirmation about the long-range potential of what they are doing. I gather this from the papers themselves.

*This comment was delivered orally and informally from notes at the Law and Medicine Round Table at the Annual Meeting of the Association of American Law Schools, San Francisco, Cal., on Dec. 29, 1957. Apart from correcting the usual minor excesses, inaccuracies, and lapses from syntax that dot a transcript of what one has actually said, the writer has decided to let it stand as it was delivered.

† Professor of Law, University of Chicago.


and even more from casual discussions I have had over the past day or two with the participants. I have high hopes for the contribution the Pennsylvania project will, in fact, make to the reputation of work like this.

I am much taken with a theme that Mr. Foote was particularly hitting. He used the phrase, "the law going from the periods of fanaticism to failure." If I can borrow a phrase from Dr. Watson, I would say there has been a manic-depressive quality about the law's efforts in the past. To go back over the history a little, there is a nice pair of readings you find every twenty years or so. Münsterberg, as Leo Levin noted, writes this enormously enthusiastic book at the turn of the century, a book that is going to change law completely; and Wigmore writes not only a merciless paper, but a funny paper, a caricature of the whole thing. You come down another twenty-five years, and a psychologist, Robinson, writes a delightfully optimistic book about reforming law completely by adapting the methods of psychology to it; and a gentleman named Mechem writes a review which is even more devastating and, I think, more pertinent really, than Wigmore's. You go on another ten years, and another great law teacher, Underhill Moore, finally produces his traffic study after laboring on it for fifteen years or more; and this time, he is met by absolute silence, which is even worse. And finally, only yesterday, we seem to have the pattern repeated again with Beutel writing an extremely optimistic book; and you have Mr. Cavers applying the scalpel to him. The pattern has been unmistakable.

I would like to devote a few moments to what may account for that pattern and to why this may be a more promising time than ever before. One rather obvious thing is that, except for Underhill Moore, these were heroic prospectuses by men who were in flight from law, who were out to revolutionize it. And they started with the premise that anything must be better than what we have now. The vision was, you know, large and generous, a sort of crusade to bring finally a little sense into the priesthood that we are all in. In brief, these were calls for a revolution of law. And, of course, that approach has two great difficulties. The first is it obviously alienates everybody else in the field, as they are quick to indicate. The second and more serious is that it is fundamentally wrong; it is a view that denies the considerable wisdom and sense and rationality of the legal system as it now is. And I think that the great promise that is now present and characterizes, I hope, the work we are doing at Chicago as well as at Pennsylvania and elsewhere is that, for once, I do not think the people that are doing it are really disaffected by the law. Nobody is talking about revolution. There is talk of an enrichment of law here and there, steadily, surely, but not spectacularly.

3 HUGO MÜNSTERBERG, ON THE WITNESS STAND (1908).
4 Wigmore, Professor Muensterberg and the Psychology of Testimony, 3 ILL.L.REV. 399 (1908).
8 Frederick K. Beutel, Experimental Jurisprudence (1957).
And there is a moral. It is that the millenium will come not when lawyers become sociologists, but when the work becomes routinized, when it need not carry the burden of this historical impact every time it reappears.

A second point is, in a way, more interesting, and was touched on by Mr. Foote. It is a curious point; it is that the law really is ambivalent about science. It seems to be simultaneously skeptical and unbelievably gullible. I do not know whether those are the same people, but certainly taking the institution as a whole, that is the way it works out. A choice example is the story of Justice Holmes and the three generations of imbeciles—the story, that is, of the legal attitude toward sterilization. The law at first is stubbornly resistant to the law of genetics; then it adopts in the most uncritical fashion claims in the name of science that science is not making at all. And now, thirty years later, we are greatly embarrassed by current findings in genetics and *Buck v. Bell.* It now looks, as I have said elsewhere in print, as though there are two difficulties with Holmes’ famous wisecrack. One is that three generations of imbeciles will not be forthcoming; and if they were, they would not be enough.

There are innumerable other examples of this. Therefore, in a way, I agree with Mr. Levin and Mr. Foote that it is important to develop some critical sense in the law student to guard against gullibility re science. On the other hand, I disagree with them in their emphasis—and I would have disagreed more, had not Mr. Foote toned down his paper somewhat between the time I saw it and the time he gave it.

Here there are several related points. The first difficulty is that the critical skepticism is put somewhat arrogantly, perhaps inadvertently; we appear to be making methodological discoveries against the scientist rather than with him. My experience, and I guess it would be theirs, too, is that the first man to make these points is the scientist himself. He knows all about his methodological problems. He is three times as critical of his method as we are. If we can at least appear to join him in exploring the difficulties, we will not, as Leo Levin was saying, alienate the colleagues that we have to work with.

The second point is that I think the critical posture is too seductive. It is too easy for us, as lawyers, to play the hardheaded role of picking up the logic and method—of finding out that the method has shortcomings in operations—and then to do nothing at all, to blame the difficulties of method, and sit back to wait for another thousand years until the method is sufficiently improved.

My third observation from my experience with the people at Chicago is that it seems to me that the more professional they are and the better they are, the less they talk explicitly about method. There is something a little naive about the desire to show you are now a little familiar with social

---


11 In *Symposium: Morals, Medicine, and the Law,* 31 N.Y.U.L.Q. 1222, 1230 et seq. (1956). A similar swing from skepticism to gullibility can be traced in the tort law’s handling of emotional shock; see Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VA.L.REV. 103 (1944); Note: *Tort Liability for Miscarriage “Caused” by Fright,* 15 U.CHI.L.REV. 188 (1947).
science by talking about whether something is statistically significant, whether a sample is representative, and so forth. To borrow an expression from the world of sports—the pro's don't tend to talk that way.

But the crucial point for almost all the studies I know of is that, of course, they do have shortcomings, and the first man to be aware of it is the man who has made the study. What he has had to do is compromise his pure criteria of method with the possibilities of, the limitations on, getting the data. The blueprint of an ideal method and sample, and so forth, in the social sciences has to yield somewhat to that reality, or you do not do anything at all. Of, if you do it, you take the one possible thing you can study with maximum precision, which then turns out to be monumentally trivial. This is not to ratify the quality of all scientific studies that have been made so far; but it is to say that to a surprising degree, the scientific fraternity itself is articulate about the degree to which they know they have had to compromise the purity of method to a desire to do anything at all.

Finally, Dr. Watson showed restraint in not using the obvious rejoinder—look who is talking! What is so wonderful about the legal data—we now have or the guesses we otherwise make? Who are we to be quite so finicky about the information we will tolerate from our social science colleagues only when it satisfied God-knows-what kind of criteria?

Finally, I would like to throw out a question, particularly to Dr. Watson. In the handling of psychoanalytic materials in law school, it seems to me, you do have a special problem in method. The problem of a critical sense is of a different dimension here. What can it mean for the layman, at least in a student or law position, in any sense to make an independent judgment about the quality of the evidence? Here the evidence presented publicly is curiously dreamlike, symbolic, terribly different from what it must have been like when it was received. I am puzzled, therefore, as to how one meets the problems created by the special inaccessibility of this data.

I would like to mention, too, the rather fascinating issue raised by Dr. Watson in connection with the teaching of psychiatry: whether, unlike the teaching of anything else in law, psychiatry has to be partly therapeutic as taught, apparently both on the part of the pupils and the teacher; and whether the legal image that the impersonal intellectual discussion of doctrine is possible here as well as elsewhere is really wrong.

I come back now to the Pennsylvania studies. As Mr. Foote particularly pointed out, what I would have thought was a serious flaw in the Pennsylvania study seems to be only a partial weakness. It is a weakness I think they are aware of. It is a weakness Mr. Currie came upon in his study of the experience in the late twenties and early thirties. The effort then was basically to collate the existing scientific materials with legal problems and not to do direct scientific research. As the Columbia experience indicates, that was by no means a futile approach, but rather a frustrating one that could not fully succeed because, of course, as Mr. Foote has well put it, there was no reason on earth why the social scientist should have been working on these legal questions before. The distance from materials over

there to materials in law was just too great, and that, in a sense, is the dis-
covery that Pennsylvania has again made. But two important qualifications
are in order. One is that the Pennsylvania people have found more ma-
terial than I would have thought possible, and I am impressed with the in-
genius and skill with which they have put together their materials. The
other is that they view what they have done as, in part, the spending of a
couple of years organizing a beautiful prospectus for legal-social research
in the future. That kind of thoughtful agenda for research is superior to
any that was existent before, and it could prove a great stimulus to future
work. But I think the point we are not in dispute about is that further ef-
forts along the line that Pennsylvania has followed so far are not likely
to be terribly promising. The social science literature is not likely to yield
much more than they have culled, and, if there is a future here, therefore,
it is a future in the direction of new and original joint research.

Both the Pennsylvania venture and the earlier Columbia venture strike
me as being based on a premise that I find somewhat questionable—that
is, whether it is sensible immediately to try to utilize these materials in law
teaching. Or, to put it another way, whether we are not committed im-
plicitly to an odd view that the only test of relevance of research in the
law school world is whether you can teach it. I suggest that is the view
we tend to operate on in fact, and I suggest it is a mistaken view. I offer
the somewhat perplexing competing suggestion that research ought to be
justified on other grounds. The only way you can decently liberate the hori-
zons for legal research is not to be so completely teaching-oriented as we ap-
parently are.

Let me turn, in conclusion, to the matter of direct empirical field research
in law. Dean Cavers has recently noted many of the problems which arise
once we start looking in that direction. There are many difficulties. One is
the difficulty of the project. How is research to be organized, does it have
to be collective research? There is the problem that Dr. Watson was talking
about: what happens on the personal level when you try to get inter-
disciplinary research really going? There are the very formidable problems
of time and money, the problem of recruitment.

Will our problems, in fact, be sufficiently interesting to the good social
scientist? Is there a basis for confidence that our enthusiasms will mesh on
the points of real interest? What may be terribly interesting to us, what we
really want him to do, may turn out to be rather routine and rather deadly
for him. I am not perfectly confident of the frequency of points of joint
effort that would be at once significant research both in law and in social
science.

Finally, I have an impression that in the social science world, the real
problem has been the lack of continuity of research. In the natural sciences,
at least, I have the happy impression that there is no problem in that re-
gard. One study is piled up on top of another down through the ages.
You can work in a little segment and know what you are doing because it
is measured against a prior tradition of research. That has not been true
of the social science world up until now in its own field; and, of course,
it has been spectacularly not true in this law-social science area. Unless some
 provision for continuity can be made, so that modest studies build on each
other, I think the somewhat heroic efforts that are now being made will turn
out to be rather interesting historically, but, once again, not permanently effective.

Let me just say one last word about the one special value that I think the work of this sort has—it was touched on by Mr. Foote—and that is that it may turn out to be surprisingly fruitful for law teaching after all, although I would not want to judge it solely by that criteria. It may reclaim and make teachable some areas of law that apparently we cannot now manage. The reason we cannot manage them is simply because they do not produce appellate litigation. The new studies may often provide a substitute for the "muscles" of appellate litigation. They may furnish some data on which you can operate with a class, data that invites reflection on the problems involved, and without which apparently we are unable to teach. The sentencing problems Mr. Foote was talking about are a vivid example of this. I take it appellate cases on sentencing are not particularly interesting or useful and do not lead to a discussion of the problems. Yet, without some supplement of this sort in appellate cases, we have had no way of teaching it. There is, then, in this new research a great enlargement of our own experience and the possibility of recapturing for law teaching some fairly important areas of law.

I think the proper context for the judging of efforts of this sort is to ask the question: what are the avenues today for mature research in law generally? It is a question of comparing this type of work to the other alternatives that are available now. It is a question of looking not at this nakedly and off by itself—and I say this not in derogation of the other kinds of research that can and are being done in law. The test is the contribution such research can make, as I say, to the alternatives for serious and adult work in law generally. May I say again that I am greatly impressed and pleased with the progress of the Pennsylvania studies thus far.