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BOOKS REVIEWED

Sociology of Law. Edited by Vilhelm Aubert. Baltimore: Penguin Books. 1969. Pp. 367. \$2.25.

Professor Aubert has compiled a rather choice sampling of twenty-eight articles and excerpts for this paperback volume, one of a series published by Penguin Books on modern sociology. The selections deal in varying degree with the relationship between law and modern sociology. As in most undertakings of this nature, the result is of uneven quality among the articles reprinted.

The importance of sociology and of the application of its methodologies to the practice and understanding of law can hardly be questioned. Indeed, the practicing lawyer often employs methods in many respects similar to those of the sociologist in order to persuade a court to adopt a particular interpretation of the law. For example, the school integration suits were replete with sociological analyses and studies.¹ Similarly, such studies and accumulations of data are often considered (albeit not exclusively) in the enactment of legislation.

Sociological methods are relevant in all schools of jurisprudence which are not based solely on a priori, non-empirical grounds. Accordingly, sociology is important not only to adherents of legal realism² and the sociological schools³ of legal philosophy, but also to adherents of positivism,⁴ analytical jurisprudence,⁵ and the natural law theories.⁶

1. See, e.g., *Brown v. Board of Educ.*, 349 U.S. 294 (1954).

2. As representative of American realism, see Frank, *Are Judges Human?*, 80 U. Pa. L. Rev. 17 (1931); Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897); Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931). See generally W. Friedmann, *Legal Theory* 292-304 (5th ed. 1967) [hereinafter cited as Friedmann].

3. See, e.g., E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1962); M. Weber, *On Law in Economy and Society* (1954); Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1 (1943).

4. See, e.g., J. Austin, *Province of Jurisprudence Determined* (1954); H. Kelsen, *General Theory of Law and State* (1961); H. Kelsen, *Pure Theory of Law* (1967).

5. See, e.g., H. Hart, *The Concept of Law* (1961); W. Hohfeld, *Fundamental Legal Conceptions* (1923); Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967). See generally Summers, *The New Analytical Jurists*, 41 N.Y.U.L. Rev. 861 (1966). Many of the thinkers here and elsewhere placed in the category of analytical jurisprudence might also be termed "legal positivists." Use of the term "positivist" often occurs to indicate opposition to "natural law" jurisprudence or to indicate (usually pejoratively) that the "positivist" being labelled as such has no values and/or morality, is disinterested in the law's relationship with values and morality, or denies the existence of such a relationship. For a distinction between legal positivism and analytical jurisprudence, see S. Shuman, *Legal Positivism* 11-18 (1963).

6. There are as many natural law theories as there are theories about the "nature(s)" of man and beast. The major Greek representative is Aristotle (primarily his *Nicomachean*

Although this relevance is clearly evident in the case of a legal philosopher such as Ehrlich, who emphasizes sociology (in some instances seemingly to the exclusion of all other methodologies), the role of sociology in the latter three schools of jurisprudence is less evident and requires some elucidation. Present-day legal positivist and analytical jurists emphasize the study of the meaning of legal concepts as distinct from historical and sociological inquiries into the relation of law and other social phenomena and also from an appraisal of law in terms of morals, social aims, etc.⁷ Yet this emphasis does not necessarily preclude or negate the use of sociological methods in understanding, appraising and changing the positive law (either legislatively or judicially). The debate between Professor Hart and Lord Devlin on the relationship between positive law and morality illustrates this point. Lord Devlin argues that the positive law must enforce the moral values held by the legal system's society, because morality is a cohesive force necessary to the continued existence of that society.⁸ Devlin conceives this morality as a "seamless web." Hart terms this argument the "disintegration" thesis to distinguish it from the "conservative" thesis.⁹ The conservative thesis bluntly holds that society has a right to enforce through positive law the majority's morality system because the majority has the right to follow its own conviction that its moral environment is a thing of value to be defended from change.¹⁰ Viewed in this manner, the conservative thesis can be defended and challenged primarily on political grounds, that is, in the context of defining the rights of the majority in a political unit.

The disintegration thesis, on the other hand, presents a different and more fundamental question which cannot be solved simply by defining the majority's political rights. Hart himself points out that the sciences of psychology and sociology must provide hard evidence to prove the existence of the disintegration thesis.¹¹ Thus, the leading contemporary exponent of legal positivism or analytical jurisprudence unequivocally recognizes the importance of sociology and other behavioral sciences to legal philosophy. What perhaps distinguishes the contemporary "positivist" school from the sociological school

Ethics, book V); Cicero perhaps best represents the Roman and Stoic variation (see particularly *De Legibus*); Aquinas clearly dominates the Roman Catholic version of natural law (see particularly *Summa Theologica*, questions 90-100); "secular" natural law is represented by Grotius in *De Jure Belli*; and contemporary variations can be found in, among many others, H. Rommen, *The Natural Law* (1947); Dabin, *General Theory of Law*, in *The Legal Philosophies of Lask, Radbruch, and Dabin* 229 (K. Wilk transl. 1950); d'Entreves, *The Case for Natural Law Re-Examined*, 1 *Natural L.F.* 5 (1956).

7. See, e.g., Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 601-02 (1958).

8. See P. Devlin, *The Enforcement of Morals* (1965).

9. Hart, *Social Solidarity and the Enforcement of Morality*, 35 *U. Chi. L. Rev.* 1, 2 (1967).

10. *Id.*

11. For example, sociologists might address themselves to the question of whether moral pluralism can lead to quarrels which will "destroy the minimal forms of restraints necessary for social cohesion." *Id.* at 12-13.

is the former's emphasis upon analysis and linguistics. This respect for and expert use of analytical powers makes jurists like Hart properly critical of the too often grand conclusions and designs offered by many sociologists without evidence which is sufficiently persuasive. For example, Hart asserts that Parsons and Durkheim, both highly respected sociologists, have in effect adopted the disintegration thesis with little empirical evidence as support.¹² Durkheim, in a book (excerpts from which are in the volume under review), speaks in terms of "mechanical solidarity" arising from shared beliefs and the "collective conscience."¹³ Even after discounting possible *méfiance*, on the part of the Oxford philosopher, of constructs involving "organisms" and "collectives," Hart's critical attitude toward the proof of the disintegration thesis is well taken and his call for more empirical studies should be heeded.

The importance of sociology to natural law philosophies has been recognized by at least some of the contemporary adherents, particularly those advocating a "dynamic" natural law. The natural law tenets of Aquinas, with the theological underpinnings removed, are often founded on judgments as to the operation of law in the human society.¹⁴ Thus, there is nothing incompatible between this convergence of natural law and sociology and no reason to believe that Aquinas would be adverse to employing the more sophisticated methods of modern sociology in making such judgments. More flexible natural law theories should welcome the use of refined methods to empirically verify those laws "natural" to man. Natural law viewed in this respect begins to look much like the "minimum content" of law of analytical positivists like Hart.¹⁵ Unfortunately serious question exists as to whether such a "natural law" or "minimum content" of law could ever be sufficiently defined solely on the basis of any empirical verification provided by sciences such as sociology and psychology. Doubt as to the ultimate success of a *complete* definition through the use of behavioral sciences does not negate those gains to be derived from an incomplete definition which might at least clarify, if not solve, some jurisprudential problems.

Sociology of Law presents a varied assortment of articles. A few examine explicitly the relationship between law and sociology¹⁶ but most are examples of work products in the area.

Professor Aubert in his introduction makes a distinction between sociology and law in the following terms: sociology is primarily a descriptive science,

12. Parsons has stated that "without the attachment to the constitutive common values the collectivity tends to dissolve." T. Parsons, *The Social System* 41 (1951).

13. E. Durkheim, *The Division of Labor in Society* (3d ed. 1964), excerpts reprinted in V. Aubert, *Sociology of Law* 17 (1969) [hereinafter cited as Aubert].

14. Because of Aquinas' quasi-official status as the perennial spokesman of Roman Catholic jurisprudence, much ink has been unnecessarily spilled in attempting to put the new ideas of natural law jurists into the writings or unarticulated thoughts of Aquinas rather than simply getting on with the job of exploring the operation of laws.

15. H. Hart, *The Concept of Law* 189-95 (1961).

16. E.g., H. Bredemeier, *Law as an Integrative Mechanism* (1962), excerpts reprinted in Aubert 52.

while law is primarily a normative discipline. Lawyers talk of rights and expectations with a view toward giving directives to clients as legal functionaries.¹⁷ To the sociologist, on the other hand, terms like rights and obligations to a great degree merely summarize observations of actual transactions or the normative convictions of the actors.¹⁸ The distinction or juxtaposition is not completely exclusive but rather expresses "a basic tendency in the differences between the two disciplines . . ."¹⁹

A second distinction should be made between sociology *of* the law and sociology *in* the law. The former makes the law a focus of sociological investigation and is a branch of general sociology. Sociology *in* the law "aims to facilitate the law's performance of its functions by adding sociological knowledge to its stock of tools."²⁰ In the latter sense sociological methodologies serve as additional tools of the jurist. Again the articles selected by Aubert fall into both categories.

Sociology of Law is divided into five parts: 1) law and social structure; 2) legislation, law enforcement and the public; 3) law and conflict resolution; 4) judicial behavior; and 5) the legal profession.

In part one law is viewed as the passive partner in the relationship between law and sociology. The authors generally examine law to determine which societal and individual values are reflected by and are embedded in both substantive and procedural law; that is, laws are seen as dependant variables. For example, Durkheim argues that the types of law correspond to the forms of social solidarity. Criminal law is based upon repressive sanctions, while non-criminal or civil law is based upon the principle of restitution. Durkheim's discussion of criminal law is the more interesting to the jurist. He asserts that a totality of beliefs of average citizens form a determinate system—called collective or common conscience. This collective conscience is a "distinct reality."²¹ An act is criminal because it shocks or contravenes this common conscience.²² Two questions immediately rise. First, are conclusory statements positing the existence of abstract entities like collective or common consciences suspect in the absence of empirical data better than that offered to date by sociologists? The need for further verification is increased if modifications of positive law are to be based upon such abstractions. Second, as-

17. Aubert's basic distinction of law from sociology based upon his characterization of law as normative remains valid even if some laws are considered non-normative. Raz has shown that some laws are not norms, e.g., laws which make the acquisition of a right dependent only upon events which do not include voluntary human acts (e.g. the transfer of ownership upon death of owner of property which cannot be left by will). See J. Raz, *The Concept of a Legal System* 182 (1970).

18. Aubert 9 (Introduction).

19. *Id.*

20. *Id.* at 52 (from H. Bredemeier, *Law as an Integrative Mechanism* (1962)).

21. Aubert 20 (from E. Durkheim, *The Division of Labor in Society* (1964)).

22. Durkheim states: "We must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience. We do not reprove it because it is a crime, but it is a crime because we reprove it." *Id.* at 21.

suming the existence of a collective conscience, should the sanctions of positive law be used to enforce all the shared beliefs comprising the collective conscience? And if not, what are the criteria for choosing which beliefs will be so enforced? Durkheim does not address himself to this question, perhaps because he views the law not as an active instrument to enforce public morality but rather as a result of the collective conscience. It is unclear from the article, however, whether Durkheim takes the position that all conduct which shocks the collective conscience must be reflected in or regulated by positive law. Clearly all such conduct is not, in fact, regulated as Durkheim seems to recognize when he states that there are "certain elements of the collective conscience which, because of their smaller power or their indeterminateness, remain foreign to repressive law while contributing to the assurance of social harmony."²³

Also in part one, Karl Renner examines law in relation to the underlying interests (mostly economic) which the law serves to protect.²⁴ Renner, one of the leading Marxist jurists, raises the question of how unchanged legal norms (like "property") can perform different social and economic functions over a period of time. According to Renner, the right of property ownership evolved in the capitalist societies from control over matter (*e.g.* means of production) to control over persons (*e.g.* labor).²⁵ In the present century, Renner asserts that there has been a gradual development of the property concept from one of private property into one resembling public utility ownership.²⁶

The approaches of Durkheim and Renner might be comparatively described as follows: Durkheim investigates law primarily in order to classify societies or classify certain segments of societies.²⁷ Renner analyzes law in a more critical fashion to reveal and make express the law's function of serving social and economic interests. On the more immediate level, Renner's approach better advances the objectives of jurisprudence.

Part two is perhaps the strongest in Aubert's volume. In this section law is viewed as an active instrument for shaping behavior and society. The emphasis, therefore, is on the need and effect of legislation. Aubert asserts that there are two contrasting views on the relationship between law and public attitudes or opinions. One view has it that positive law is determined primarily by public attitudes and legislation, and, therefore, must remain close to those attitudes to be effective. The other view recognizes that law can be a vehicle of programmed social evolution.

The contrariety of these views can be exaggerated and the difference between them is only one of emphasis. Most authors who emphasize one view also

23. *Id.* at 25.

24. K. Renner, *The Institutions of Private Law and their Social Functions* (1949), excerpts reprinted in Aubert 33.

25. Aubert 34-35.

26. *Id.* at 43.

27. This somewhat oversimplifies Durkheim. A clearer illustration or example of this kind of approach is the work of Sir Henry Maine, a two page excerpt of which is reverently reproduced in Aubert at 30.

indicate acceptance of the other. For example, Dicey is often cited as a pioneer of the view that public opinion largely determines legislation.²⁸ But Dicey himself recognizes that laws "foster or create law-making opinion."²⁹ The relationship between legislation and public opinion is a two-way street with each affecting the development of the other.

The relationship is further complicated by the fact that both law and social attitudes are constantly changing. The often resultant disharmonious lag between law and social change is examined by Dror.³⁰ Dror distinguishes direct and indirect influences of law on social change. The influence is direct when law interacts with basic social institutions in a manner constituting a direct relationship between law and social change—for example, a law prohibiting polygamy. The indirect influence of law occurs when law affects social institutions which in turn have a direct impact on society—for example, laws requiring compulsory education enable the operation of educational institutions which in turn play a direct role in social change.

The use of legislation to effect social and economic change has both theoretical and practical importance. Theoretically, it raises issues essential to an understanding of the relationship between socio-economic behavior and positive law. It is of the utmost practical importance to many, if not all, the developing nations who are confronted with the task of changing existing social and economic behavior in order to advance economic and technological development. Indeed, the relationship between law and societal development has been increasingly recognized as a central problem for the developing nations.³¹ Some preliminary studies indicate that wholesale application of Western law to a developing country may have more effect in the commercial area than in the personal status area. At least this appears to be the result of Turkey's adoption of the Swiss Civil Code.³²

Part two contains two other articles which are excellent examples of empirical studies of the effect of a particular piece of legislation. Gorecki has studied the operation of the Polish divorce laws to determine whether they are furthering the purported objectives of the legislation.³³ Aubert offers an empirical study of the impact of the Norwegian Housemaid Law of 1948 again in light of the declared legislative purpose.³⁴ Aubert's study is particularly enlightening where he shows that the influence of the law was to a large extent shaped by

28. See A. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1905), excerpts reprinted in Aubert 71.

29. Aubert 79. Dicey writes: "Every law or rule of conduct must . . . lay down or rest upon some general principle, and must therefore, if it succeeds in attaining its end, commend this principle to public attention or imitation, and thus affect legislative opinion." *Id.*

30. Dror, *Law and Social Change*, 33 *Tul. L. Rev.* 787 (1959), excerpt reprinted in Aubert 90.

31. See, e.g., Merillat, *Law and Developing Countries*, 60 *Am. J. Int'l L.* 71 (1966).

32. See Aubert 96-98.

33. Gorecki, *Divorce in Poland—A Socio-Legal Study*, 10 *Acta Sociologica* 68 (1966), reprinted in Aubert 100.

34. Aubert, *Some Social Functions of Legislation*, 10 *Acta Sociologica* 99 (1966), reprinted in Aubert 116.

the level of knowledge about the law among those directly affected—in this case, housemaids and their employers. This observation is peculiarly apt to the contemporary urban scene in the United States where laws intended to effect social change are often nullified through failure of the proposed beneficiaries of the law to understand its terms or to even be aware of them.

Part three examines the legal and non-legal methods of resolving conflicts. The articles which most attracted this reviewer's attention were those of Kawashima³⁵ and Macaulay.³⁶ Kawashima examines dispute resolution in Japan and concludes that the Japanese generally hesitate to resort to litigation to settle disputes; they rather prefer extra-judicial means of reconciliation and conciliation.³⁷ An analysis of conflict resolution in Japan limited to the statute books would, therefore, be highly inaccurate. The failure to consider a wide discrepancy between positive law on the one hand and operative social behavior on the other distorts many general descriptions of legal systems—primarily those no longer operating.

Macaulay summarizes the first phase of a study into the effectiveness of contract law in the area of conflict resolution. The primary research technique involved interviewing 68 businessmen and lawyers representing 48 companies and 6 law firms. One of the findings was the frequency with which businessmen settle disputes without reference to the contract or the potential of actual legal sanctions. This often occurs even where there is a carefully detailed written agreement.³⁸ Macaulay goes on to discuss the reasons for this failure or hesitation to invoke legal processes and to disregard already negotiated contracts.

The most important aspect of the approach exemplified in part three is its usefulness toward a better understanding of the proper role and scope of legal processes in relation to extra-legal ones in settling disputes. As both Macaulay and Kawashima demonstrate, social attitudes and sentiments significantly modify the resort to legal procedures. In Japan, for example, Kawashima argues that the preference for extra-judicial settlements is rooted primarily in socio-cultural factors. Litigation is avoided because it leads to a decision clearly assigning fault to one of the parties in accordance with standards that are independent of the wills of the disputants. Judicial decisions also "emphasize the conflict between the parties, deprive them of participation in the settlement, and assign a moral fault which can be avoided in a compromise solution."³⁹

These characteristics of judicial decisions, particularly the attempt to regulate conduct by universalistic standards, are incompatible with the nature of the traditional social groups in Japan. First, these groups are hierarchical with

35. Kawashima, *Dispute Resolution in Contemporary Japan*, in *Law in Japan: The Legal Order of a Changing Society* (A. von Mehren ed. 1964), excerpt reprinted in Aubert 182.

36. Macaulay, *Non-Contractual Relations in Business*, 28 *Am. Sociological Rev.* 55 (1963), excerpts reprinted in Aubert 194.

37. Aubert 191. (Kawashima, *supra* note 35).

38. *Id.* at 200. (Macaulay, *supra* note 36).

39. *Id.* at 185. (Kawashima, *supra* note 35).

social differentiation in terms of deference and authority—the social role definition of the members of the group is precarious and contingent on the others. Second, relationships between members of equal status are, to a great extent, particularistic and functionally diffuse—social roles are defined in general and very flexible terms so that they can be modified whenever circumstances dictate.⁴⁰

Kawashima summarizes:

It is obvious that a judicial decision does not fit and even endangers relationships. When people are socially organized in small groups and when subordination of individual desires in favor of group agreement is idealized, the group's stability and the security of individual members are threatened by attempts to regulate conduct by universalistic standards. . . . the litigious process, in which both parties seek to justify their position by objective standards, and the emergence of a judicial decision based thereon, tend to convert situational interests into firmly consolidated and independent ones. Because of the resulting disorganization of traditional social groups, resort to litigation has been condemned as morally wrong, subversive, and rebellious.⁴¹

Part four of *Sociology of Law* examines judicial behavior in decision-making. The need for behavioral studies is quite evident here because of the central place held by judges in the Anglo-American legal systems. This need is not diminished because many sociological and psychological studies have had a debunking aspect—reflected by their quest for hidden motives and inarticulated group interests which supposedly form the *true* basis for the judicial decision.

Schubert in the opening article offers a statistical study of Supreme Court decisions by the nine Justices sitting at the time of the 1963 term.⁴² Initial analysis of voting behavior disclosed a liberal and a conservative bloc with a considerable amount of inconsistent voting. Later refinements of analysis (linear cumulative scaling, factor analysis and multidimensional scaling) revealed three major attitudinal components of judicial liberalism and conservatism—political, economic and social. Combination of the components resulted in four categories: liberals, conservatives, individualists (political liberalism and economic conservatism) and collectivists (political conservatism and economic liberalism). Schubert then places all nine Justices in each category, albeit four do not fit the categories exactly.⁴³

Analysis of judicial decisions is a valuable method of amassing data on what courts are, in fact, doing. Knowledge of the actual operation of judicial decision-making is a necessary (but not a sufficient) condition to determining what courts should be doing. As Stone points out in another excerpt in *Sociology of Law*, the behavioral studies have not, to date, concerned themselves with the question of how courts ought to decide cases.⁴⁴ Stone concludes that these

40. *Id.* at 185-86.

41. *Id.* at 186.

42. G. Schubert, *The Political Role of the Courts: Judicial Policy-Making* (1965), excerpts reprinted in Aubert 213.

43. Aubert 220-21.

44. J. Stone, *Social Dimensions of Law and Justice* (1966), excerpt reprinted in Aubert 256.

attempts at a quantitative analysis do not question the integrity of the judgment of justice, "despite the *apparent* proximity between the explanation of decisions and the making of them"45

Attempts at scientific prediction of future decisions do raise the undesirable possibility of a feedback or "Heisenberg" effect resulting from judicial awareness of the predictions and, perhaps, analysis of past judicial behavior. Little empirical work has been done on this possibility and most discussions have been conjectural.⁴⁶

None of the selections in part four discuss, in any detail, the use of role behavior theory in analyzing judicial decisions.⁴⁷ This is an unfortunate omission in view of the increasing interest shown in the use of role behavior theory to correct deficiencies in judicial behavioral studies; such as, inadequate description of the institutional factors (as opposed to personal attitudes) in judicial decision-making. Role behavior theory could be used to "set the balance between structural and behavioral factors in a manner which makes more clear how and under what conditions personal attitudes may influence judicial decisions."⁴⁸

Part four also contains excerpts from Kalven and Zeisel's empirical study of the American jury system.⁴⁹ The chapter selected deals with disagreements between judge and jury as to guilt and sentencing.

Part five deals with the legal profession. The emphasis is mainly upon the mechanisms by which the legal profession is integrated into, and heavily influenced by, structural features of society, that is, the relationship between law and class structure. Abel-Smith and Stevens show how lawyers as an interest group have impeded desirable developments of the law.⁵⁰ Carlin and Howard discuss the class differences in legal representation.⁵¹ Perhaps the most

45. Aubert 257. In October, 1970, the American Civil Liberties Union released a five-year compilation of the voting records of the Supreme Court Justices in certain civil rights cases. See *N.Y. Times*, Oct. 12, 1970, at 26, col. 3. The compilation and attendant publicity should not be condemned in themselves or viewed with great alarm as somehow destructive of the legal system. Criticism, if any, would be better directed at the press's reporting of the release; for example: there was little or no disclosure that the ACLU had been an interested party or amicus in many of the actions. More important, prominent exposure of the story (as occurred with the *N.Y. Times*) may give an inaccurate impression to the uninitiated of the meaning of the compilation.

46. See Aubert 262-63.

47. The concept of "role behavior" in this context has been defined as those patterns of activity which reflect a justice's perception of the proper role of a Supreme Court Justice, including his adjustment of personal values and perceived role expectations. Behavior which is substantially incongruous with the role definition may be referred to as deviant role behavior. Grossman, *Dissenting Blocs on the Warren Court: A Study in Judicial Role Behavior*, 30 *J. Pol.* 1068 (1968).

48. James, *Role Theory and the Supreme Court*, 30 *J. Pol.* 160 (1968).

49. H. Kalven & H. Zeisel, *The American Jury* (1966), excerpts reprinted in Aubert 237.

50. B. Abel-Smith & R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965* (1967), excerpts reprinted in Aubert 279.

51. Carlin & Howard, *Legal Representation and Class Justice*, 12 *U.C.L.A.L. Rev.* 381 (1965), reprinted in Aubert 332.

interesting article in part five is a study by Abraham Blumberg of the role of counsel in criminal litigation.⁵² Blumberg, a practicing criminal lawyer, very persuasively argues that the traditional conception of criminal counsel—that counsel musters all the admittedly limited resources at his command to defend the accused in an adversary, combative proceeding—does not square with reality. According to Blumberg, this role of defense counsel is materially altered by the institutional requirements, organizational goals and discipline of the court.

One field connected with sociology, ethnography, is represented by only one selection—Gluckman's study of the judicial process in a "primitive" Rhodesian tribe.⁵³ Aubert explains his exclusion of ethnographic studies of primitive law by the need to avoid undue diversity as well as the general availability of selections on the ethnography of law.⁵⁴ The limitation of his selections to modern legal systems is not a serious defect. Most contemporary legal philosophers have limited their inquiries to those legal systems then extant. Many jurists briefly consider primitive law, but it is questionable whether the operation of primitive legal systems and the content of primitive law have been sufficiently examined so as to justify attempts to explain the origin of modern legal systems in terms of the past. For example, Hart's conception of the elements of law rests, in part, upon unarticulated premises concerning the actual operation of legal norms in primitive societies.⁵⁵ This is due perhaps to a tendency to treat primitive law only as a stepping stone to the leap to a modern "legal system" which is the primary subject of inquiry. This tendency is strengthened when the jurist views the primitive society more as a logical construct, helpful to his argument about modern systems, than as an empirical entity. Primitive law and society, then, almost become "fictions" and there is little use for ethnographic studies.

Investigation of primitive societies may not be essential in explaining the origin of modern legal systems. But ethnographic studies may be very helpful in providing insights into the present-day operation of modern legal systems. The structural approach of Levi-Strauss⁵⁶ appears to be particularly pregnant with possible benefits to jurisprudence. Ethnography and anthropology may also be helpful toward establishing the "minimum content" of law or "natural law."⁵⁷

Professor Aubert's volume, in conclusion, is a successful attempt to cull a

52. Blumberg, *The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession*, 1 *Law & Soc'y Rev.*, June 1967, at 15, reprinted in Aubert 321.

53. M. Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (1955), excerpt reprinted in Aubert 161.

54. Aubert 10 (Introduction).

55. For Hart's basic division of law into primary and secondary rules, see H. Hart, *The Concept of Law* 86-96 (1961).

56. See, e.g., C. Levi-Strauss, *The Savage Mind* (1966); C. Levi-Strauss, *Structural Anthropology* (1963).

57. See, e.g., Mead, *Some Anthropological Considerations Concerning Natural Law*, 6 *Natural L.F.* 51 (1961).

limited number of worthwhile and representative selections from a vast number of available writings. The balance struck by Aubert in his editing is perhaps most clearly manifested in his inclusion of an excerpt by Thurman Arnold.⁵⁸ Arnold's comments are a fitting and perhaps necessary bromide to those who drink too deeply from the casks of jurisprudence:

We may describe jurisprudence . . . in our present day as the effort to construct a logical heaven behind the courts, wherein contradictory ideals are made to seem consistent. . . .

. . . [J]urisprudence [is] the shining but unfulfilled dream of a world governed by reason. For some it lies buried in a system, the details of which they do not know. For some, familiar with the details of the system, it lies in the depth of an unread literature. For others, familiar with this literature, it lies in the hope of a future enlightenment. For all, it is just around the corner.⁵⁹

BARRY HAWK*

Law and the Behavioral Sciences. By Lawrence M. Friedman and Stewart Macaulay. Indianapolis: The Bobbs-Merrill Company, Inc. 1969. Pp. xxxv, 1017. \$14.50.

This book consists of a collection of essays and excerpts from the works of nearly one hundred authors, generously annotated, and designed to serve as teaching material for an introductory course in law and social science. It should not be regarded, however, simply as another conventional *reader* illustrating the current "state of the art" for students of the topic.¹ Rather it is an anthology reflecting the views and raising the questions that Professors Friedman and Macaulay have about such basic matters as the nature of law, its function as a social system, and its relation to other social systems in American society. It treats a wide variety of subjects bearing on these matters, ranging from the law of primitive man² to a systems analysis of bureaucracies,³ and including studies so diverse as a comparison of social controls in two different Israeli agricultural settlements⁴ and a survey of parental attitudes in Nebraska toward the disinheritance of children.⁵ It thus contains a considerable amount of material of much more than pedagogical interest and is a book in which any lawyer of a reasonably inquiring turn of mind may read or browse with profit.

58. T. Arnold, *The Symbols of Government* (1962), excerpts reprinted in Aubert 46.

59. Aubert 50-51.

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1. Some such readers, of course, are very useful. The outstanding example in America is *The Sociology of Law, Interdisciplinary Readings* (R. Simon ed. 1968).

2. L. Friedman & S. Macaulay, *Law and the Behavioral Sciences* 36-42 (1969) [hereinafter cited as Friedman].

3. Friedman 231-48.

4. *Id.* at 509-52.

5. *Id.* at 553-57.

Initially, the authors candidly admit that social science interest in law is still outside the main stream of scholarship in both law and in sociology. One is compelled, unhappily, to agree. Despite the appeal that sociological jurisprudence has had for twentieth century American lawyers influenced by the writings of Roscoe Pound, and notwithstanding the spate of valuable books produced⁶ and the studies made at a number of universities⁷ by knowledgeable people in the past twenty years, the sociology of law as well as the uses of sociology in law are confused, with large areas remaining unexplored.

One reason for this may be the ambiguity of the term "sociology of law," under which a wide variety of studies with significance for both law and sociology have been subsumed without any clear consensus as to what is distinctively legal or the best use to which the insights obtained by the social sciences can be put. Another reason must surely be the mystery in which jargon and formalistic techniques have shrouded the law for nonlawyers, while conversely, social science methods are largely unknown and fairly suspect to scholars trained principally in law. Even when this mutual exclusiveness is overcome, there probably remains a yet more cogent reason separating the study of law and sociology from the mainstream of scholarship in either field. This is the divergence in the narrowly perceived goals of each discipline, the law's goal being to provide solutions to discrete and immediate problems, while the goal of any behavioral science is the far longer range business of understanding and possibly predicting human phenomena—individual and social.

But whatever and however deep the major reason, the consequences of this separation are deplorable. Problem oriented but predominately doctrinal research utilizing the methodology of close analysis perfected in an outdated positivist milieu continues to occupy the energies of most of the people willing (or driven) to write on law subjects; it fills the pages of most of the law journals which continue to proliferate on American law library shelves. In 1963 it was estimated that the resource base for legal research was only about 500 strong, consisting almost entirely of law teachers only a fraction of whom were engaged in interdisciplinary studies of any kind.⁸ The first instance of American lawyers and sociologists collaborating to produce a book about law and society was as recent as 1961.⁹ The number of joint projects has now increased as a result of funding through grants such as those of the Russell Sage Foundation, and efforts to introduce law teachers to social science methods have made some progress.¹⁰ Even so, the number of scholars involved must remain extremely small. Any empirical data bearing on the interrelation of

6. See, e.g., G. Sawyer, *Law in Society* (1965); E. Schur, *Law and Society* (1968); J. Stone, *Social Dimensions of Law and Justice* (1966).

7. E.g., Yale, Northwestern University, University of Minnesota, University of Wisconsin, and especially at the Center for the Study of Law and Society, University of California, Berkeley.

8. See Brown, *Legal Research: The Resource Base and Traditional Approaches*, 7 *Am. Behavioral Scientist* 3 (1963).

9. See F. Davis, H. Foster, C. Jeffery & E. Davis, *Society and the Law, New Meanings for an Old Profession* (1962).

10. One of the most successful of these efforts has been the *Social Science Methods in Legal Education Institute*, held for the past four summers at the University of Denver Col-

legal and social norms if gathered by practicing lawyers is collected principally for the purposes of specific litigation and is usually discarded or immured in a forgotten brief as soon as the case is decided.

Lacking the underpinning of scholarship, legal theory fails to promote a common understanding of why law changes and must change in response to changing social conditions, or the penalties that will otherwise inure. Lacking understanding, with a strong tendency to preserve the gulf between law and morals, and constrained by the requirements of formal consistency in the law without regard to its interaction with existing social imperatives, we can be led to the kind of unhealthy polarization that was recently seen in the controversy generated by President Nixon's Supreme Court nominations. Further extreme polarization might carry with it the ugly threat that legal controls could become unworkable, could break down and be replaced by other controls of dubious nature and effect.¹¹

Inasmuch as the university is a primary place to promote the necessary understanding of how law and society interact, Professors Friedman and Macaulay have made an important contribution in *Law and the Behavioral Sciences*. There is no comparable teaching tool available.¹² The book begins with a modern classic: Philip Selznick's succinct and magnificent survey of the sociology of law, written in 1959 and still probably the best statement we have, outlining its progression from speculation to empiricism and predicting maturity and an ultimate normative effect of empirically verified theory.¹³ This is followed by materials illustrating a classic debate as to the central goals of scholarship—is it to provide data, or to develop hypotheses—if the collaboration between law and social science is to be a fruitful one.¹⁴

The balance of the book is organized so as to clarify the distinctions that must be made between (a) the study of law as a system having many of the general characteristics of all systems and yet characterized by uniquely legal properties,¹⁵ (b) the study of the uniquely legal institutions and elements of that system,¹⁶ (c) the collection of data concerning the impact of law on society,¹⁷ and (d) assessment of the impact of society (in both modern and historical perspective) on law.¹⁸

Although the authors indicate that the book is intended to be equally

lege of Law under the joint sponsorship of the Association of American Law Schools and the Law and Society Association.

11. A premonitory case is the recent Chicago conspiracy trial, *United States v. Dellinger*, No. 69 Crim. 180 (D. Ill., Feb. 20, 1970). Much of the transcript is reprinted in M. Levine, G. McNamee & D. Greenberg, *The Tales of Hoffman* (1970).

12. The only work that even approaches it in intent, though not in scope, is E. Schur, *Law and Society* (1968) designed for undergraduate students of sociology.

13. Selznick, *The Sociology of Law*, in Friedman 2.

14. Auerbach, *Legal Tasks for the Sociologist*, 1 *Law and Soc'y Rev.*, Nov. 1966, at 91, reprinted in Friedman 18-26; Skolnick, *Social Research on Legality, a Reply to Auerbach*, 1 *Law & Soc'y Rev.*, Nov. 1966, at 105, reprinted in Friedman 27.

15. Friedman 36.

16. *Id.* at 55.

17. *Id.* at 197.

18. *Id.* at 507.

adapted to use in a law school or a sociology department, I find it hard to imagine how anyone not trained in law could effectively use it as a teaching tool. At the same time, as indicated earlier, its value should not be limited to the classroom. One of its virtues is the avoidance as far as possible of the use of professional jargon. It has been cited, incorrectly in my opinion, as appearing under the banner of judicial behavioralism,¹⁹ but in essence its approach is liberal in the old sense in which the word liberal was once a term of approval, and does not commit either teacher, student, or general reader to the maelstrom of such concepts as jurimetrics, systems theory or behavioral jurisprudence.

Indeed there is absent any emphasis on the efforts of behavioral jurisprudence to predict adjudicative behavior, and in the materials provided for study of the legal system as a social system the actors—lawyers, judges, policemen—are analyzed by applying role theory even to the possible detriment of a total view.

If there is any weakness in the book it is in the section concerned with the impact of society on law.²⁰ The weakness, let it be emphasized, however, is not in readability—some of the most intriguing and provocative materials of general interest are to be found here. The weakness is rather in theory, and this can hardly be blamed on the authors. The lack of developed theory in this area is the result of an extreme paucity of basic research.²¹ This fact, in turn, points up the importance of interdisciplinary studies in law and society. One can be mindful of the dangers inherent in turning the ordering of society over to the experts, as well as the dangerously narrow limits of any expertise, and yet acknowledge that the integration of law and sociology, each having a common concern with normative phenomena, may lead to a useful evaluation of both legal and extra-legal standards.²² A good way to begin is with the book under review.

MARTHA S. YERKES*

The Air Net: The Case Against the World Aviation Cartel. By K.G.J. Pillai. New York: Grossman Publishers. 1969. Pp. xix, 179. \$5.95.

As the title of the book clearly states, it represents a brief against the International Air Transport Association which is more familiarly known as IATA. The author makes no attempt to be impartial.

On the back of the book jacket, there is an endorsement of the writer's views

19. Lewis, *Systems Theory and Judicial Behavioralism*, 21 *Case W. Res. L. Rev.* 361, 365 (1970).

20. See Friedman 507-733.

21. See Jones, *Impact Research and Sociology of Law: Some Tentative Proposals*, 1966 *Wis. L. Rev.* 331.

22. This is the thesis developed in Gibbs, *The Sociology of Law and Normative Phenomena*, 31 *Am. Sociological Rev.* 315 (1966).

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by Ralph Nader. I would say that Nader's appraisal of the book is not really supported by its contents. Mr. Nader says that "[h]e [the author] unravels the air net—strand by strand—and shows how IATA makes air travelers pay more to receive less, how IATA encourages costs, stifles consumer-oriented competition, and keeps air travel from serving the mass passenger market." It is true that the author makes such statements but he does not marshal sufficient evidence to support them.

Too often the author makes bald unsupported accusations against IATA. Nowhere does the book give any credit to the organization. Seldom is a person or organization all bad but, of course, this may be an exception. Unfortunately, there is no one place in the book where the reader can get a clear enough picture of IATA, its organization, its functions, its administration, its authority, and its effectiveness to be able to decide whether it is such an exception. One would think from reading the book that IATA is concerned only with the establishment of rates. Disregarded are the activities of such IATA committees as the financial committee, the technical committee, the legal committee and the medical committee.¹

The author makes it abundantly clear that in his judgment the consumer or the public, which he treats as one and the same, is not represented by IATA.² The argument is made that if the so-called rates fixed by IATA were reduced, this would, without further ado, increase the number of travelers and thereby benefit the consumer.³

To establish this thesis the author sets forth statistics which indicate that a substantial increase in passenger traffic has occurred in the wake of each of four major fare reductions on the North Atlantic routes.⁴ The statement that any fare reduction will tend to increase traffic is generally true but the inference that future fare reductions would produce increased revenues is not necessarily sound. In the light of airplane capacity limitations, air fare reductions (notwithstanding an increase in traffic) could result in a decrease in revenue.

Moreover, without any analysis of the cost factors, it is impossible to determine whether an increase in traffic or revenue will generate a profit for the operators. It is questionable whether the author is concerned at all with airlines' profits and their relevance to the rate establishment equation. Of more importance is the fact that the book contains no factual support for Mr. Pillai's assertions that the rates on international routes are excessive. The extent and the amount of profits, if any, by the air carriers are not developed. Without this the reader is left to presume that extensive fare reductions would be economically feasible.

The author further states that, at the expense of the consumer, certain in-

1. See Act of Incorporation, Articles of Association, Rules & Regulations of International Air Transport Association 31-32 (1967).

2. E.g., K.G.J. Pillai, *The Air Net: The Case Against the World Aviation Cartel* 7 (1969).

3. *Id.* at 60-65.

4. *Id.* at 61.

efficient carriers are permitted to survive under the present rate structure.⁶ Many of these so-called inefficient carriers are owned by countries which take great pride in their flag carriers. The fact that the international community in its wisdom has felt it desirable to lend a helping hand to the smaller countries can hardly be laid at IATA's doorstep.

When it suits his purposes the author recognizes that some of the IATA members are wholly or partially owned or controlled by governments⁶—otherwise, he treats them as though they were private enterprises.⁷ Thus, he refers to IATA as a private cartel. This simply ignores the basic fact that most of the IATA members are owned in whole or in part by the countries of their origin and consequently their decisions, to a large extent, merely reflect the wishes of their respective governments.

Thus, where government airlines are involved, the question arises who should subsidize whom. If rates are reduced below the break-even point then the taxpayer is subsidizing the consumer. In any event, the question of who subsidizes whom is determined by the governments involved and not by IATA.

While I think the subject of the book is an interesting one, the author's premise that IATA should be supplanted by another international organization is not a convincing one. Since IATA already is an international organization controlled directly or indirectly by the international community, the only real effect of creating a new organization would be a change of name.

Despite the major criticisms set forth above, I shall conclude with two notes of credit. First, the chapter dealing with the supplemental carriers and their effect on IATA's rate structures was well documented and persuasive. It is interesting to note that the supplementals, or to use Mr. Pillai's terms, the "friends of the consumer,"⁸ are presently under investigation by the CAB. The CAB is considering adopting regulations⁹ which the supplementals contend would severely hamper their ability to perform charters. Secondly, it is obvious that in the preparation of this book the author has done a great deal of research which is evidenced by the voluminous notes to each chapter.

LESLIE H. ARPS*

5. *Id.* at 16-19.

6. See, e.g., *id.* at 8-9, 19.

7. *Id.* at 37.

8. *Id.* at 174.

9. Docket No. 22,174, Notice of Proposed Rule Making, May 8, 1970.

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