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## LAW AND SOCIOLOGY: SOME ISSUES FOR THE 70's†

*Albert J. Reiss, Jr.\**

THE relationship between sociology and the law has not been a very stable one. It has barely passed from the stage of flirtation to that of courtship, though the dependence of each upon the other seems obvious enough to some scholars in each discipline. The two communities have long seemed content to live in symbiotic rather than commensal relations. There are a number of reasons why it is difficult to consummate a stable marriage at this time, if not in the long run.

Examining their relationship, one is struck by the observation that sociology seems least relevant to the law where the relevance of psychology and psychiatry has been greatest, viz., in trial, particularly criminal proceedings. The relationship between the two has grown somewhat closer in legal education where in recent years at least the major law schools have appointed sociologists to their faculties. Nonetheless, law faculties are inclined to regard sociologists more as lecturers than as bona fide members of the teaching faculty. They are more likely to fit them into courses in criminal law than in civil law and at the graduate rather than the basic program level. The relevance of sociology for the law is granted more readily (even if the relationship is not much closer) when the law is regarded as a normative system. The appearance of sociological studies in briefs at the appellate level or in testimony before legislative committees and commissions is growing. The closest relationship, however, has been with operating organizations in the criminal justice system and with some agencies of administrative law. The most established relations among sociologists and lawyers have been among men of low prestige in both disciplines: sociologists regarded as criminologists and lawyers who specialize in the criminal law. But times and the scene change. Even their prestige has risen in both disciplines.

I shall not try to explain how these relationships between sociology and the law grew up. Rather I want to draw from them those matters

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† Public lecture delivered at the University of Richmond, March 5, 1970, celebrating the one hundredth anniversary of the founding of the T.C. Williams School of Law.

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that continue to make it difficult for sociologists and lawyers to establish commensal relations and partake of the same table.

#### A WEDDING WITH MOTIVATION

A great deal of the law as it relates to persons is bound up with philosophical and theoretical traditions that impute *motives* for behavior to men. The criminal law provides many examples. It is not uncommon that one decide whether an act was "voluntary," whether a man is capable of "reason," or whether the act was "premeditated." Lawyers often want to know something about what *motivated* a specific person to do something in the *past*. Indeed their way of thinking about behavior is much like that of many psychologists and psychiatrists who are called clinicians. They ask the question: What went on *inside* of Person and *why* did Person do it? You will notice that I have been careful to talk about the common element being "motives" rather than "reasons" for behavior, since sociologists also are interested in reasons for behavior. Motives are but one kind of reasoning about behavior. What is more, in reasoning that admits of motivation one is forced to talk about what lies *inside* Person even when many of the causes are said to lie outside.

Sociologists more commonly explain behavior in terms of elements in the social environment of persons and their relationships with one another. Even when their data relates to individuals, their emphasis is upon explaining the behavior of social aggregations or groups of persons. Thus sociologists (apart from some social psychologists) generally do not try to explain individual behavior or cases of behavior. Their interest lies in laws of large numbers (to use the word "law" in another sense).

#### THE CASE FOR CASES

Being interested in large numbers, whether Persons, Groups, or Organizations, sociologists generally are not clinical about them. They speak rather in terms of models of explanation that deal with large numbers as, for example, stating the probability that an event takes place. Herein lies one of the fundamental points of cleavage between much of sociology and the law. The lawyer handling a case wants to develop as much as possible about fact and cause for that case. The sociologist wants to develop similar types of information but often

with the full recognition that the facts cannot be established for the individual case when they can be established for an aggregate.

Let us take a simple example to illustrate the point. Taking one of the issues of the 70's we shall turn to shortly: the exercise of discretionary justice. Suppose we consider the problem of proving discrimination against women in employment. For the lawyer the "case" generally arises with "a case," the matter then being brought before an administrative or other tribunal and a specific allegation made about discrimination. The problem immediately gets broken down into several elements, such as: Is there sufficient evidence to warrant accepting this as a bona fide case for consideration? I need not carry you through all of the steps for decision making in these cases.

Now the sociologist knows that often it is impossible to establish whether there has been discrimination when a specific allegation is made, since the establishment of what is fact is at issue. He knows, nevertheless, that there are other ways of establishing that discrimination occurs. One procedure involves experiments where persons with known characteristics and qualifications apply and are processed by the employer against whom a charge has been made. The actions of the employer can then be assessed and a conclusion reached about whether discrimination occurred for that aggregate.

Instead of setting up an experiment, however, the sociologist might examine the history of past actions of the employer. Given equal qualifications for men and women, is the probability of employment greater, the same, or less for women than men at a given job level?

I will not pursue this example much further. But, let me suggest that proof of discrimination in any case ultimately depends upon accepting certain kinds of evidence as proof. For the sociologist this depends upon evidence meeting scientific criteria and modes of reasoning. Think about the following facts and decide whether you think any of them provide evidence for discrimination against women and whether you regard some facts as more "crucial" than others.

1. Few women major in pre-law curricula.
2. Law school catalogues provide only pictures of men attending law schools.
3. There are no scholarship funds for women law school students but large amounts specified for male students.

4. There are more men than women with similar LSAT (Law School Aptitude Test) scores admitted to law schools.
5. There is a place to indicate one's sex on a law school application form.
6. No women students admitted to law schools finish in the bottom half of the class.

In leaving you with these thoughts about discrimination against women, I cannot resist making the observation that the twentieth century may yet be known as the period when men were emancipated from women. During the first half Dr. Freud freed men from their mothers while during the second half the civil rights movement freed men from their wives.

What I have tried to say to this point is that sociologists tend to generate information that is relevant to the law by focusing on populations of persons or organizations. Though it is necessary to have facts about them, often such facts are not direct evidence that an event has occurred. Indeed, the sociologist is quite willing to assume that his estimates may be only minimum estimates, that some may be in error, and that his procedures permit only probabilistic statements.

#### CAUSE AND INFERENCE

Another point of cleavage focuses around the matter of proof. Sociologists often operate with theory and analysis systems that make it difficult to determine causality. For that reason they are limited in what they can offer the law by way of causal proof or predictions of what will occur under given circumstances. At the heart of the matter are systems of reasoning. The problem for lawyers often is taken as one of how can they fit sociological data into a system of legal reasoning and decision making where specific cases are at issue. The answer is not a simple one which readily lays down guidelines. Indeed, only by trial and error can one decide how they may relate fruitfully one to another.

Let me illustrate how much at odds sociologists and judges can be at the appellate level. In a case currently on appeal to the United States Supreme Court, that of *Maxwell v. Bishop*<sup>1</sup> (the case of a black man who raped a white woman in the state of Arkansas and was sentenced

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<sup>1</sup> *Maxwell v. Bishop*, 257 F. Supp. 710 (E.D. Ark. 1966), *aff'd*, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded*, 398 U.S. 262 (1970).

to death), Dr. Marvin Wolfgang, a sociologist, undertook a study of rape convictions in "a stratified random sample of Arkansas counties, geographically dispersed throughout the State and representative of the State in urban-rural and white-Negro population ratios (containing more than 47 per cent of the total population of Arkansas."<sup>2</sup> What Dr. Wolfgang proceeded to show was that the chances of the death sentence were much higher when a Negro raped a white woman than when rape occurred within race lines. Without going into additional detail, what Dr. Wolfgang seems to have concluded to the satisfaction of most sociologists is that "Negro defendants who rape white victims have been disproportionately sentenced to death, by reason of their race during the years 1945-1965 in the State of Arkansas."<sup>3</sup> Part of what he showed was that a Negro raping a white woman had roughly a 50 per cent chance of being sentenced to death while all other defendants in rape trials had a 14 per cent chance of a death sentence, a result that could be considered a chance outcome but two times in a hundred.<sup>4</sup> Most gamblers would settle for such odds. So would most scientists, but not many lawyers and judges can "settle" that way.

What the appellate court questioned suggested that they wanted the study to show that "invariably" or in at least "a majority" of cases, the death penalty was handed down. A difference, though large, is unsatisfactory for them unless it meets a criterion closer to what is at issue in the case: the man has been sentenced to death, and it is *his* death sentence that is at issue.<sup>5</sup> But the court was particularly non-plussed by the fact that Dr. Wolfgang has not sampled all counties and, woe betide, the sample did not include the county of original jurisdiction in Arkansas.<sup>6</sup> The hostility of the court toward statistical argument, basically what is at issue here, is clearly shown in statements such as: "statistics are elusive things at best, and it is a truism that almost anything can be proved by them."<sup>7</sup> The district court in fact concluded that they are "not certain that, for Maxwell, statistics will

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<sup>2</sup> Wolfgang, Preliminary Analysis of Rape and Capital Punishment in the State of Arkansas, 1945-1965, Exhibit for Petitioner at 1 (P-4), *Maxwell v. Bishop*, 257 F. Supp. 710 (E.D. Ark. 1966).

<sup>3</sup> *Id.* at 7-14.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> Brief for Petitioner at 55, *Maxwell v. Bishop*, 398 U.S. 262 (1970).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 56.

ever be his redemption.”<sup>8</sup> Clearly it doesn't seem to be so for the bench. I hesitate to suggest (but cannot resist) the thought that maybe a *new* generation of lawyers who learned the *new* math may be more receptive to statistical argument. They will understand it. It will not be new.

#### CHANGE THROUGH EXPERIMENT

It is perhaps unfortunate that the work of sociologists so often appears to challenge an established order and offer so little by way of programs for change. This is altogether apparent in sociological studies that challenge the operation of the legal system, whether they be studies of decision making by juries<sup>9</sup> and/or delay in the courts<sup>10</sup> or ones on the ineffectiveness of particular laws such as those on divorce, abortion, and homosexual behavior,<sup>11</sup> or be they investigations of the absence of general or specific deterrent effects of sanctions in the law such as sentencing, imprisonment, and fines.<sup>12</sup> All such investigations tend to challenge the legally constituted order: its institutions, its organization, and its operation. There often is a seeming destructive quality to them in that there are no demonstrated alternatives that the system may be made to work. By way of contrast, lawyers are far more given to draw policy implications from their observations and research or to argue the merits of a proposed change.

#### CONTROLLED EXPERIMENTS

The fact of the matter is that both lawyers and sociologists are bound by a set of legal conditions that make it difficult to demonstrate alternative ways of handling problems or measuring effects in the legal system and in matters regulated by law. Sociologists are frustrated in their

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<sup>8</sup> *Id.* at 57.

<sup>9</sup> See R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967); H. ZEISEL & H. KALVEN, *THE AMERICAN JURY* (1966); Strodtbeck, et al., *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713-19 (1967); Strodtbeck & Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOOMETRY 3-11 (March 1956).

<sup>10</sup> See H. ZEISEL, H. KALVEN, JR. & B. DUCKHOLZ, *DELAY IN COURT* (1959).

<sup>11</sup> Mosk, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A.L. REV. 646-832 (1966); Westoff, et al., *The Structure of Attitudes Toward Abortion*, 57 MILBANK MEM. FUND Q. 11-37 (Jan. 1969).

<sup>12</sup> Morris & Zimring, *Deterrence and Corrections*, 381 ANNALS OF THE AM. ACADEMY OF POL. & SOCIAL SCIENCE 137-46 (Jan. 1969); Zimring & Hawkins, *Deterrence and Marginal Groups*, J. RESEARCH IN CRIME & DELINQ. 100-14 (July 1968).

experimental efforts to demonstrate how systems may be changed because they are not permitted to conduct controlled experiments—ones where they have the power to alter conditions and examine the results of doing so. We know, for example, that we would like to investigate the effects of particular ways of treating convicted offenders by comparing them with one or more control groups of untreated convicted offenders. With knowledge from experiments we could more readily answer questions such as: Does a given fine, sentence, or type of parole have a measurable effect? Some legal scholars are sympathetic with the goal of conducting experiments in the legal system. But experiments on human subjects who are being processed in the legal system threaten a fundamental tenet of the legal order, the requirement that equals be treated equally.<sup>13</sup> Controlled experiments by their very nature create inequality.

A problem to which lawyers and sociologists must direct their attention is this: Some controlled experiments are an essential aspect of all applied science whether in demonstrating that space flight is possible, that methadone changes the behavior of drug addicts,<sup>14</sup> or that arrested persons released without bail will return for trial.<sup>15</sup> Ways must be found to make such experiments a common basis for changing the legal system and other public systems in the society. Clearly at issue here in the seventies are two things: how to make our systems change more rapidly and how to make experiments in the social environment a basis for changing systems.

The matter of increasing social experimentation where decisions about persons are at stake will not be easily resolved. Yet sociologists and lawyers must find ways of making more experimentation possible for persons processed in the legal system. Norval Morris of the University of Chicago Law School has contributed to the dialogue about experimentation in the legal system in proposing that experimentation should be permitted if two safeguards are satisfied in the experiment: (1) that any treatment group is given more *favorable* treatment than

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<sup>13</sup> Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 451-54 (1969).

<sup>14</sup> Dole, et al., *Narcotic Blockade: A Medical Technique for Stopping Heroin Use by Addicts*, 118 ARCHIVES OF INTERNAL MEDICINE 304-09 (Oct. 1966).

<sup>15</sup> Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEXAS L. REV. 319 (1965); *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice*, U.S.G.P.O., Washington, D.C. (1965).

is the aggregate of all persons now in that system, and (2) that all groups shall be chosen by lottery so that everyone has an *equal chance* for more favorable treatment.<sup>16</sup> Certainly if Morris's rules for experimental procedure were permitted and followed, considerably more experiments could take place in the legal system.

We must consider other possibilities as well. Short of constitutional amendment (and perhaps even that if necessary), we must provide for broader mandates through legislation giving more such powers to administration in legally constituted agencies.

Up to this point I have emphasized problems that confront lawyers and sociologists in developing a closer working relationship, a relationship that in my opinion will benefit both parties. Let me now turn to some issues of the 70's that beset the larger society. I believe we must attack together the problems posed by these issues if they are to be resolved. The core issues that must command the attention of lawyers and sociologists in the 70's are these: (1) How can we develop and administer laws to insure their intended effects? (2) How can we make all agencies of discretionary justice accountable to the people they serve? (3) How can we maintain order in a society through respect for the rule of law? (4) What constitutes a proper balancing of individual and collective rights in our system of law and justice?

Each of these large issues includes many smaller ones in terms of which the public generally thinks and responds, whether issues of controlling organized crime, of police brutality, and of disorder in the streets and the court room, or of air pollution, discrimination against citizens, and victim compensation for losses from crime. I will not now examine these specific issues, though sociology offers something to an understanding of each. Rather, since each of these issues includes some larger issues that will surface again and again in the 70's, I propose to say something about them.

#### THE LAW AND ITS EFFECTS

Consider first the core issue of how we can develop and administer laws to insure their intended effects. There are two rather important general issues here that we must tackle if we are to avoid some of the mistakes of the past. They are: (1) How can sociologists help insure the intended consequences of legislative acts that involve human be-

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<sup>16</sup> Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 645-55 (1966).

havior and its organization? (2) How can we develop and assess sanctioning systems? I shall try to present an illustrative case and then suggest how we might go about avoiding these mistakes.

These days much concern is expressed over the pollution of our environment. One reads about the "war on pollution." Central to the "war on pollution" is legal control of human and organizational behavior. This means that we must agree upon what it is we want to change, determine what kind of laws are essential to bring about these changes, and what kinds of sanctions will bring conformity with the law.

In the State of Michigan there was much concern two years ago with the way that "dumps" were polluting the environment. Across the State there were several thousand dumps where trash was taken. Consequently, the countryside was treated to the odor of rotting matter and of smoke pollution when it burned. The Michigan Legislature proposed to do something about that matter by "setting standards" for dumps. They righteously outlawed smells and smoke requiring among many other provisions that a dump operated by a township had to be covered with earth once in 24 hours. Clearly the dumps became more costly to operate. At a minimum, a bulldozer now is required to move the earth.

What the legislators had not reckoned with is a system concept, something which social scientists have been developing as well as engineers. A sociologist, for example, would have asked what is the behavior system that leads to the use of dumps, to behavior that brings material to dumps, and a host of questions about how one could effectively get people to engage in appropriate (if you will excuse it) dumping behavior.

Without taking you through an elaborate model about the organization of dumps and dumping behavior, let me bring you up to date as to what has happened in Michigan since the passage of that law. Consider just a few facts: most dumps have closed in Michigan or are open only two or three days a week; individuals who bring trash to dumps are charged a service fee; there has been no increase in public collection. Would you predict that as a consequence of these factors, littering along public highways and at collection points has increased enormously in the State of Michigan? Any systems analyst probably would, even granted that there are unintended consequences of all human activity.

Think about just one prediction: if the cost of getting rid of trash is not born by the public and a service fee is charged for dumping, those who cannot afford the disposal will get rid of it by other means, the most common means being unauthorized dumping or littering. What has happened in the past two years? At some rest stops and picnic stops along Michigan highways the amount of trash deposited in and around cans now averages two truckloads per picnic table per week!<sup>17</sup> Parenthetically I might remark that this tells us something about orderly attempts to dispose of trash and garbage at public expense.

My point is that sociologists and other social scientists have a great deal to contribute to the development of the law by analyzing law in a systems analysis. Such analysis tells us what law can accomplish in a given social system. It is a systematic rather than a haphazard approach.

Turning to the second of the intended effects of law, that of sanctions to bring about the intended ends or goals of the system. It seems all too obvious that our present systems, built as they are upon punishment and detention, have little specific deterrent effects upon those punished, apart from the effects that flow if anyone is constrained through detention. This is not too surprising since there is a growing body of both experimental and organizational research strongly suggesting that systems based primarily on punishment fail to bring conformity. Put another way, it seems clear that any system that does not include some rewards within it will not generally lead to change in behavior. What is more, without some continuing rewards, it is unlikely that conformity will continue. In the language of psychologists we have learned that learning occurs most rapidly when it is reinforced either by a reward schedule or one of rewards and punishments (ignoring for the moment questions of scheduling). We also have learned that learning extinguishes without continued reinforcement. In the language of sociologists we observe that positive sanctions, whether of rewards through appropriate jobs or income or some other social reward, bring the highest rate of change in behavior and of conformity to new standards of behavior.

These studies provide clear implications for the law where it generally is assumed that negative sanctions are effective. If companies making billings have learned that a discount for prompt payment brings conformity, why must it be so difficult for legally based agencies to get a similar message? Whether or not one accepts the results of ad-

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<sup>17</sup> Ann Arbor News, Feb. 28, 1970, at 9, col. 1.

mittedly incomplete research on the question of sanctions, it should be apparent that the law makes basic assumptions about the effect of sanctions, assumptions that thus far have not held up under social science investigations. Parenthetically let me remark that whether or not it is done as part of a law school education, today's lawyers must be familiar with behavioral and organization research that underlies assumptions the law makes about its effects on human behavior. From the standpoint of legal education, an understanding of the basic science of human behavior and organization must be accomplished both by prerequisite and as a continuing part of legal education.

#### ACCOUNTABILITY AND DISCRETIONARY JUSTICE

A recent book by the distinguished legal scholar, Kenneth Culp Davis, argues persuasively that a central problem of modern society is the enormous growth of discretionary justice without comparable growth in means of making these systems accountable to the people or the government they serve. Professor Davis points out that the rapid growth of laws where legislators grant to administrative agencies the power to develop their own rules for decision making has led to considerable abuse of the rights of persons they were designed to serve. Whether it be the Department of State making decisions about passports, the prosecutor making decisions about charges for crimes, the judge about sentencing, the parole board about paroles, the Federal Trade Commission about licensing, or a school board about dismissing teachers, there is enormous power to decide the fate of persons and little recourse for them to pursue their case when they believe justice has not been met.<sup>18</sup>

Professor Davis does an excellent job of demonstrating that the current system does not provide adequate protection and that discretion is not properly structured, confined, or checked in the public interest. Yet when he makes proposals for holding public agencies accountable, it is clear that he makes many judgments which empirical social science research can affirm or deny. Indeed, at times his policies and recommendations seem to be based on false notions about how organizations operate or how people make decisions. To choose but a single example, Professor Davis believes that discretion is reduced whenever one must decide according to a rule. Yet there is plenty of research

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<sup>18</sup> K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

demonstrating that the larger the number of rules among which one can decide, the greater the discretion to choose among them or that the smaller the differences among stimuli, the harder it is to discriminate among them and the more differences among persons in selecting among them according to a given option.

The question of how to make organizations and decision makers accountable is not for the most part a legal question. It is partly a question of values but primarily a question of how one makes organizations and persons who function within them work in a given way.<sup>19</sup> This should be all too apparent to men in the legal system who are accustomed to talking about differences among judges and selecting according to the predilections of judges. Such statements are clear evidence of the discretionary power of judges. The question of controlling that discretion in the public interest, however, often is resisted, the argument being based solely on rather tired opinions and decisions about judicial authority and power. On the face of it, most judges lack the expertise to determine any question of treatment of how long a sentence should be to produce a given result. Apart from that, however, there seems no justification for their refusal to have *their* judicial record examined. Just how well do *they* do, and what accounts for *their* record? The public interest can demand no less if we are to have full confidence in our public agencies, including confidence in the bench. Such investigations must be conducted independent of the legal or any other system and the basis for such investigations must rest upon the growing social science models for evaluating human and organizational performance.

#### RESPECT FOR THE RULE OF LAW

We hear and read that we live in a period of growing disrespect for the rule of law. It is difficult to know whether there is change in respect for the rule of law since we have been measuring this quality of American life only a relatively short period of time. Furthermore, we have not as yet learned how to measure respect for the police authority, for the authority of the United States Supreme Court, or for a particular set of laws. Over and above this our judgments are based on behavior in the society—of civil disorders, of respect for judicial authority in

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<sup>19</sup> See Reiss, *Servers and Served in Service, in Financing the Metropolis*, URBAN AFFAIRS ANNUAL REV. (1970).

the trials of the "Panthers" in New York, or of the "Eight" in Chicago, of student and minority accusations against the police.

Since we have no precise benchmarks against which to measure changes in respect for the rule of law, it is not clear whether we are experiencing but a short run fluctuation in respect and behavior toward legal authority or whether it represents the beginning of a long run trend. Focus for a moment on the respect that Negroes in our American Society have for the rule of law. The evidence from the past suggests that they have always regarded the police, lawyers and the courts as dispensing "white man's justice." What does one make therefore of the statements of two Negro Senators from the Detroit area following the most recent acquittals in trials of the police involved in the "Algiers Motel Incident"?<sup>20</sup> Mr. Coleman Young commented: "The latest phase of a step-by-step whitewash of police slaying demonstrates once again that law and order is a one-way street; there is no law and order when black people are involved, especially when they're involved with the police."<sup>21</sup> State Senator Basil Brown, another Negro from the Detroit metropolitan area protested: "This acquittal and the others legitimate cold-blooded murder. This is the kind of thing you see in Mississippi. Is it any wonder that black people don't respect our courts and our white juries? The feeling in the black community is that we've taken about all we're going to take. Black Panthers' membership probably doubled after the slaying of the Chicago Panthers. It will probably double again after the Algiers Motel acquittal."<sup>22</sup> Now clearly these Senators express a sense of frustration, alienation, and lack of full respect for a system of law and order. They are speaking for their constituency in a Northern metropolitan area. They are responding not only in a general way to the law but to a specific instance that they see as representing "injustice," a symbol of an order. Perhaps we need to look at what happens in such events as well as at their symbolic nature, since they tell us something about "the system."

Whether or not current opinions and behavior toward the law and its administration represent a fluctuation or a change in direction, the evidence suggests that a substantial minority of American citizens in some way lack respect for the rule of law. This is particularly ap-

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<sup>20</sup> J. HERSEY, *THE ALGIERS MOTEL INCIDENT* (1968).

<sup>21</sup> Kamisar, *Was Justice Done in the Algiers Motel Incident?*, N.Y. Times, March 1, 1970 § E, at 10.

<sup>22</sup> *Id.*

parent in the behavior of citizens exhibited in uncivil conduct toward legal authority, whether that of the police, or public officials, or civil servants, of lawyers, or of members of the bench. Even the debate about our highest tribunal displays elements of incivility toward, and questioning of, the legitimacy of that body's authority.

What I want to suggest, as I have elsewhere, is that we may have been looking at the wrong side of the question in talking about respect for the rule of law.<sup>23</sup> What we have been investigating, whether as social scientists or lawyers, is how much lack of respect is there and what causes the disrespect. This leads us to focus either on the behavior of specific parties to a transaction (How did the police behave? What did the defendants or the judge do?), or on the motives for their behavior (Why did they do that?).

The more appropriate question is what makes people believe in and accept the rule of law. What makes for civil relations among men, not simply what makes for incivility among them. What makes for civil order, rather than what makes for civil disorder. I submit that we must turn these questions around if we are to become an orderly society where there is respect for the rule of law and where civility prevails among men. When we take this question seriously, we may learn more about how to change toward the good society we seek through the rule of law. We may then discover, as I have said elsewhere,<sup>24</sup> that we probably cannot have civility among men unless persons are accountable for their behavior. Such knowledge makes it possible for us to change in more predictable ways.

#### BALANCING RIGHTS

Since the 40's there has been in this country a developing emphasis on the rights of persons in the society. The emphasis goes beyond "civil rights," including such diverse issues as those of obscenity, of the rights of drunken drivers, and of discrimination against minorities. Important changes have been occurring on all of these issues, changes that bring opposition with them. Opposing sides debate whether individual rights are made at the expense of collective rights and issues are polarized as involving individual versus collective rights.

This formulation tends to misstate the problem and to that question

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<sup>23</sup> See Address by Albert J. Reiss, Jr., *Toward a Civil Society*, Dwight H. Terry Lectures, Yale Univ. (Yale Univ. Press, 1970).

<sup>24</sup> *Id.*

I finally turn. The appropriate question is: What is the relation between individual rights and collective ones, given certain goals in the society? We must be particularly interested in the special conditions where the exercise of individual rights infringes the rights of others or of organized goals in the society. I suspect that during the 70's we shall have to pay closer attention to questions about the exercise of individual rights infringing the rights of others since they surface in various forms in the legal system and adjudications. Can the behavioral scientist offer anything to their resolution? From the standpoint of a value or normative system, the answer is very little. When the resolution of the question is made to hinge upon an established value position such as those of a constituted order or some value system that cannot be questioned directly, science can clarify but not much more. Suppose, however, that one wishes to hinge decisions on such questions on an understanding of the consequences of taking one position as over or against another. The question then becomes more germane. A few examples may help to clarify the point.

Suppose we take the question of the rights of an individual to privacy. So long as decisions about those rights rest in argument and values of the past, sociological evidence is often defined as relevant insofar as it fits within that framework. But in the future, the interests of society may require something more. Consider for a moment the matter of organized crime and assume that it is the fastest growing sector of American crime—a difficult matter for documentation. We know from sociological research that organized criminal activity is difficult to document so long as individual rights to privacy are protected in the system. The problem becomes one of how one deals with organization. At law, the conspiracy theory has tended to dominate. Yet, going back to the beginning, conspiracy rests so heavily on demonstrating intent, a difficult matter at best. In balancing collective with individual rights in the system, does it make sense to continue to regard organizations as one does individuals or to regard individuals in the same way if they function in organizational roles as when they function apart from them?

I think not. Here we move into the thicket of values. Whether in selecting a justice for the United States Supreme Court or talking about the behavior of trade union officials, we are coming to recognize that behavior acceptable in private citizens is not acceptable for men in public positions of trust.

Just one other example. It is clear that the exercise of rights often

involves conflict among several different types of groups. A controversial speech may lead one group to sponsor it, another to protest it, a third to police it, and end by affecting every taxpayer in the community because of the additional tax burden that policing the event may place upon the community. We may come to recognize that decisions about "who pays" in such instances may have far reaching implications for the whole legal order of society because they are questions of public as well as individual interest.

#### EPILOGUE

The issues of the 70's like those of the 60's challenge some fundamental principles of our legal system. At issue is the extent to which a society can maintain respect for the rule of law while rising to the challenges of a social order that must change. I have tried to suggest that there are ways sociology and the law must develop a closer working relationship if we are to meet these challenges through change.