within ivy, are sure to enter the judicial crucible and thus similarly to have their impact on how judges judge. The oldest of limitations, money, will unfortunately be of major importance: someone must pay for an expert from the East to testify in the West, if only his airplane ticket or, if by deposition, the lawyers' airplane tickets. Only great causes can afford great experts.

VIII.

And lastly . . . maybe it should be firstly . . . judges have personalities. They have prejudices and stomach aches and pride and stalled cars and inspirations and hangovers and far visions and sore feet. All judges try, and most succeed in reducing the impact of "gastronomical jurisprudence",[24] but few reduce its effect to zero.

For after all judges are . . . thanks be to Heaven . . . human. They are not computers controlled by always knowable inputs. Neither are they scientists indifferently imposing inexorable rules. They are only humans, judging only humans, hopefully themselves in turn to be similarly judged.

*Response—Werner F. Grunbaum**

> What subject indeed is so vast as the law of the State? But what is so trivial as the task of those who give legal advice? . . . Now all this amounts to little so far as learning is concerned, though for practical purposes it is indespensable.
>
> Cicero, *Laws* I. iv. 14

The courts, legal practitioners and the academicians who study them are influenced by and react to the climate of opinion and events around them. Sometimes they tend to react rapidly. Other times they tend to resist change. But they cannot excape the influence of their environment.

Recently, legal practitioners have emphasized such activities as consumer lawyering and legal aid. Law school academics thus responded[1] both to the world around them and to those young law

24. Skogan, *Judicial Myth and Judicial Reality* at ____, ____ *infra.*

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1. *See, e.g., The Law Schools and the Minority Group Law Students, A survey for the A.A.L.S. Committee on Minority Groups,* 1970 AALS PROCEEDINGS 9-91.

students who are no longer satisfied with the prospect of potential material gain through corporate law practice. These law students demand that our society improve the quality of life. As a result, for the first time in many years social scientists have viewed legal practititoners with envy. Everyone at one time or another has felt the desire "really to do something!"

However, if all of us immediately sought to do something, the final result might indeed be less desirable than anticipated because, as everyone knows, good intentions alone are insufficient to achieve the better quality of life that we desire and are working toward. When we act we must do so intelligently.

But while it is easy to agree that our society must promote a better quality of life, it is difficult to blueprint the kind of knowledge we need to transform this goal into reality. And once we solve the information problem—certainly an unlikely prospect—we are faced with a second problem. Even if we pinpoint the specific social science contributions necessary to act intelligently, we must identify the appropriate people who could or should act on the basis of the research. Should we seek contributions to aid or influence legal practitioners (problem oriented research), academicians (basic research), analysts, judges, policymakers, and/or the man on the street? Surely, the contributions that social science may make to the law are not limited to judges and other policymakers (problem oriented research).

Unfortunately, the contributions in this symposium are all essentially addressed to legal policymakers. Accordingly, the immediate need to act to improve the quality of life has overwhelmed the selection of the articles placed in this issue. Problem oriented research has been emphasized over basic theoretical research.

Skogan is concerned with student criticism of courts. Grossman and Sarat attempt to integrate a vast literature concerned with policy outputs and the impact of the courts. Schmidhauser, Berg, and Melone are concerned with congressional criticism of the Supreme Court. Cook brings attention to the need for increased socialization of federal judges. Fahey describes the legal problems that result from changing patterns in public attitude toward the use of marijuana. And Burnham deals with social science data supporting the discriminatory nature of the Texas voter registration laws.

I have no quarrel with the quality of this research. In fact, it is rare to find a single symposium that has the range, breadth, depth, and high research quality found here. The general level of the present

contributions probably surpasses that of similar symposia published in the past. But the intense emphasis on problem directed research is novel.

Of course, there is nothing wrong with problem oriented research, especially of the high calibre found here. My criticism applies to the mix of the present contributions and to the trends this mix may signal. Surely, out of six contributions one or two basic theoretical ones would have been appropriate.

If I felt that the lack of balance found there could be attributed to the personal idiosyncrasies of those selecting the articles, I might feel easier about the problem and simply shrug off the matter. But the new emphasis on problem oriented social science research is a pervasive and dominant one. It is not only prevalent among legal academics and government policy makers, but also appears to be gaining ground among political scientists with their new emphasis on public policy (impact) research.

The new emphasis on problem oriented social science research is well stated by law Professor Robert G. Dixon. He laments the small proportion of public law articles published in political science during the last decade and then points out that "only about half relate to substantive issues." By substantive issues he seems to imply problem oriented social science research. His suggestions for fruitful future research call for research on negotiation, on influences on the adjudicatory process, and on impact analysis.

In the same article, Dixon condemns political science's new "advanced numerology."[3] But at the same time he lauds the behavioral movement as "an important step toward putting some objectivity and science into political science, and toward asking new questions even though answers may not be forthcoming."[4] Evidently, Professor Dixon had second thoughts as he roundly criticized political science's efforts toward establishing at least some theoretical basis for understanding the legal process through the study of judicial behavior.

Clearly, the emphasis on problem oriented research, especially as cogently presented by Dixon, deserves serious consideration. However, two problems then arise. First, to argue against Dixon's position might suggest the erroneous conclusion that theoretical research is superior to applied research. And secondly, there really exists no argument justifying theoretical research on practical grounds. Theoretical research

2. Dixon, *Who is Listening? Political Science Research in Public Law*, 4 PS 19 (1971).
3. *Id.* 24.
4. *Id.* 22.

may or may not lead to a state of decision. In fact, the chances are greater that it will not lead to a state of decision.

In order to argue for the validity of a balance between theoretical and applied research, one must establish the necessity of theoretical investigations. I would prefer to argue only that research should be professionally interesting and that the methods be appropriate to carry out the research design. But Dixon has found judicial behavior research unintelligible and the mathematical methods inappropriate. Thus, many scholars fail to accept this argument favoring basic research solely for its own sake.

The statistical methods Dixon condemns are unfortunately necessary to conduct basic research in judicial behavior. Statistical methods enable one to generalize beyond the data actually in hand.[5] Quantitative methods can be used to test traditional insights into the legal process. "Quantitative techniques have the advantage that general trends can be projected from vast masses of data, and such general trends should serve as an additional aid to the appellate lawyer."[6] It is important to supplement insights based on educated guesses with replicatile procedures which can be tested by other investigators.

Dixon would respond that the lawyer can better predict cases than the political scientist.[7] Although no evidence exists supporting Dixon's claim, even if the claim were true, is it not preferable to have replicatile procedures that can be used by all? How many Rodells are there in the legal profession? Moreover, if Professor Rodell's unique methods to predict appellate court decisions could be standardized in a replicatible form, all lawyers could share his predictive skills.

Clearly, basic research is unique because it is abstract and has broad rather than narrow implications. But more important, it relies on replication and so leads to objectivity and science.

Accordingly, social science contributions to public law should be balanced between basic and problem oriented research. Furthermore, both types of research make an important contribution to law. But more specifically, how is social science important to the law?

1. *Input into legal cases.* The Brandeis brief, originally used for the narrow purpose of supporting legislative intent, is widely recognized as

5. Grossman & Tanenhaus, *Toward a Renascence of Public Law,* in FRONTIERS OF JUDICIAL BEHAVIOR 9 (J. Grossman & J. Tanenhaus eds. 1969).

6. Grunbaum & Newhouse, *Quantitative Analysis of Judicial Decsions: Some Problems in Prediction,* 3 HOUSTON L. REV. 201 (1965).

7. Dixon, *Who is Listening? Political Science Research in Public Law,* 4 PS 19, 21 (1971).

the "granddaddy" of social science input into the legal process. More recently, social science inputs into legal cases have become the subject of academic controversy. The controversy surrounding the social science evidence used by the Supreme Court in *Brown* v. *Board of Education* has been sufficiently publicized to make further comment unnecessary.[8]

Professor Burnham's brilliant contribution to this symposium is in the Brandeis tradition. He demonstrates the Texas voter registration laws to be unconstitutional since they deter voter registration.

2. *Explication of normative values underlying legal cases.* Professor Skogan's study of the "judicial myth" is an interesting attempt to empirically test certain accepted jural postulates. It is a significant finding that while judges accept the principle that "the rule of law is superior to the rule of man" such was not the case with the student sample. Whether such data indicate student hostility toward legal institutions or whether the data indicate a legally uninformed student population is difficult to decide.

3. *Dynamics of legal decision-making.* This area of social science contributions to the law directs itself less to problem oriented research than to an understanding of the judicial decision-making process itself. Especially noteworthy in this area is C. Herman Pritchett's bloc analysis which pioneered the systematic study of judicial attitudes. Later, Glendon Schubert refined Pritchett's techniques. The reader is referred to Professor Barker's introduction of this symposium which traces this development.

Unfortunately, as noted, there is no contribution in this symposium dealing with the dynamics of legal decision-making. It is difficult to see how continued efforts at policy oriented research can be successful unless they are based on significant and valid basic theoretical research. Such basic research would appear to be especially important in understanding the judicial decision process.

4. *Studies of the consequences of judicial decisions.* Richard Fahey's article is a detailed and excellent presentation describing changing public attitudes toward the use of marijuana. Such impact research not only aids judicial policy makers but also helps administrative and legislative policy makers.

5. *Studies of the political role of the court system.* Grossman and Sarat present an extensive review dealing with much of the literature in this area. The study and its proposed conceptualization present an

8. *See, e.g.*, Cohn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955).

interesting introduction to the Cook and Schmidhauser studies that also fall within this general area.

The painstaking and thorough study of the socialization of new federal judges by Professor Cook presents both important theoretical conclusions as well as significant practical conclusions. Cook has thoroughly documented the need for policy makers to consider alternatives other than additional judgeships to eliminate the legal log jam found in the federal courts.

The Schmidhauser study presents strong evidence that members of the Congress who also are lawyers do not assume more favorable attitudes toward the Supreme Court than non-lawyers, as had been widely assumed by much of the public media and by many scholars. Such a conclusion is significant not only to scholars studying the role perceptions of lawyers but also to policy makers attempting to work toward a more favorable climate for the courts to function in.

As the studies reported here demonstrate, social science has important contributions to make to the law in all of these areas. However, applied research must be supplemented by significant basic theoretical research. Applied research without substantive theoretical base will lead sooner or later to the same condemnation of "infant social science" that was voiced in connection with the *Brown v. Board* decision. Problem oriented social science research cannot and will not endure unless it is grounded in sound basic theoretical research. Although this criticism is not applicable to the contributions in this symposium, if the present trend emphasizing policy oriented research continues, it will be only a matter of time before policy oriented research enters a state of decline. Therefore, it is regrettable that the present symposium fails to strike a balance between policy oriented research and basic theoretical studies.

*Response—Francis M. Gaffney**

Professor Huntington Cairns, writing in 1935 on the relationship between law and the social sciences, made the following observation:

> No aspect of present legal thinking is more marked than its tendency to levy upon all fields of knowledge for assistance in the analysis of fundamental problems . . . . This characteristic results perhaps from the departure from the view that law was entirely self-sufficient—that a

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