*Response—Lawrence M. Friedman**

Some Thoughts on the Relationship Between Law and Political Science

The articles gathered in this symposium provide a rich, varied picture of research at the meeting place of law and political science; and an interesting platform from which to comment on how these two academic disciplines relate to each other. The two fields have had a long but not always intimate connection. The connection, as is well known, was broken off in the late 19th century. Political science was in its infancy; and the study of law, as Langdell and others conceived it, found it most profitable to turn more and more in on itself. For most of the time since then, political science departments and law schools have tended their own gardens, barely speaking to each other. It is only in the last generation that the two have come at all closer together.

I take it that political science, though an extremely catholic field, pinches off, as its subject matter, the study of power and authority. It is mainly though not exclusively concerned with public power and public authority—with government, in a word. That the core of political science is the science of government is not really a matter of dispute. Political scientists are much more likely to fight among themselves over method. To an outsider, the debate between behaviorists and non-behaviorists is as mysterious as it is raucous and unseemly (at times). To an outsider, it is not clear why the field cannot encompass all sorts of methods and philosophies. Perhaps at the root of the trouble is a dispute about power and prestige, about the politics of political science. At any rate, whoever ultimately seizes control of departments of political science, it seems clear that empirical, quantitative research on problems of government, including law, is here to stay.

There have been intramural battles within legal education, too, some of them not dissimilar to the battles within political science. C.C. Langdell founded at Harvard (1870) what has become a kind of standard, classic model of legal education, partly dogmatic, partly practical. The training method had its counterpart in partly dogmatic, partly practical research, which produced the ponderous treatises (Williston was the heaviest) that formed the most famous output of university teachers of law. Out-and-out clinical training has recently made a strong bid to regain a foothold in legal education, and there has

* Professor of Law, Stanford University School of Law.

also been a growing interest in social science research in law schools—more interest than research, unfortunately. All three tendencies—the classical, the clinical, and the social science—might conceivably coexist rather neatly in the law schools; in fact, they coexist badly if at all. Apparently, some law professors conceive of control of legal education as a single, indivisible good, like kingship or deanship. This adds a certain bitter tang to discussions of the methods and goals of legal science.

That political science which sends out feelers to the law schools is, as a matter of fact, strongly behavioral. Those who, in the law school world, come to meet it half way, are also mainly scholars who are committed to social science research in the law. These two groups at any rate seem to get on well; they have a common purpose. Most of the concerns of political scientists are quite relevant to the study of law;—perhaps the statistical analysis of voting behavior is an exception. Legal academics, to be sure, are not terribly interested in many other kinds of current research—on political socialization, for example; but perhaps they should be. But, while a great deal of what political science does is irrelevant to the *practice* of law, if (suppose) law schools were magically transformed into double institutes, devoted half to scientific study of law, half to clinical training in the practice, there is no inherent reason why the nonclinical side could not comfortably slip into a political science department, or vice versa. It would hardly matter which one swallowed the other up. In this symposium, there is a study of law enforcement, a study of judicial socialization—subjects of high concern to both fields, and an essay which relates to legal studies the body of materials on political culture. A behavioral law professor would be as likely to find these essays interesting as a behavioral political scientist.

The two disciplines are, of course, different in other ways. Training is likely to be different. A few political scientists have law degrees; a few active law professors carry the Ph.D. in political science, the badge of that field's authority. Most, however, have the field though not the training in common. Lawyers and political scientists, even when they think they are using similar methods and attacking similar problems, may have quite different outlooks. But these differences flow from differences in socializations, and in career paths, I suspect, rather than from more deep-seated, timeless factors. Political sociologists are another breed who deal with power, authority and government; and indeed, share methodology too with behavioral political science. Compared to a "political sociologist", a "political scientist" has

probably undergone somewhat different training, been exposed to different teachers, read different books "outside his field," learned to look up and down at different reference groups, gone to different conventions and conferences; learned, in short, to behave and think differently in some regards, simply because of the structural path his career has taken. These differences may be diminishing. So too for lawyers. The articles in this symposium do not seem out of place in a law review; indeed, they seem perfectly at home.

Political science is obviously *useful* to law, in the sense of promoting understanding of legal process. At least the promise is immense, even if one feels (as some do) that the work so far in the field has not quite lived up to this promise. One source of disappointment may simply be that some problems turn out to be unyielding; current techniques are simply not adequate for solution. This may be the case with the problem of ferreting out secrets of Supreme Court decision-making. On the other hand, work like Richard Fayey's study of the enforcement of the Illinois marijuana laws deals with behavior which is, unit for unit, not as suffused with grandeur as the case-law of the Supreme Court; and yet, in the aggregate, is of considerable social importance. To show that "what people label deviant is . . . subject to change," and to put a search-light on the process of law enforcement, is certainly not an unimportant enterprise.[1]

Fahey's article illustrates one "use" of political science in law, one with obvious implications for public policy, though to be sure the authorities are often deaf. Sometimes political science data can be used even more directly. Occasionally, social science can be injected directly into the bloodstream of law, in the form of expert evidence at trial, or as supporting material (theory or data) to buttress a brief on appeal. In this way, social science may help engineer social change in the ordinary course of legal process. There have been, in recent years, a number of examples of this use of social science; enough to kindle a certain degree of enthusiasm, both among lawyers and social scientists. One of the essays in this symposium is a case in point, showing how social science evidence can be marshalled in support of legal change—Professor Burnham's account of his role in the Texas litigation.[2] The tradition of using hard but non-legal evidence goes back at least as far as the Brandeis brief in *Muller v. Oregon*[3] and very likely further. Use of

1. Fahey, *The Enforcement of the Illinois Felony Marijuana Law in Chicago*, at ____ *infra*.

2. Burnham, *A Political Scientist and Voting-Rights Litigation: The Case of the 1966 Texas Registration Statute*, at 335 *supra*.

3. 208 U.S. 412 (1908).

scientific data (besides or instead of raw case material and statutes) is surely on the upswing; and while political science or sociology or economics does not pull the weight of blood tests or ballistics, it has not been left out in the cold.

That the Brandeis brief could be filed at all, that Professor Burnham could do his research and play his role in the Texas voter case, are signs that the legal profession has begun to emerge from its coffin of concepts and has begun to let in the air of the outside world. The classic theories treated law as a "science", independent of other sciences. Law supposedly moved on the wheels of its own indigenous principles. These and these alone gave legitimacy to judicial decisions at least. Legitimacy, which is a set of cultural values, is in constant evolution; and old theories treating law as a law unto itself, rather than as a social instrument, are slipping into oblivion. The more contemporary concept of law is frankly utilitarian. It tends to welcome change, and therefore looks with favor on ideas and facts from the social context—anything that will serve and reach the purpose.[4]

Most of us, if only because we are helpless creatures of our times, will applaud changes in legitimacy that have taken place in the law. There is no room in our world-view for traditional legal culture. On the other hand, one must be cautious in measuring the change in outcomes that has actually taken place. How much of the "reception" of social science is style rather then substance? Take, for example, the famous social science footnote, in the school desegregation case.[5] It created quite a stir; some thought the Court was behaving outrageously; some, mainly social scientists, could scarcely contain their joy at the thought that they had, at long last, entered the sacred precincts.[6] But do we really know what role social science played in the actual decision of the case? Sophisticated lawyers and social scientists had long argued, quite persuasively, that the string of citations that courts regularly shoveled into their opinions did not really explain how the judges behaved, how their minds moved, what forces they responded to. The essay by Grossman and Sarat is in this tradition.[7] It would be a pity if naive legal determinism were transferred

4. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969).

5. Brown v. Board of Education, 347 U.S. 483 (1954): the court felt that segregation was harmful to minority children, a "finding . . . amply supported by modern authority," whatever "may have been the extent of psychological knowledge" at the time. The Court then cited a number of modern studies of prejudice and segregation by social scientists.

6. *See, e.g.*, Cahn, *A Dangerous Myth in the School Segregation Case*, 30 N.Y.U. L. REV. 150 (1955); Clark, *The Segregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224 (1959).

7. Grossman & Sarat, *Political Culture and Judicial Research*, at 177 *supra*.

from citations of precedents to citations of books by social scientists. We do not know when these citations are rationalizations after the fact of decision, and when they are not. Professor Burnham's article is, I think, an example of a use of data that may be much more than window-dressing. Information can be a powerful force to open the cognitive windows of law. But the *basic* message of social-scientific studies of law is that legal behavior is tough, complex, and much intertwined with powerful, long-standing social forces. These findings have not been overruled merely because courts more freely cite and quote a new kind of source. It behooves social scientists to be rather humble about the role that they can play. It is still power that talks and molds the law; knowledge is part of this power, but very far from all.

The essays in the symposium, for all their variety, seem to stand firmly in the middle of the road in political science. They do not directly reflect the new voices from within the disciplines that accuse social science itself of unreality, even repression. Young Turks, in every field, assert that old guard social science inhibits social change, stifles what is fruitful in progressive thought, eagerly acts as lackey to conservative forces. In part, their work is a portion of the healthy process of laying bare the hidden assumptions of the past generation of scholars. But some radicals go beyond this role; they reject the concept of value-free research; they want to feel and to act; they do not want to study and explain every impulse to death. There are similar strong tendencies among young lawyers. Fiery advocates—many in the pay of OEO—have plunged into community organization, poverty-action work and aggressive litigation against big business and big government. Yet even this is one full turn of the wheel less argent than the work of active revolutionaries. Militant as it is, it maintains one foot within the system, and is one step removed from direct, hand-to-hand action. The social scientist who comes to the law is one step even further removed from white heat. If he is careful and empirical, full of wisdom about strategy, interest groups, and balance, he serves to dampen ardor. The litigators are anxious to use social science, when it serves their purposes; they do not necessarily want to listen to its message. Social science research has fallen under a shadow, in some radical quarters, not because it is unthinking and inexact, but precisely because the more it is careful and comprehensive, the more paralytic it becomes. Scratch deeply at a social problem, and all the blacks and whites merge into gray. To understand everything may not be to condone everything, but it comes dangerously close.

I make this point because it seems to me that trouble may lie ahead for those of us who feel that social science has an enormous role to play in legal education, a role of salvation and resurrection. The smug self-satisfaction of legal education retarded, for years, the interdisciplinary study of law. That self-satisfaction is now in process of retreat, and there is underway a serious movement to reform, recast, and revitalize legal education. There are two attacking armies: one from the clinical-activist side, and another from the social science side. The two forces are now allied, in rather uneasy coalition, against their joint enemy, the traditional forms of legal education. By rights, the two forces should remain good friends. But will they? It would not be the first time that allies fell out after a victory. In a law school dominated by clinical activists, what will become of social science? Will it be given a place of honor, or will it be thrown out (or exiled into other parts of the university), except insofar as it is willing to serve as a humble servant of the Pharaoh, making bricks for his temple? This possibility is real; it has some basis in the history and structure of legal education. The final outcome, only time can tell. Dr. Barker's introduction to the symposium takes a position, as I read it, of quiet optimism. He reads the testimony of events to say that a long, productive union of law and political science seems certain to sustain itself and grow. For the sake of both disciplines—and for the sake of the administration of justice, which would, in the long run, immeasurably gain—one hopes that events will bear him out.