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THE SOCIAL SCIENCE OF IDEOLOGY AND THE IDEOLOGY OF SOCIAL SCIENCE

JOHN M. CONLEY*

I. INTRODUCTION

My original assignment was to examine the impact of ideology on legal education and the legal profession from the analytical perspective of the social scientist. As I prepared my remarks, however, it became increasingly clear that social science itself needs to be examined as an ideology that has profoundly influenced the law. As a result, my presentation pursues two rather disparate objectives. First, consistent with my charge, I review some recent changes in legal education, and higher education generally, from the social science vantage point. I then turn the analytical lens back on myself and consider the role of social science as a causal agent in these same changes.

My own perspective is that of the anthropologist, meaning that I see things in cultural terms. Culture, which is anthropology's core concept, comprises the shared beliefs and practices that define a particular society's way of life. Every culture has a set of constituent institutions: religion, politics, and kinship, for example. All interact, each plays an essential role in ordering and regulating social life, and none has any inherent basis for claiming primacy. In the anthropological view, law is one such institution. Because of their cultural perspective, anthropologists reject the idea that law can be studied adequately as a closed system. They also note that the American penchant for strict separation of such institutions as law and religion is, against the background of other cultures, extremely unusual.¹

At the outset, it might be helpful to define "ideology," since it means different things to different people. At a minimum, it is a system of shared beliefs by which a group of people interpret and impart meaning to events. Anthropologists see ideology as a major subset of the concept of culture, almost but not quite coterminous with it. They emphasize ideology's role in helping people make sense of events, build consensus, and distinguish themselves from others. Such diverse belief systems as feminism, conservatism, and environmentalism all fit this definition. Marxists, by contrast,

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1. For an introduction to the anthropological perspective on law, see John M. Conley & William M. O'Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 *Lox. L.A. L. Rev.* 41 (1993).

have emphasized the so-called hegemonic function of ideology: that ideology is a tool that elites use to distort reality, legitimate the status quo, and dominate the rest of society.²

II. AN ANTHROPOLOGIST'S PERSPECTIVE ON THE CULTURE OF HIGHER AND LEGAL EDUCATION

In the nineteen years since I entered law school, I have observed a major cultural shift in legal education. In most respects, this is the same shift that has transformed higher education as a whole. Those of us in the education business tend to assume that the contours of this transformation are universally understood. My experience, though, is that the nature and extent of the transformation are news to people outside the university world, however well educated they may be. Accordingly, I turn next to a brief and much-simplified account of what has happened in higher education during the last ten to fifteen years.

The developments I have in mind have been most prominent in the arts and sciences departments, which form the core of every university. (For reasons that I will explain shortly, the law schools have undergone a parallel but more subtle transformation.) So-called postmodernist scholars from a variety of disciplines have questioned not only the current state of knowledge but the very possibility of knowing.³ They reject the positivist ideal of the relentless pursuit of objective truth through verifiable, value-neutral research. Instead, they see politics exerting a pervasive influence on what questions get studied, what methods are accepted, and what answers become respectable. Everything is, in the current jargon, "contingent."

My own discipline of anthropology illustrates this trend. When I was in graduate school in the 1970s, a major issue was how to make anthropology more "scientific." Scholars worried about how to make comparative, theoretical sense out of the huge volume of descriptive ethnographies that had accumulated over the previous hundred years.⁴ Quantitative analysis was in the ascendancy. Many scholars sought to delineate precisely the relationship between ecology and culture, while others argued that anthropology needed to move away from its traditional reliance on open-ended, holistic observation and make greater use of psychological tests and similar evaluative instruments.⁵

2. See William M. O'Barr & John M. Conley, *Ideological Dissonance in the American Legal System*, 30 ANTHROPOLOGICAL LINGUISTICS 345, 346-47 (1988).

3. For a readable introduction to postmodernist thinking, see ERNEST GELLNER, POSTMODERNISM, REASON AND RELIGION (1992).

4. See, e.g., MARVIN HARRIS, THE RISE OF ANTHROPOLOGICAL THEORY 3 (1968). Anthropology graduate students of my generation almost universally read Harris's controversial book.

5. See, e.g., David H. Spain, *On the Use of Projective Tests for Research in Psychological Anthropology*, in PSYCHOLOGICAL ANTHROPOLOGY 267 *passim* (Francis L.K. Hsu ed., 1972).

Now, however, anthropology has all but abjured such questions. Instead of striving to expand its body of knowledge and refine its theoretical insights into the nature of culture, anthropology seems consumed by doubts about whether it really knew anything in the first place. A vast amount of writing and much classroom time is now dedicated to the critical reexamination of past research.⁶ Once-canonical works are attacked as illuminating little more than the biases of their authors. The current fashion is to view anthropology's literary corpus as teaching us more about the culture of Western science than about the traditional societies that are anthropology's nominal subjects. From this perspective, Western anthropologists have not described the non-Western world, but have constructed it, and the construction is irremediably contaminated by "the malignancy of primitivism—and its most notable symptom, exoticism."⁷

Comparable trends are evident throughout the humanities and social sciences. In literary criticism, for example, deconstruction challenges the idea that any text can have a "correct" interpretation and argues instead that every interpretation contains the seed of its own refutation.⁸ In philosophy, sociology, anthropology, and elsewhere, adherents of the French social theorist Michel Foucault contend that everything, even the self, is "discursive," or the product of an ongoing process of negotiation.⁹ Even the traditionally "hard" sciences are not immune, as critics point to political influences on the selection and funding of research topics.¹⁰

These academic trends have had important consequences for the day-to-day practice of higher education. Postmodernist faculty members, absolute in their dedication to relativism, have led the assault on traditional academic standards. "Merit," they argue, far from being a fixed and neutral referent, is in fact an open-ended rhetorical construct that elites manipulate

6. See, e.g., ANNETTE B. WEINER, *THE TROBRIANDERS OF PAPUA NEW GUINEA* 1-9 (1988) (arguing that the early twentieth-century ethnographer Bronislaw Malinowski gave inadequate attention to women's perspective on society).

7. JOHN COMAROFF & JEAN COMAROFF, *ETHNOGRAPHY AND THE HISTORICAL IMAGINATION* 45 (1992). The Comaroffs are perhaps the most influential postmodernist critics of traditional anthropology. Much of their recent work has reexamined the history and culture of South Africa from a postmodernist perspective. See, e.g., JEAN COMAROFF & JOHN COMAROFF, *OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM AND CONSCIOUSNESS IN SOUTH AFRICA* (1991). Both books contain excellent introductions to the theoretical issues in postmodernist anthropology.

8. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 481-84 (1987).

9. See, e.g., SALLY E. MERRY, *GETTING JUSTICE AND GETTING EVEN* 8-11 (1990) (analyzing law as a series of discourses). Those interested in Foucault's own development of these ideas should consult MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., 1972).

10. See, e.g., JOHN K. SMITH, *AFTER THE DEMISE OF EMPIRICISM: THE PROBLEM OF JUDGING SOCIAL AND EDUCATIONAL INQUIRY* 9-10 (1993).

to maintain their power. We should acknowledge, these critics contend, that decisions about admission, grading, hiring, and tenure are inevitably and primarily political.

This critique contains many undeniable truths. For example, what reasonable person could deny that the academic world needs constantly to reassess its conventional wisdom? (Up to a point, it has always done so, or we would all still be teaching in Latin.) And we could all surely agree that every conceivable societal interest is served by making higher education available—in a meaningful, not token, way—to as much of society as possible.

Nonetheless, the critique is often troubling in its shallowness. Of particular concern is that questions seem to be debated in inverse proportion to their complexity and importance. The more difficult the question, the more its answer is treated as self-evident. Consider the following examples:

What kinds of diversity count? When we name “diversity” as a paramount goal, do we mean that we want faculties and student bodies whose individual members actually differ from each other in such dimensions as culture, economic background, philosophy, politics, and intellectual interests? Or do we mean simply that we want a representative sampling of people who identify themselves as members of certain politically recognized groups? The former interpretation holds the promise of making academic life more interesting; the latter I find offensive because it inevitably reduces to the patronizing ascription of characteristics to individuals solely on account of their membership in some more or less arbitrarily defined group.

What is multiculturalism? As one with a professional interest in the study of culture, I often ask adepts of the multicultural religion how they understand this phenomenon that they seek to multiply. I am invariably disappointed by the thoughtlessness of the answers. Anthropologists have spent more than a hundred years wrestling with the meaning of culture; we now reshape higher education as if culture were a transparently simple concept. I worry particularly that in our frenzied pursuit of relativism, we forget that no society has ever survived without a core of unifying cultural beliefs.

What about predictability? Predictability has always been an essential part of the legal concept of due process. The fact that one could predict an outcome with reasonable certainty has counted for something, however flawed the outcome might have been. If nothing else, predictability presents the opponent of a procedure with a fixed target. The same has been true in the academic world. When debating the adoption of a particular standard, one had a sense of the results that the application of the standard would produce.

This has changed radically in the last few years, at least in the view of people of my philosophical bent. In my recent experience with search committees, for example, I have often been at a loss to predict my colleagues' reactions to particular candidates, or even to understand them after the fact. I simply cannot grasp the decisionmaking algorithm. My own discomfiture aside, this development opens the academic process to power-driven abuses even worse than those alleged to have taken place under the former dispensation.

Where is the mandate for this revolution? The developments I have just described have, I believe, caused higher education to deviate even farther than usual from the ideals of the society it purports to serve. I am not proposing that we set academic policy by plebiscite. But we in higher education, particularly public higher education, are guilty of indefensible arrogance if we treat our constituents' values with contempt.

The advocates of the transformation of higher education that I have been describing tend to characterize it as a shift from elitism to egalitarianism. As an anthropologist, I interpret that as a value judgment. In cultural terms, it looks to me like a substitution of one elite for another.

I have noticed these trends in legal education as well, although they are not as prominent as in the arts and sciences. In this law school, for example, a majority of the faculty believe that the traditional standards are inadequate or worse as a basis for admissions, evaluation, hiring, and tenure decisions. Despite this consensus, it is unclear what new decisionmaking model we will choose. There has been little discussion, and certainly no resolution, of what I would view as questions of first principles: what our objectives are, why we choose those objectives, and how we can best accomplish them. Instead, we struggle from case to case, our standards, such as they are, evolving almost unconsciously.

There is good news in all of this, however. Whatever the direction of our motion, we in the law schools are moving slowly and cautiously. Remembering the best part of our training, we usually take seriously such ideas as free speech, due process, and similar treatment of similar cases. Here and elsewhere, these constraints save the law schools from some of the excesses that bedevil our colleagues across campus.

Nonetheless, change is accelerating. One feature that has particularly marked the cultural transformation in the law schools has been a revolution in the relations with other disciplines. Interdisciplinary work is nothing new, of course (see, for example, Holmes writing on law and economics at the turn of the century).¹¹ Now, however, such work is in the ascendancy at many schools. The new law school culture no longer sees itself as self-

11. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469-70 (1897).

contained; on the contrary, the self-contained view (as manifested in traditional doctrinal teaching and research) is devalued at many leading schools.

Here, too, there is good and bad. On the positive side, interdisciplinary work reflects the salutary realization that law cannot be fully understood apart from its place in society. However, much as I benefit personally and professionally from the growth of interdisciplinary scholarship, I regret the tendency to devalue traditional scholarship. Moreover, I fear that the interdisciplinary movement is driven less by the pursuit of intellectual breadth than by a half-informed desire to imitate and ally with those fields (*e.g.*, English, linguistics, and sociology) that are the trendsetters in the postmodernist academy.

III. SOCIAL SCIENCE AS IDEOLOGY

The deeper I delved into the topic, the more I began to wonder about the sources of the transformation I have described. An obvious answer was that this transformation is simply higher education's version of a generation-long drift toward relativism in society as a whole. Although there is undoubtedly some truth in this answer, it seemed to beg the ultimate question of causation. Gradually, and ironically, I came to view social science itself as a prime suspect. I began to question whether my purportedly objective and dispassionate analytical tool was not itself a belief system, and thus a form of ideology. (By doing so, of course, I was conceding one of the revolution's major theoretical points.) As I worked through this issue, I found it helpful to divide social science into two categories.

Traditional, positivist, instrumental social science. This is what most people think of as social science: "studies," experimental or otherwise, designed to answer important questions about human behavior. This sort of social science has an ancient pedigree and a longstanding relationship with the law. In addition to the Holmes example I mentioned above, think of the social engineering goals of the New Deal's "expert" agencies,¹² or Karl Llewellyn encouraging the drafters of the Uniform Commercial Code to study the culture of the marketplace,¹³

12. Karl Llewellyn coined the phrase "law-and-government" to describe the hybrid legal and political institutions that he and other legal realists thought were the wave of the future. *See* Karl Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HARV. L. REV. 1286, 1292 (1949).

13. Llewellyn's earlier collaboration with the anthropologist E. Adamson Hoebel on a study of the unwritten "law-stuff" of the Cheyenne Indians clearly influenced his work on the Uniform Commercial Code. *See* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941). Note particularly the singular legal significance that the Code ascribes to "usage of the trade." *See* U.C.C. § 1-205 (1993).

or the current federal sentencing guidelines' reliance on predictive correlations.¹⁴

But even positivist social science went far beyond simply providing information for legal decisionmakers to use in traditional ways; it transformed the values of those decisionmakers. In many instances, the ability to study a problem from new angles contributed to a redefinition of the problem itself. Consider the question of why a person commits a crime. Formerly, the analysis was cast in terms of good and evil, sin and grace, and personal responsibility. Social science pointed out that those moral factors might be incomplete sources of relevant information and began to correlate the commission of the crime with other things. Some may have viewed these correlations merely as helpful adjuncts in answering the original question. The actual effect, however, has been a restatement of the question, with the original analytical criteria being ruled out of order. By extension, moral factors generally have become less and less respectable in legal discourse, particularly in the legal academy.

A second ideological contribution of traditional social science has been the promotion of relativism—to an unwarranted degree, in my judgment. In my discipline of anthropology, one can find a culturally sanctioned example of almost anything. Some of my colleagues take this as evidence that it is illegitimate for our own society to hold, teach, and enforce any particular set of values. This view is fatuous: the fact that cultures vary says nothing about what is appropriate, ethically and pragmatically, for *this* culture. Moreover, the observed variation is between cultures; while every society has its share of deviance, I am aware of no (other) culture that has decided to do without values.

Contemporary or postmodernist social science. As I have described already, the last ten years have witnessed a major theoretical reassessment across the humanities, the social sciences, and to a lesser extent, the natural sciences. This reassessment has challenged our most fundamental epistemological conventions. The traditional distinctions between subject (or researcher) and object and fact and value have been blurred.¹⁵ The study of values now includes—indeed, emphasizes—the analysis of the “values” we use to study values. Relativism has penetrated to a deeper level; the ideal of analytical detachment is everywhere in retreat. The current state of cultural

14. See Federal Sentencing Guidelines, 18 U.S.C.A. app. 4, ch. 1, pt. A.3 (West 1993) (describing reliance on empirical study of 10,000 presentence investigations).

15. On this point, EDWARD W. SAID, *ORIENTALISM* (Vintage Books 1979) has been especially influential.

anthropology is illustrative: most research, and much teaching, seems to be devoted to proving how much we have not proved in our 125-year history.¹⁶

Legal teaching and scholarship have felt the effects of this trend, although probably not as strongly as other disciplines. Critical legal studies and feminist jurisprudence on the left, and law and economics on the right, for example, have all "demystified" the law (often with justification, in my view): law is politics, law is patriarchy, law is (or at least ought to be) economic efficiency. Moreover, research itself is seen as politics. Thus, many think that the process by which law and economics scholars have become dominant at law schools like Chicago and Virginia is far more interesting than the research these scholars do.

The ideology of the new social scientists is ostensibly one of total relativism. If research, academic standards, and the "canonizing" of texts are all political, they are negotiable, and thus relative. This is at first glance a liberating realization. There is danger here, however. Many of those who are saying "everything is relative" act as if what they mean is "everything *else* is relative." But even if the old standards fall, decisions still have to be made. And no human being can make a decision without standards; we are the cultural animal, after all. So whose standards do we use now? Pursuant to what authority will some standards be preferred over others? And will the new standards yield more or less predictable results than the old? My fear is that rather than moving in the direction of greater inclusiveness we are replacing one sort of intellectual tyranny with another—one that has greater potential for mischief because of its contempt for the moderating influence of free speech and due process values.

IV. WHAT DIFFERENCE DOES ALL THIS MAKE?

Does this make any difference? The short answer is, "Yes, a great deal." First, the evolving ideology of social science has had a major impact on legal education. I have already alluded to some of the effects. They might be summed up as a challenge to the moral authority of law and the educational principles deriving from that presumed authority.

The impact on law in the practical world has been more complex and harder to assess, but no less significant. Judicial enthusiasm for social science and its ideology has ebbed and flowed, but the courts have reacted. Consider the Supreme Court's reception of social science evidence. In 1954, in *Brown v. Board of Education*,¹⁷ the Court predicated revolutionary constitutional law on the interpretive findings of psychologists, sociologists,

16. Right or wrong, this is disorienting to 18-year-olds taking introductory courses. They arrive at college eager to "know" things. As they tell me constantly, they are confused and demoralized when the major theme in their first semester is the impossibility of knowing.

17. 347 U.S. 483 (1954).

and anthropologists.¹⁸ Later, in the 1960s and 1970s, in cases such as *Hazelwood School District v. United States*,¹⁹ the Court made a firm commitment to positivist social science by finding that statistics alone could prove intent to discriminate²⁰ (and even going so far as to attribute legal significance to particular kinds of statistical analysis).²¹ But in 1986, in *Lockhart v. McCree*,²² the Court made a 180-degree turn by refusing to find that powerful social science evidence was a sufficient basis for holding the death penalty unconstitutional. Did the Court jump off the bandwagon because a majority of its members perceived the excesses of social science ideology? Or was the adoption and subsequent rejection of social science merely pretext for decisions driven by other kinds of ideological concerns? Before assuming the latter conclusion, one should read carefully the *Lockhart* majority's analysis of the strengths and weaknesses of social science.²³

A further question is whether the evolving ideology of social science has influenced the way lawyers practice. Do lawyers, perhaps influenced by their teachers, question traditional forms of moral authority more than they used to? Has interdisciplinary teaching impelled lawyers to deny the very possibility of moral authority? Are lawyers today more likely to see law in purely instrumental terms than they were a generation ago? If so—and most people in this country seem to believe that these arguments are true—then lawyers are following larger social trends. One can hardly blame these developments on something as esoteric as social science—or can one? I am convinced that the ideology of social science has become so pervasive in our legal, political, and ethical discourse that it is now a major contributing factor.

V. CONCLUSION

In light of this discussion, my conclusion is an ironic one: For all its flaws, social science makes me a better lawyer. It does so in three principal ways.

Social science's first contribution to my professional life is instrumental: it improves my understanding of human behavior in legal settings. The

18. *Id.* at 494-95 n.11 (citing psychological and sociological evidence that separate education is inherently unequal).

19. 433 U.S. 299 (1977).

20. *Id.* at 307-10 (discussing statistics as prima facie proof of discrimination).

21. *Id.* at 308-09 n.14, 311-12 n.17 (discussing legal relevance of standard deviation analysis and statistical significance).

22. 476 U.S. 162, 173 (1986) (holding that, even if assumed to be valid, social science studies do not prove that "death-qualification" of juries is unconstitutional).

23. *Id.* at 168-73; *cf. id.* at 185-92 (Marshall, J., dissenting) (analyzing the same social science evidence). In the interest of full disclosure, my personal view is that this was an unusually mean-spirited decision that reflects insufficient respect for human life.

tactical advantages of such understanding are obvious. But on a more significant level, social science contributes to a fuller appreciation of the goals, motivations, and strategies of clients, judges, and adversaries. This understanding makes me, I hope, a better educated and more discerning lawyer than I would otherwise be.

Second, social science reminds me of the complementary truths that no society does without law and that the form of law is endlessly variable. This reminder reinforces for me the importance of what I do as a lawyer, as well as the constant need to seek improvement in the system in which I work.

Third, social science helps me to understand the difference between good law and bad. Good law identifies and strives to promote the core values of the society that it serves. Bad law ignores or neglects those values.

Ultimately, the trick is to learn lessons like these from social science while resisting its ideological pull toward moral nihilism. Can we do so? This is a daunting task to begin with, and it has been rendered almost impossible by an unintended but highly significant side effect of the recent changes in legal education.

Whatever else it has done, the ideology of social science has widened the gulf between the legal academy and the legal profession. I hear from many members of the bar that what we do on law faculties seems more irrelevant than ever to your daily professional lives. You seem as alienated from us as from the elites that are widely perceived to have subverted other institutions (the public schools, for example). This feeling, while understandable, is regrettable. I think that what I do as a social scientist makes me a better lawyer, both instrumentally and ethically, and can make you one as well. But I also recognize that the burden of bridging this gap lies largely with me and my colleagues in the transformed academy, and I am not at all confident that we are up to the job.