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## A Robinson-Patman Primer, by Earl W. Kintner

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## BOOK REVIEWS

A ROBINSON-PATMAN PRIMER. By Earl W. Kintner. London: The McMillan Company. 1970. Pp. xii, 396. \$8.95

It is seldom that a lawyer successfully authors a book directed to practicing lawyers, students, and businessmen alike. One key to success in such an endeavor seems to be in finding a topic of great complexity about which few persons possess expertise, but with which those enjoying or striving for success in the business world should be at least generally familiar. *A Robinson-Patman Primer*, written by a lawyer with exceptional qualifications,<sup>1</sup> deals with a poorly charted and increasingly complex segment of antitrust legislation. A lack of general knowledge in this area can cause tragedy for the businessman, confusion for the student, and embarrassment for the attorney. The author is remarkably successful in providing a tool for each of these groups.

The final version of the Robinson-Patman Act,<sup>2</sup> enacted in 1936 and supplemented in 1938, was the result of severe legislative compromise following extensive hearings, lobbying, and amendments.<sup>3</sup> "As a result, the end product is not the hallmark of clarity"<sup>4</sup> — a conclusion which many antitrust scholars might nominate for the understatement of the year. But amid the confusion and complexity of the Act lie vital provisions for the prohibition of discriminatory practices which injure competition.<sup>5</sup> These provisions are enforceable under existing civil sanctions of the Clayton Act, which may be imposed through suits by the Federal Trade Commission,<sup>6</sup> the Department of Justice,<sup>7</sup> and private complainants.<sup>8</sup> In addition, criminal sanctions may be imposed through suits by the Justice Department under the provisions of section 3 of the Robinson-Patman Act.<sup>9</sup> These provisions "have been attacked for vagueness and characterized as both inconsistent and redundant with the other provisions of the

<sup>1</sup> Earl W. Kintner has served with the Federal Trade Commission as a trial attorney, legal advisor, General Counsel, member, and Chairman. He is currently a senior partner in Arent, Fox, Kintner, Plotkin & Kahn of Washington, D.C.

<sup>2</sup> 15 U.S.C. §§ 13, 13a-c, 21a (1964).

<sup>3</sup> See E. KINTNER, *A ROBINSON-PATMAN PRIMER* 11-16 (1970).

<sup>4</sup> *Id.* at 14.

<sup>5</sup> 15 U.S.C. §§ 13, 13a (1964).

<sup>6</sup> Clayton Act, 15 U.S.C. § 21(a) (1964).

<sup>7</sup> *Id.* § 15a.

<sup>8</sup> *Id.* § 15.

<sup>9</sup> 15 U.S.C. § 13a (1964).

act."<sup>10</sup> It is readily understandable why there is a lack of expertise about this Act; yet its importance to the practicing attorney, businessman, and student is obvious.

The author approaches the Act pragmatically,<sup>11</sup> attempting to explain it rather than criticize it. As a result, *A Robinson-Patman Primer*, although more detailed than most introductory definitions directed to laymen,<sup>12</sup> provides the businessman with a comprehensive overview of the Act, presented in a clear and well-organized style. And for the businessman who finds the book too detailed, or who wants a simplified presentation for his subordinates, the book contains an 18-page "bird's-eye view" of the Act.<sup>13</sup>

Recognizing that "[t]he comparative youth of our antitrust statutes, their ambitious scope, and their undoubted complexity have, unfortunately, produced a number of questionable judicial decisions,"<sup>14</sup> the author presents, with appropriate caution, a summary of holdings from the more difficult cases.<sup>15</sup> He challenges the courts to resolve existing conflicts,<sup>16</sup> and, when an issue has remained unresolved or confused by the decisions, he presents guidelines in laymen's terms which the businessman can follow.<sup>17</sup> For example, when presenting the complex area of brokerage payments, the author states:

This section is aimed at reaching dummy brokerage payments that are in reality "under the table" price concessions eventually falling into the hands of the buyer. Section 2(c), being self-contained, does not permit a defense of meeting competition or cost justification. Also, unlike Section 2(a), only one transaction — one payment by a seller to a buyer's broker — comprises a Section 2(c) violation, and a specific effect on competition need not be shown.<sup>18</sup>

In addition, the author alerts the reader to potential developments,<sup>19</sup>

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<sup>10</sup> E. KINTNER, *supra* note 3, at 266.

<sup>11</sup> "Like Mount Everest, it is still very much there, very much a challenge that must be met and understood by responsible businessmen." *Id.* at 310.

<sup>12</sup> See Stedman, *Twenty-Four Years of the Robinson-Patman Act*, 1960 WIS. L. REV. 197.

<sup>13</sup> E. KINTNER, *supra* note 3, at 17.

<sup>14</sup> *Id.* at 314.

<sup>15</sup> See, e.g., *id.* at 57, where the author reviews the landmark decision, *FTC v. Borden Co.*, 383 U.S. 637 (1966).

<sup>16</sup> See, e.g., E. KINTNER, *supra* note 3, at 59.

<sup>17</sup> See, e.g., *id.* at 68-71 (discussing the "same seller" requirement).

<sup>18</sup> *Id.* at 29.

<sup>19</sup> See, e.g., *id.* at 270, where the potential personal liability of a corporate executive involved in section 3 litigation is considered.

and whenever possible he outlines the elements upon which a change will depend.

The student and the attorney will find the author's presentation of the jurisdictional requirements of section 2(a)<sup>20</sup> very helpful. After listing the elements necessary for a violation of section 2(a),<sup>21</sup> the author discusses each element separately. Although this discussion may in some parts become too detailed for the layman, a general understanding can be gained by reading the introductory paragraph to the chapter, which includes the listing of the elements, and then reading the initial paragraph of the respective subsections. The above method of presentation, which is followed generally throughout the book, will be particularly appealing to the Robinson-Patman Act novice. Although there is an obvious danger of oversimplification in this approach to the Act, it will be of great assistance to the businessman reviewing his practices, the student trying to grasp the fundamentals, and the general practitioner considering litigation. The more sophisticated antitrust lawyer might even find this approach helpful as a checklist in his everyday practice.

Subsequent chapters give a general explanation of competitive and anticompetitive effects under section 2(a) and of competitive injury under that section. The author also presents helpful explanations of the defenses to charges of Robinson-Patman violations, devoting chapters to both the cost justification defense and the meeting competition defense. The prohibition against the granting of allowances in lieu of brokerage fees, the provision forbidding promotional allowances, and the buyer inducement or receipt of discrimination provision are treated in separate chapters. In the final chapters, the author gives a brief sketch of what the reader might expect as a defendant to an action by the Federal Trade Commission, the Department of Justice, or a private party.

The appendices include the texts of the Robinson-Patman and Federal Trade Commission Acts, FTC Guides, digests of selected FTC Advisory Opinions, and compliance suggestions for the brokerage provisions of the Robinson-Patman Act.

The student and practicing attorney might find that the absence

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<sup>20</sup> *Id.* at 35-91.

<sup>21</sup> In order to bring the substantive portions of the act into play, there must be (1) two or more consummated sales, (2) reasonably close in point of time, (3) of commodities, (4) of like grade and quality, (5) with a difference in price, (6) by the same seller, (7) to two or more different purchasers, (8) for use, consumption, or resale within the United States or any territory thereof, (9) which may result in competitive injury. Furthermore, (10) the "commerce" requirement must be satisfied. *Id.* at 35.

of footnotes casts suspicion upon the authority of many of the statements. The appendices, however, include a selected bibliography corresponding to chapters in the text and containing reference materials, cases, and citations which support and document the text. This bibliography provides a research tool for each general subject, but it fails to provide the reader with a ready reference for specific points of discussion.<sup>22</sup> Although this arrangement decreases the value of the book to researchers, it provides a readable text for the layman, who may find constant citation burdensome. And it still serves as a general research tool for the practicing attorney, who can find at least the leading cases and texts in the bibliography. The researcher will be even more disappointed with the surprising lack of law review articles in the bibliography. But this deficiency will undoubtedly be of greater significance to the student than to the layman or attorney.

Compliance with the Robinson-Patman Act is a necessity for the maintenance of the American system of free enterprise. Although many authorities have advocated the development of voluntary compliance programs by businessmen,<sup>23</sup> the achievement of this goal has been thwarted by the business community's inability to understand the Act. *A Robinson-Patman Primer*, by explaining the provisions of the Act in laymen's terms, makes a valuable contribution to the goal of voluntary compliance.

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HOSPITALIZING THE MENTALLY ILL IN OHIO. By Victor M. Victoroff and Hugh A. Ross. Cleveland: The Press of Case Western Reserve University. 1969. Pp. xxii, 353. \$8.95.

This book is intended to be a manual for physicians, hospital staffs, attorneys, law enforcement officers, mental health workers,

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<sup>22</sup> See, e.g., *id.* at 187-88, where the author, in discussing when a seller is beating rather than meeting a lower price, refers to "a leading case," "other situations," "the 1955 Attorney General's Report," and "the cases," but gives no indication of what the cases are or where they can be found. For additional examples, see *id.* at 276-78.

<sup>23</sup> See, e.g., Birdzell, *What Can Be Done to Minimize Danger of Antitrust Litigation? Preventive Measures, Handling Government Investigations and the Roles of Corporate Counsel and Outside Counsel*, 38 ABA ANTITRUST SECTION 126 (1969); Curtis, *Pursuit of Happiness Under the Antitrust Laws: Corporate Planning to Preserve Liberty and Property*, 7 ANTITRUST BULL. 97 (1962); Monroe, *Voluntary Compliance Programs*, 22 CASE W. RES. L. REV. 65 (1970) (*supra* in this issue); Van Cise, *Problems and Procedures of Counsel in Advising on Compliance with the Antitrust Laws*, 5 ANTITRUST BULL. 221 (1960); Withrow, *Making Compliance Programs Work*, 17 BUS. LAW. 877 (1962).

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and the general public. Its ambitious intent is successfully executed. Anyone expecting the literary product of a law professor (Ross) and a psychiatrist (Victoroff) to be an incomprehensible blend of legalese and psychiatric jargon need not be apprehensive. This book is a remarkably concise and clear description of the medical and legal aspects of mental illness in Ohio.

The book is designed primarily to aid the Ohio physician who is not a psychiatrist and who more than likely has no knowledge of the laws and procedures affecting the disposition of mentally ill patients. In practice, fewer than 10 percent of Ohio's physicians are familiar with the treatment facilities for, and the possible legal ramifications of, hospitalizing the mentally ill.<sup>1</sup> Since more than half the psychiatric patients hospitalized in Ohio are admitted through the efforts of physicians who are not psychiatrists, this lack of knowledge can present serious problems.<sup>2</sup>

The book has two major divisions. The first, entitled "Medical Aspects," lists and describes the roles of the medical, paramedical, law enforcement, and judicial specialists who might become involved in the handling of mentally ill patients. The several kinds of private and public hospital facilities available for short-term or long-term treatment of disturbed patients are also set forth and differentiated. The last part of this division contains capsule descriptions of the most common types of psychiatric disturbances.

The second division, entitled "Legal Aspects," begins by setting forth Ohio's legal definition of mental illness and explaining such ramifications as criminal responsibility, competency, and guardianship. The procedures for both voluntary and involuntary hospital admission are outlined. The legal and medical rights of a mental patient are spelled out: for example, the right to continuing diagnosis, the right to release, and the right to communicate with persons outside the hospital. These rights are embodied in section 1 of the Ohio hospitalization statute<sup>3</sup> — a law for which the authors are largely responsible.<sup>4</sup> Also discussed is the conflict between the right of the doctor and patient to a confidential relationship and the need for full disclosure to the probate judge who, in Ohio at

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<sup>1</sup> V. VICTOROFF & H. ROSS, *HOSPITALIZING THE MENTALLY ILL IN OHIO* at xix (1969).

<sup>2</sup> *Id.*

<sup>3</sup> OHIO REV. CODE ANN. §§ 5122.25-.31 (Page 1970). See also V. VICTOROFF & H. ROSS, *supra* note 1, at 138.

<sup>4</sup> Ewing, *Preface* to V. VICTOROFF & H. ROSS, *supra* note 1, at viii.

least, must ultimately determine such issues as involuntary admission, release, guardianship, and competency.

The final 150 pages are devoted to five appendices which list, among other things, Ohio's psychiatrists, psychiatric facilities, and probate courts, as well as the public and private organizations concerned in some way with the care of the mentally ill or retarded. That these appendices will probably not need revising or updating for some time is a sad commentary on the State's static response to its mental health needs.

Apart from an objective one and one-half page appraisal of the "Ohio Situation,"<sup>5</sup> it is possible to read this book without getting a visceral awareness of the disgraceful mental health situation in Ohio. By failing both to delineate the inadequacies of the present system and to make forceful recommendations for remedial action, the authors missed a timely opportunity to instruct those groups most able to bring about pressure for necessary changes. The authors point out that "the treatment of child psychiatric conditions and delinquency [are] two of the most serious areas of deficiency in the state system."<sup>6</sup> But they fail to mention that for a recent 12-month period Ohio ranked 41st in the nation in per capita maintenance expenditures for mental health,<sup>7</sup> and ranked last in these expenditures among comparable Great Lakes and New England industrial states.<sup>8</sup> During the same period, Ohio's per patient per day expenditures were about three-fourths the national average.<sup>9</sup> As the authors recognize, Ohio ranks 12th to 14th nationally in per capita income.<sup>10</sup> Thus, the reasons for such niggardly spending cannot be based on the poverty of its citizens.

An example of the shortsighted use of funds by Ohio can be

<sup>5</sup> V. VICTOROFF & H. ROSS, *supra* note 1, at 5-6.

<sup>6</sup> *Id.* at 30.

<sup>7</sup> PUBLIC HEALTH SERVICE, U.S. DEP'T. OF HEALTH, EDUC., & WELFARE, MENTAL HEALTH STATISTICS, CURRENT FACILITY REPORTS — STATE AND COUNTY MENTAL HOSPITALS, July 1, 1966-June 30, 1967, ser. MHB-H-12, Table 1, at 9 (Jan. 1968).

<sup>8</sup> *Id.* Comparative dollar per patient per day figures are as follows:

Conn.	11.24	Mich.	9.73	Pa.	8.19
Ill.	11.12	Wis.	9.55	N. Y.	7.69
Mass.	10.25	N. J.	8.95	Ohio	6.83
Minn.	9.89	Ind.	8.42		

Alaska ranks first in the country with \$32.37; Colorado is a distant second with \$21.10. At the other end of the scale are Alabama and Mississippi with \$4.30 and \$3.99 respectively.

<sup>9</sup> *Id.* The national average for this period was \$8.84 per patient per day; Ohio's average was \$6.83.

<sup>10</sup> V. VICTOROFF & H. ROSS, *supra* note 1, at 6.

found in the relatively new 92-bed psychiatric hospital for children at Sagamore Hills.<sup>11</sup> Due to a lack of personnel — or more precisely, a lack of funds — this facility has never been fully occupied, and the present occupancy rate is about 65 percent of capacity.<sup>12</sup> Another example of inadequate funding can be seen in the situation where emotionally disturbed children over 12 years of age are taken to the juvenile court for help. One form of assistance, considered by some experts to be the most desirable,<sup>13</sup> is placement in a private residential treatment center. However, the juvenile court can only exercise this option for that part of the year for which funds are available. In both 1969 and 1970 the \$764,000 allocated was gone in less than 6 months.<sup>14</sup>

Apart from their failure to elaborate upon Ohio's disgraceful mental health situation, the authors passed up an opportunity to compare Ohio's efforts in this area with those of the more enlightened states.<sup>15</sup> Misery of the magnitude that exists in Ohio's mental institutions deserves every available forum. Unless the public is made aware of the deficiencies which exist in treatment of the mentally ill, the impetus for improvement may never materialize.

In fairness to the authors, however, it was their stated purpose not to judge, but rather to describe and explain Ohio's mental health alternatives and legal implications. This they have done well, and their product is a valuable addition to anyone's library. But the existence of alternatives should not lead one to believe that the treatment afforded by Ohio is satisfactory. The choice is all too often between grossly inadequate alternatives.

VILMA L. KOHN\*

<sup>11</sup> For some facts about this facility, see V. VICTOROFF & H. ROSS, *supra* note 1, app. 2, at 256-57.

<sup>12</sup> Interview with Dr. Rachel Baker, Assistant Clinical Professor in Child Psychiatry at Case Western Reserve University, School of Medicine, Cleveland, Ohio, in Cleveland, Ohio, Sept. 11, 1970.

<sup>13</sup> Interview with Dr. Larry Schreiber, Child Psychiatrist, Hanna Pavilion, University Hospitals, Cleveland, Ohio, in Cleveland, Ohio, Sept. 11, 1970.

<sup>14</sup> Interview with John J. Alden, Director of Social Services, Juvenile Court, Cleveland, Ohio, in Cleveland, Ohio, Sept. 11, 1970.

<sup>15</sup> For example, Massachusetts provides either residential or day-care treatment for all children excluded from school because of emotional difficulties. MASS. GEN. LAWS ANN. ch. 71, §§ 46H, 46I (1969). Although the Cuyahoga County Board of Education has estimated that 1 to 3 percent of the county's school children need to be placed outside the school, and 1 percent absolutely need residential treatment, Ohio has no comparable provisions. Interview with Dr. Rachel Baker, *supra* note 12.

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LAW AND THE BEHAVIORAL SCIENCES. Edited by Lawrence Friedman and Stewart Macaulay. Indianapolis: The Bobbs-Merrill Company, Inc. 1969. Pp. xxxv, 1059. \$14.50.

The significance of this extensive and varied collection of behavioral studies concerning the legal process is fully appreciated only when one considers the existing state of legal education. Articles concerning legal education are wont to speak of the ferment brewing in law schools. In recent years it has appeared that the pot is about to boil over. Read the well reasoned and documented critique of our law schools by Professor Paul Savoy if you are not already aware of the extent to which law schools are viewed by many as "places where old men in their twenties go to die."<sup>1</sup>

In the past the response of law faculties to criticism of teaching methods has been to propose packaging the old wine in new bottles by substituting the problem method or clinical approach for the traditional case method. The substantive emphasis remains unchanged. The student must learn the art of lawyering, and this requires attention to the traditional "hard core" areas of the law. For those who have experienced the delight of spinning the seamless web of the law by manipulating analogies and drawing mind-expanding distinctions such as that which differentiates an executory interest in the nature of a shifting use from a contingent remainder, it is hard to see how a young law student would object to learning to "think like a lawyer." Some, however, think that undue emphasis on exegeses of appellate opinions serves to sharpen the mind by narrowing it. Indeed, a few are bold enough to suggest that the typical law school curriculum is "too rigid, too uniform, too narrow, too repetitious and too long."<sup>2</sup> For these few, the legal scholar all too frequently fits Archibald MacLeish's characterization: "The scholar digs his ivory cellar in the ruins of the past and lets the present sicken as it will."<sup>3</sup>

Some attribute the tension that now exists in our law school enterprises to the new breed of students who, raised in a Spockian,

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<sup>1</sup> Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 462 (1970). For a similar although less extreme critique, see Watson, *Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968). For an earlier comment on the failure of law faculties to apply basic learning principles in legal education, see Kelso, *Science and Our Teaching Methods: Harmony or Discord?*, 13 J. LEGAL ED. 183 (1960). See also Kelso, *Behavioral Psychology: Springboard for Imaginative Legal Educators*, 45 DENVER L.J. 313 (1968).

<sup>2</sup> PROCEEDINGS OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS, REPORT OF COMMITTEE ON CURRICULUM 1, 8 (1968).

<sup>3</sup> A. MACLEISH, *THE IRRESPONSIBLES* 26 (1940).

permissive milieu, are incapable of exercising the self-discipline necessary for the completion of a rigorous program of education. My own personal experience, and that of others, indicates that this hypothesis widely misses the mark.<sup>4</sup>

The thesis advanced here is that the present crisis arose because the emphasis in law school curricula has remained relatively unchanged in the last 30 years, even though our conception of law has undergone a radical transformation. The teachings of the realists, sociological jurists, jurimetricians, and judicial behavioralists have impelled not only legal scholars, but lawyers and judges as well, to reject the views that law is a discoverable entity and that judges arrive at decisions through mere manipulation of legal rules and principles.<sup>5</sup> Instead, the law is viewed today from a functional perspective. Geoffrey Hazard suggests that our present jurisprudential outlook on the nature of law invites

a pervasive assimilation of social science and legal criticism, scholarship and education. If, as someone has observed, lawyers are social scientists of necessity, it is time that they became better ones than they have been. To do so entails more than taking findings from social science, as in taking findings from the weather bureau. It requires sympathetic . . . comprehension of the theory and ethos of social science disciplines, of the origins and development of the questions that concern them, of the premises and methodology of their processes of inquiry.<sup>6</sup>

If we now accept a concept of law which admits that it is constantly recreated within the context of transacting legal, social, and behavioral systems, how is it possible to retain a curriculum that deals so minimally with the relevant processes and variables? In addition, it is clear that practically speaking the courtship of law and science has progressed to the point where the offspring are arriving, whether or not they are legitimized by law school curriculum committees. Consider the relevance of social science findings and techniques to the determination of adjudicative and legislative facts (statistics and discrimination in selection of juries and in reapportionment; economic theory and antitrust violations; sociology and family law; modern logic and drafting techniques and interpretation of documents). Or consider the impact of the prodigious protégé of scien-

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<sup>4</sup> See *Forward* to CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE, 5, 8 (E. Kitch ed. 1970).

<sup>5</sup> See, e.g., Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 540-43 (1968).

<sup>6</sup> Hazard, *Challenges to Legal Education*, in THE PATH OF LAW FROM 1968, at 185, 191 (1968).

tific technology — the computer. There are endless examples of the ways in which the law must deal with scientific advances.<sup>7</sup> But what do we find when a survey is made of the state of legal education?

As a profession, law is concerned, of course, with human relationships, and one might logically expect to find behavioral sciences treated as basic disciplines for the preparation of lawyers. Yet, for reasons that lie in the history of the legal profession and of university disciplines, law schools do not employ social scientists to any great extent, nor are they deeply involved in what is ordinarily considered social science research.<sup>8</sup>

Given our schizophrenic attitude toward law and legal education, is it any wonder that criticism is reaching the boiling point? But how is one to implement a program to train law students in the new social science methods and to provide them with access to the more relevant findings of these disciplines? Certainly the publication of *Law and the Behavioral Sciences* is a step in the right direction. Hopefully, it will not meet the fate of Glendon Schubert's helpful text, *Judicial Behavior: A Reader in Theory and Research*, which received such a warm reception on its publication in 1964 that it was out of print a few years later.<sup>9</sup>

But, realistically, are law faculties and students prepared for a course using *Law and the Behavioral Sciences*? There are numerous points in this text that require an understanding of statistical inference, beyond that gained in a first course in statistics, to develop a meaningful critique of the conclusions of the studies presented.<sup>10</sup> How is it possible to discuss the validity of the Pareto optimality without a first course in decision theory like that offered at Yale Law School?<sup>11</sup> Indeed, each chapter in *Law and the Behavioral Sciences*

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<sup>7</sup> See S. NAGEL, THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE 29-33 (1969); Lewis, *Systems Theory and Judicial Behavioralism*, 21 CASE W. RES. L. REV. 361, 362-63 (1970).

<sup>8</sup> NATIONAL ACADEMY OF SCIENCES & SOCIAL SCIENCE RESEARCH COUNCIL, REPORT ON THE BEHAVIORAL AND SOCIAL SCIENCES: OUTLOOK AND NEEDS 184 (1969).

<sup>9</sup> In 1965 I suggested that the primary significance of Schubert's text was "its potentiality for instructing critics in precisely what the behavioralists are trying to accomplish. Hopefully, with understanding will come a reduction in hostility and a greater rapport between law-trained persons and judicial behavioralists, and ultimately the long-awaited integration of law and the other social sciences." Lewis, Book Review, 20 RUTGERS L. REV. 162, 170 (1965). I now view my optimistic prognostication as hopelessly naive.

<sup>10</sup> See, e.g., Berkowitz & Walker, *Laws and Moral Judgments*, in LAW AND THE BEHAVIORAL SCIENCES 198 (L. Friedman & S. Macaulay eds. 1969).

<sup>11</sup> See Buchanan & Tullock, *The Calculus of Consent*, in LAW AND THE BEHAVIORAL SCIENCES 57, 67 (L. Friedman & S. Macaulay eds. 1969). The Yale course is "aimed primarily at giving a background in model building problems and the concepts of con-

merits a separate course, and in some cases several preparatory courses.

The sequence starts with the threshold question of how one delineates the legal system from the systems with which it transacts. Traditionally this topic is dealt with extensively in a jurisprudence course. Perhaps the careful attention given to the "concept of law" in most such courses would justify suggesting that a student would profit more from a social science text if he had completed a good course in jurisprudence. As Professor Harry W. Jones has noted, "[c]ontemporary scholarship in the sociology of law is making insufficient use of jurisprudential insights as hypotheses for empirical investigation and verification."<sup>12</sup> The obvious reason for this state of affairs is that very few individuals have any in-depth knowledge of both legal philosophy and social science.<sup>13</sup>

The remaining chapters deal with questions that the functional approach compels us to answer. For example, how does the law actually operate in the social system? It is difficult to imagine how a contracts teacher could ignore an article like Macaulay's *Non-Contractual Relations in Business: A Preliminary Study*,<sup>14</sup> which reveals:

Disputes are frequently settled without reference to the contract or potential or actual legal sanctions. There is hesitancy to speak of legal rights or to threaten to sue in these negotiations. Even where the parties have a detailed and carefully planned agreement which indicates what is to happen if, say, the seller fails to deliver on time, often they will never refer to the agreement but will negotiate a solution when the problem arises apparently as if there had never been any original contract. One purchasing agent expressed a common business attitude when he said, "if something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently."<sup>15</sup>

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flict theory, including a basis of game theory, bargaining, and strategic analysis." Bulletin of Yale University, Aug. 1969, at 45.

<sup>12</sup> Jones, *A View From the Bridge*, LAW & SOC'Y REV. 39, 41 (Summer Supp. 1965) (emphasis omitted).

<sup>13</sup> Glendon Schubert notes: "[L]egal sociology . . . labors under the constraining handicap that most persons who become law professors are poorly trained as sociologists; it is hardly surprising, therefore, that many of the attempts to date, by law professors who have endeavored to do sociological research on legal problems, have not yet become noted for their empirical contributions to either law or sociology." Schubert, *From Area Study to Mathematical Theory*, in COMPARATIVE JUDICIAL BEHAVIOR 3, 5 (G. Schubert & D. Danelski eds. 1969).

<sup>14</sup> Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, in LAW AND THE BEHAVIORAL SCIENCES 145 (L. Friedman & S. Macaulay eds. 1969).

<sup>15</sup> *Id.* at 155.

In subsequent chapters the text sets forth studies dealing with the impact of law on society, the impact of society on law, the legal system as a social system, and the relationship of law to culture and history. It is apparent that several courses would not exhaust the subject matter alluded to in these studies.

The topic that might initially appear least significant, that of comparative law, is essential to the behavioral enterprise, since "no comparison of a single pair of natural objects is interpretable."<sup>16</sup> Thus, legal scholars are becoming interested in comparative law not only in its own right but also as a means of verifying hypotheses concerning causal relations.<sup>17</sup> Schubert suggests that there is value in comparative studies of "primitive" tribes since "[s]uch analyses of microcosmic social systems may suggest hypotheses about fundamental communalities in the behavior of human beings with statuses and roles in judicial systems, even when such a system is so undifferentiated that we can observe only the judicial function because no judicial structure is manifest."<sup>18</sup>

Ideally, prior to taking a course using this text a student would have acquired a sufficient understanding of behavioralism to appreciate the difficulties involved in assessing the scientific validity of the studies — both from a methodological and from a substantive viewpoint. The student should be aware of the significance of the distinction between systems transacting as opposed to reacting. He should surely appreciate when equilibrium, homeostatic, and morphogenetic models are appropriate. The Whorfian hypothesis and its attendant assumptions, as opposed to Chomsky's thesis, should be in his store of knowledge. He might not be expected to know the Scheherazade effect,<sup>19</sup> but he should certainly know the import of the more significant behavioral variables that can invalidate studies, including the Halo effect, Hawthorne effect, Rosenthal effect, substantive Heisenberg analogue, regression problem, *ceteris paribus*

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<sup>16</sup> Campbell, *The Mutual Methodological Relevance of Anthropology and Psychology*, in *PSYCHOLOGICAL ANTHROPOLOGY* 333, 344 (F. Hsu ed. 1961) (emphasis omitted).

<sup>17</sup> See Schubert, *supra* note 13, at 5. See also Lempert, *Strategies of Research Design in the Legal Impact Study*, 1 *LAW & SOC'Y REV.* 111 (1966). The problem of regression and other difficulties involved in controlling for plausible rival hypotheses are set forth in Campbell & Ross, *The Connecticut Crackdown on Speeding: Time-Series Data in Quasi-Experimental Analysis*, in *LAW AND THE BEHAVIORAL SCIENCES* 374 (L. Friedman & S. Macaulay eds. 1969).

<sup>18</sup> Schubert, *Cultural Anthropology and Judicial Systems*, in *JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH* 84, 85 (G. Schubert ed. 1964).

<sup>19</sup> See Goldiamond, *Self-Control Procedures in Personal Behavior Problems*, 17 *PSYCHOLOGICAL REPORTS* 851, 855-56 (1965).

problem, the idiographic problem, the conflict between phenomenology and phenomenalism, the competing fallacies of reductionism and reification, and the Verstehen problem, to mention only a few. Ideally, a student should have participated in a clinical project in which he designed a study, since, as with lawyering, "[t]his ability to deal with specific problems is something that perhaps can only be learned by doing . . . ."<sup>20</sup>

The primary criticism then that emerges from a reading of *Law and the Behavioral Sciences* is not of the text but of the law schools. They are not yet ready for this text. The faculties are generally neither prepared nor interested in deviating radically from the traditional approach that has made legal education what it is today. The curriculum still emphasizes analysis ad nauseum of desiccated appellate opinions.<sup>21</sup> Occasionally there are course offerings in social sciences, but the bulk of the curriculum, especially at the middle-range law schools, remains dedicated to the traditional courses as though the schools were totally committed to the policy expressed in Samuel Hoffenstein's immortal "Come weal, come woe, my status is quo."

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<sup>20</sup> Edwards, *Experiments: Their Planning and Execution*, in I HANDBOOK OF SOCIAL PSYCHOLOGY 259, 285 (G. Lindzey ed. 1954).

<sup>21</sup> Professor Kitch provides us with at least a partial answer as to why this is true: "It becomes quickly obvious that if the social science skills are the relevant skills, they are not skills that the typical American law teacher has mastered." E. KITCH, *supra* note 4, at 10-11.

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