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The Perilous Necessity: Non-Legal Materials in a Family Law Course*

ROBERT J. LEVY†

Even the most casual observer should be aware that we are living through a period of intense interest by law professors in the behavioral sciences. No volume of the Journal of Legal Education is published without at least one essay on a law school program, a design for cooperative research or a criticism of the lawyers for paying no heed to their more scientific brethren. A review of A.A.I.S. convention agendas would indicate, I am sure, very few meetings without some discussion of "Law and the Behavioral Sciences." The interest manifests itself in a variety of ways, but nowhere more actively, nowhere more passionately and obdurately, than in the preparation of teaching materials. In fact, all of this activity is part of a "second explosion" of the interest. It is striking that Professor Paulsen should be defending the "traditional" casebook by reference to Jacobs & Goebel since Brainerd Currie’s brilliant exposition of the initial "explosion" highlighted the first edition of that casebook as one of the prime examples of the then new and exciting effort to "coordinate" law and the behavioral and social sciences. And,

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3. Jacobs & Goebel, Cases and Other Materials on Domestic Relations (4th ed. 1961). I should note that, as it was presented, the burden of Professor Paulsen’s address was that the extant non-traditional books are inadequate; we have no choice, therefore, but to use one of the traditional efforts. That position is not too far removed from the one presented here.

of course, it was the Columbia Law School's curriculum study and revision which detonated the first explosion.

I call the coincidence striking because by any definition of the term the current Jacobs & Goebel must be considered a traditional book. When I peruse its contents my most vivid image is of Miniver Cheevy, of whom, you will remember, Edward Arlington Robinson wrote:

Miniver loved the Medici
albeit he had never seen one;
He would have sinned incessantly
could he have been one.

Miniver cursed the commonplace
and eyed a khaki suit with loathing;
He missed the mediaeval grace
of iron clothing.5

Select a section of the book at random and you may discover that cruelty was not even a ground for divorce a.m.t. in the classical canon law, but "when the English ecclesiastical administration became independent of Rome, divorce a mensa for cruelty became usual. The reasons for this change are obscure . . . "6 Despite the obscurity, a footnote continues: "In proceedings for restitution of conjugal rights the ecclesiastical remedy for desertion, the so-called exceptio saevitae (viz. justification on the ground of cruelty) could be interposed."7 Make no mistake. I am not a history-hater. Indeed, I agree with Professor Allen's complaint that we have improperly neglected to include history as one of the social sciences with which lawyers should be concerned.8 But it does seem proper, since we are talking of history, to recall Aristotle's belief in moderation.

In any case, I cite the evidence not to condemn but to illustrate a metamorphosis. I was tempted to believe that my feelings about Jacobs & Goebel were simply an example of the new generation considering old-fashioned what was to its predecessor a substantial, even revolutionary, advance. But there is overwhelming evidence that the editorial policy has been substantially revised. Consider the prefaces. In 1933 Professor Jacobs said:

7. Id. at 428-29, n. 6.
8. Allen, supra, n. 2.
Much new material must be presented for the consideration of the student. For instance, it would be almost impossible for a student to acquire even a working knowledge of current family controls without a survey of the more pertinent non-legal evidence. An attempt to confine the study to the strictly legal rules would prove inadequate. . . . The editor regrets that more non-legal material could not be included. 9

By 1953 Dean Kingsley was referring to the third edition as a "reasonably traditional" casebook. 10 The foreword attributed to Professors Jacobs and Goebel in 1961 was in startling contrast:

Because this book is designed to fit law students to deal as lawyers with questions of domestic relations, we have not entered as extensively as we might have into the sociology of the subject. Enlightening as such studies often are, they have had to yield place to technical matter. Many a litigant in the cases that follow fell into difficulties because statutes were not carefully read or because procedural problems were inexpertly handled. Such deficiencies can be averted only by training in the close reading of statutes, and in procedural detail. The opportunity for this we have endeavored to provide. 11

The metamorphosis reflects more than the interests and temperament of the editor with primary responsibility; it is as well symptomatic of a flux, a pulsation in our concern with non-legal materials. Harry Kalven spoke of the "manic-depressive quality of the law's efforts"; 12 Caleb Foote, of a "repetition of the same cycle of fanaticism followed by failure." 13 Whether the last period of "failure" was caused by the "crusading" and "revolutionary" aspects of the first explosion we need not investigate; 14 it is sufficient to point out that the current explosion seems to be better controlled, and the shock troops are moving forward with more care and less desire for a spectacular conquest. 15

Without making any effort to predict the ultimate results of this explosion, it seems necessary to recognize that Jacobs & Goebel's fourth child faces in a different direction

14. See Kalven, supra, n. 12, at 95.
than the predominant Family Law casebook population (if one may count among the births, editor-mothers either in labor,—as Foote and Sander—or quick with child—as Goldstein and Katz). The children of this new generation cannot be judged without reference to the shortcomings of their “traditional” second cousins.

I

The first count of any indictment against the “traditional” casebook should be its lack of an adequate sense of humor. Professor Currie objected to the “humorless reviewer” who begrudged the space given in a footnote of Jacobs’ first edition to Lord Neaves’ verse on Gretna Green marriages. The second edition only cited the verse; by the third all mention had been excised. But this is a minor matter. I object to any discussion of what is euphemistically called “Third Party Interference” which does not include Bedan v. Turney, an action for criminal conversation in which the court described the injury done by the defendant as an invasion of the husband’s exclusive right to beget his own children—and then held that the husband’s impotence was irrelevant. I object to any consideration of paternity actions which does not include a reference to Commonwealth of Virginia v. “Paul” Huffine—a case in which the prosecuting attorney was embarrassed by the report of a medical examination indicating that the defendant was a female; or Woodbury v. Yeaton, interpreting Maine’s rule that the mother’s accusation during travail is a condition precedent to maintaining a paternity action, denied recovery to a mother whose child was delivered by Caesarean section—since anaesthesia results in a complete loss of sensation and, therefore, “no travail and no pains of parturition in the ordinary sense of the term.” I object to

16. Currie, supra, n. 4, at 37, n. 150.
17. Ibid.
18. Id. at 37, n. 156.
22. Id. at 151, 191 A. at 280. Some poetic license has been taken with the case. The court actually reversed the judgment in favor of the plaintiff because she had not pleaded that she had given birth by Caesarean section and, therefore, the defendant was not “apprised of the precise nature of the charge against him. Id. at 153, 191 A. at 281.
any case materials on sexual misconduct which do not include the Minnesota statute making it a felony to carnally know a bird in any manner; or the Ohio statute which made it a felony for any instructor in roller skating to seduce a female pupil; or Williams v. State which reversed the convictions of a young couple found copulating on a highway to the amusement of sundry passers-by, since the lewdness statute, prohibiting indecent exposure in a public place, could not be interpreted to include a highway in the absence of a showing that it was being habitually travelled upon at the time and place of the act. And I cannot accept any casebook presentation of the law of divorce which does not include Bohnel v. Bohnel, which held that an English husband, who periodically dressed up as a woman, was not guilty of cruelty even though his wife had suffered a nervous breakdown upon each discovery of his avocation, because he had always tried to hide his idiosyncrasy to protect her; or Willan v. Willan in which a wife's cruelty consisted of insisting upon sexual intercourse with her husband

"... at times when he did not wish to have it—obliging him to conform to her wishes by indulging in various types of violence to bend his will to hers. In particular, it was said that she would pull his hair, catch hold of him by the ears and shake his head violently to and fro; and at any rate, on one occasion, ... she kicked him on his injured leg, causing him great pain. She would also pester him far into the night to have sexual intercourse, so that eventually he was compelled to comply as the only means of getting his rest."

The Court of Appeal held that the husband had condoned the cruelty by having intercourse with his wife the night before he left home, evidently on the theory that a husband cannot be raped.

Perhaps you will be more interested in other reasons why the "traditional" casebook must be rejected. The second count of the indictment, then, should read that such exercises have little, if any, relation to the real world in which we live and in which the law students will practice their profession.

In the first place, it is literally impossible to convince students—even those who have not worked in a law firm and

25. Williams v. State, 64 Ind. 553 (1878).
28. Id. at 625.
seen how a divorce is actually handled—that the law in appellate court opinions is really the law in action. Small wonder—it has hardly anything to do with it. Recrimination, condonation by intercourse, the standard formulation of what constitutes cruel and inhuman treatment—all of these are interesting oddities found in contested cases and in Family Law casebooks; neither source commonly affords guidance to a well-run law partnership. I am not arguing that these doctrines are irrelevant; only that their importance to law practice is sufficiently marginal for most purposes that we should enlighten the student as to other matters as well. Professor Kahn-Freund, recognizing that “only the exceptionally abnormal case” is decided by an appellate court, cautioned that to teach Family Law in terms of “case law” is “to act like a professor of medicine who not only teaches pathology to students knowing nothing about the anatomy or physiology of the healthy body, but who teaches pathology in terms of the rarest diseases.”

Most important for our purposes, the real world does contain difficult and absorbing “legal” problems: policy problems about the proper legal controls for the going family (such as those relating to support, intra-family torts, adoption, abortion, artificial insemination); about the controls for the creation and destruction of the family unit; for the relations of its members with outsiders; problems, also, about the proper legal sanctions for pre-martial sexual expression; about the proper procedures to be utilized in applying the controls and sanctions, or even in selecting those which should apply. These are the stuff of which law school courses are typically made; moreover, they require the kind of analysis which tradition informs us makes good lawyers. But these problems cannot be solved simply by reference to appellate court opinions: quite frequently the issues have not yet been decided; and if the discussion is to avoid “the danger of degenerating into an enumeration of meaningless abstractions,” the relevant materials must be non-legal.

Some examples of the problems ignored by the traditional casebook will illustrate my thesis. The proper method of trying custody disputes is a matter of current concern to judges, lawyers, often to legislatures, around the country. Under

30. Ibid.
what circumstances should a judge order an extra-record investigation by a social worker, and with what safeguards? Neither the student nor the judge can decide such a problem solely by reference to the few relevant appellate decisions—even if they were found in the traditional casebook. Its solution depends, rather upon whether an intelligent decision can be made without extra-record aid, upon a judgment about the background and training which a social worker brings to the assignment, and upon a judgment about the values of an open and adversary hearing, whatever its consequences. These underlying questions can be answered only by examining a host of non-legal premises: what is the training of a social worker; how unbiased can the report be; what is the quality of reports which have been utilized in such disputes in the past; how important is an open hearing; what are its risks?

Another example is afforded by the current cry for a Family Court as a means of solving all of the problems of marriage break-up in our society. It is impossible, of course, to assess the value of this instrument if the casebook doesn't mention it at all. In any case, how can we make judgments about the relative merits of voluntary marriage counseling services as a branch of the court, the “therapeutic approach,” the conciliation court method, without examining more than strictly legal material. One example should suffice. Judge Pfaff, of the Los Angeles Conciliation Court claims that his conciliation agreement “utilizes a technique entirely in keeping with the most advanced thinking in the psychiatric field” to be sure, if he is correct we should all be promoting the adoption of his ideas. But we need information of a non-legal variety to determine whether it is of any value to a recently estranged and reconciled couple to sign a reconciliation agreement which affords “a blueprint for successful living.” A typical term of the agreement provides:

The wife agrees to respond to the husband's efforts in love-making and not act like a patient undergoing a physical

examination. For the husband to acquire proficiency in making intercourse pleasurable to the wife, he must learn to relax physically and take his time. To do so, he should not be absorbed in himself, but rather in seeing to it that his wife is duly responding. The ultimate in his pleasure should be the realization that his wife also has enjoyed complete satisfaction.\(^\text{37}\)

A rational choice may be made only if we are willing to study statistics as to the results achieved by the Conciliation Court and other Family Courts (and, of course, many of the relevant statistics have never been released); if we will seek those statistics when they are not available; and finally, if we ask some astute questions of, and examine astutely the answers given by, people who spend their professional lives studying the interaction between husbands and wives—psychiatrists, psychologists, social workers, marriage counselors.\(^\text{38}\)

Consider also the impact upon legal doctrine of the burgeoning, but nonetheless quite limited, ability of psychiatrists to understand, predict and modify human behavior. A recent New Jersey opinion intimated that a wife's homosexual conduct might be "extreme cruelty \textit{per se};"\(^\text{39}\) there was no discussion of the possibility that she should not have been held responsible for such conduct. The Pennsylvania Superior Court held that it would be barbarous to grant a husband a divorce for his wife's adultery if her conduct were the product of insanity;\(^\text{40}\) without any indication that thought was given to the problem, the court adopted the \textit{McNaghton} rule\(^\text{41}\) as a standard for determining the sanity issue.\(^\text{42}\) The Court of Appeal has just denied a wife a divorce from a husband who has suffered psychotic delusions and has been a mental patient for the last ten years; the defendant had continually nagged and criticized his wife, and searched the house for partners in her adultery whose existence and location were communicated

\(^{37}\) \textit{Ib.} at 19.

\(^{38}\) It is probable that we will have to formulate and execute joint research with members of other professions in order to obtain even the preliminary answers to these questions and a host of others. See, e.g., \textit{Foote, supra}, n. 13, at 81-82; \textit{Kalven, supra}, n. 12, at 98. See generally \textit{Cohen, Robson and Bates, Parental Authority: The Community and the Law} (1958).

\(^{39}\) \textit{H. v. H.}, 59 N.J. Super. 227, 236, 157 A.2d 721, 726 (1959). The court actually decided that "the required harmful effect of defendant's behavior has been sufficiently established." \textit{Ibid.} Nonetheless, the opinion talks about the conduct and the "presumptive effect of homosexuality upon a normal spouse" in such a way that the reader is left with the impression that few plaintiffs will be denied a divorce if they succeed in proving their spouses' homosexuality. \textit{Id.} at 237, 157 A.2d at 727.


to him by his "voices." Nonetheless, the husband was not responsible, although he understood "the nature and consequences of his acts" because, under the second branch of the McNaghton rule, he did not know that his conduct was wrong.\(^4\)

Certainly, the psychiatrists have had much to say about the McNaghton rule's validity in testing criminal responsibility; it is much more difficult, I think, to justify its application in deciding whether a divorce should be granted. It is hardly adequate to point out that "there is a sharp conflict between law and medicine," as do Jacobs & Goebel;\(^4\), and the student can make no reasoned evaluation of the problem without some awareness of psychiatric insights about people whose emotional disturbances involve their spouses in one way or another.

Let me offer one more example. We expect the law student, portraying the legislator, to examine a fairly common social problem—the rights and duties of people who present themselves to a court with an existing (frequently just ended), family-type arrangement in which the man and woman are not married. Is it sufficient to examine whether this man and this woman "really intended" to consider themselves married, or said magic words which create a "common law marriage"? These questions have been considered adequate even though the legal issue may have been a woman's claim to workmen's compensation for an injury done to a man with whom she lived for twenty years and whose six children she must feed and clothe. But if these are sterile questions—as I earnestly believe them to be—we must then seek the proper materials of a better approach.\(^4\)

It is natural, I think, and essential, to look to the sociologists, perhaps to the social workers in welfare agencies, to determine how prevalent the difficult case is. If statistics, or even estimates, are available, we should obtain them; and we owe a duty to our students to present them for their consideration.\(^4\) Instead, the tradition book offers us cases such as Grigsby v. Reib,\(^4\) where the housemother of a group of prostitutes was denied the estate of a man who had

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44. Jacobs and Goebel, op. cit., supra, n. 3, at 164. The editors made the statement in the course of a discussion about whether an insane spouse may obtain an annulment if the marriage ceremony took place during a "lucid interval." The criticism, it seems to me, is no less apropos of the treatment of insanity as a defense to a divorce action is equally cursory. Id. at 435.
46. See n. 38 supra.
47. Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913).
“agreed” to be her husband; the couple’s cohabitation had not been “professedly as husband and wife, and public, so that, by their conduct toward each other, they . . . [were] known as husband and wife . . .”

This is hardly the end of our responsibility to law students—even if we seek only to introduce them to their responsibilities as lawyers. In a seminar I run, each student interviews a divorce client while the other students observe. One of the clients convinced herself during the interview that she was being silly and should go home and reconcile with her husband. At this point, the advice she sought was what to do about the marriage counselor she was consulting, since he had advised her that the only proper action was to obtain a divorce. The student had no idea what to say to her, nor any idea how to handle the marriage counselor when he finally spoke to him. This incident merely illustrates a truth which every recent graduate discovers with his first domestic relations case: his tasks as a lawyer require familiarity with the terminology, the methods and the roles of a whole host of non-legal experts who are sure to cross his path. Imagine the lawyer for parents in a Juvenile Court parental termination proceeding who cannot appreciate the significance of the testimony of a psychiatrist or a social worker that the child is “emotionally neglected.” Can the unprepared lawyer perform his task in a custody dispute when a social worker prepares a report which claims that his client would “over-protect” the child? Suppose the investigator reports that the client’s spouse is a paranoid schizophrenic but should be given custody of the children anyway? No one who has any contact with the practice of domestic relations cases would deny that encounters with professionals from other disciplines occur with increasing frequency. And an adequately trained lawyer, it seems to me, is one whose academic training has included at least some introduction to the problems he is likely to face in practice. Needless to say, there is occasional dissent from the practicing

48. Id. at 608, 153 S.W. at 1130. It is possible, of course, that the case illustrates the not atypical method by which appellate courts reach the correct results despite inadequacies in the justifications offered in their opinions. Indeed, on this theory the case permits an instructive class discussion. Without engaging in extended jurisprudential or pedagogical theorizing, however, it seems to me that the case is not capable of such an interpretation, nor very useful for such classroom analysis. In any case, the need for statistics is not obviated.

bar; one attorney's response to my seminar’s efforts in this
direction was typical: “We know little enough about Domestic
Relations after we have passed the Bar. Often times our
judgment may be better than a Welfare Worker or psychi-
atrist. We get fed enough of that stuff in everyday life, but
I don’t want too much of it to get into students’ minds that
advise people in trouble.” It is unlikely that the trend will
be reversed — whatever the law professors teach.

Enough of the strictly practical and pragmatic. We can-
not ignore the truth, expressed in a variety of ways and on
innumerable occasions, that “law is nothing more than a form
of social control intimately related to those social functions
which are the subject matter of . . . the social sciences gen-
erally.” Justice Brennan’s comment is typical: “. . . legal
scholarship must . . . be nourished by all the disciplines that
comprehend the totality of human experience.” This is nei-
ther a new idea, nor is it restricted to the study of Domestic
Relations. In the contracts course we examine the conditions
under which a manifestation of intent should be enforceable
by legal process; and, typically but not solely, we inquire as to
the needs of businessmen and the business community. Until
recently, however, the inquiry was academic even if the ori-
entation was broader. Now Professor McCauley is trying to
discover to what extent businessmen consider “deals” binding
whether or not the courts will enforce them. For almost every
subject of our curricula, law professors are investigating em-
pirically what is going on in the real world they constantly dis-
cuss. Studies of procedural devices to avoid delay, damage
awards in personal injury actions, devices to control the jury,
police practices, exercise of the prosecutor’s discretion, are
commonly announced and reported in the law reviews and at
these meetings. The legal rules and social practices covered

50. Letter from Chairman of Minnesota Bar Association Committee on
Unauthorized Practice of Law, quoting a letter from an unnamed member, Nov. 1,
1961.
52. Brennan, Law and Social Science Today 6 (1957), quoted in Donnelly,
“Some Comments Upon the Law and Behavioral Science Program at Yale, 12 J.
Legal Ed. 83, 90 (1959).
54. See, e.g., Zeisel, Kalven and Buchholz, Delay in the Court: An Analysis
of the Remedies for Delayed Justice (1959); Lenin and Woolley, Dispatch and
Delay: A Field Study of Judicial Administration (1961); Cohen, Robson and
Bates, op. cit., supra, n. 38; Rosenberg & Chanin, “Auditors in Massachusetts as
Antidotes for Delayed Civil Courts,” 116 U. Pa. L. Rev. 27 (1961); Franklin Chanin
by a typical domestic relations course have been subjected to
more empirical inquiry than any other subject in which law-
yers are interested. Indeed, we are inundated with data of at
least some relevance. With this material it is possible, perhaps,
to give students an understanding of the legal rules in con-
text — how they conform to societal practices, to our present
institutions, to the historical and projected future modifications
in these institutions. I am not suggesting the empirical data
should be the ultimate authority for either judicial or legis-
lative decision-making. It is one thing to find out whether
most people consider an oral contract binding; it is quite an-
other to recommend repeal of the Statute of Frauds. But “a
well-rounded and integrated professional education . . . . pre-
paring professional students for effective citizenship and culti-
vated living . . . .” should include some understanding of
more than legal rules. If you are willing to accept this premise,
your teaching materials must include some of the data and de-
scription necessary for such an understanding.

Finally, there is something to be said for giving the stu-
dents an even more liberal education — to make them better
lawyers by helping them to become wiser human beings. It is
especially important, it seems to me, for the attorney who
will handle those most intimate human problems which make
up domestic relations cases to have some understanding of what
makes people act the way they do, why the lawyer reacts the
way he does to other people, to their problems, to their meth-
ods of describing and responding to them. Call the endeavor
“Human Relations Training” as Howard Sacks does, or
education “about people” as Dean Griswold has referred to
it, or even “training for professional responsibility” which
the National Council on Legal Clinics seems to prefer —
but whatever the problem of nomenclature, it seems clear that

and Mark, “Accidents, Money, and the Law: A Study of the Economics of Per-
55. Smith, “The Education of Professional Students for Citizenship,” in Educa-
tion for Professional Responsibility, 188, 203 (1948), quoted in Currie, supra,
n. 51, at 21 n. 70.
56. Sacks, “Human-Relations Training for Law Students and Lawyers,” 11 J.
57. Address by Dean Erwin Griswold, 37 Chi. B. Record 199, 203 (1956),
quoted in Sacks, supra, n. 56, at 317. See n. 58 infra.
on Legal Clinics,” 46 A.B.A.J. 1110 (1960). This is not to suggest that the only
concern of the National Council, or of Professor Sacks and Dean Griswold, is the
kind of education described in the text. Many other objectives might also be
phrased. See Sacks, supra, at 1111-12.
the endeavor is important and certainly worth experimenting with. If there is to be experimentation, it must be with materials which are new and primarily non-legal.

II

I hope that I have proved that non-legal materials are a necessity; I have yet to establish that their use is perilous. Initially, a disclaimer is necessary. I am not one of those conventional law teachers Currie describes whose

"original response to the demand for integration of law and the social sciences had been to approve the idea in principle and to take shelter in its unworkability. . . . After Professor Jacobs and his colleagues with prodigious effort . . . had provided an answer of sorts to such questions . . . the response from the same type of teacher was, not that the wrong materials were provided; not that they were not enlightening; but that they should merely be cited, and not put right between the covers of a coursebook, where they could demand attention from students and instructors." 59

I think I have already said enough to indicate that I am committed to hazarding the risks incident to obtaining a usable product.

But there are problems with using non-legal materials. They require time, and lots of space. We must recognize that the time devoted to other matters permits that much less time to make the student an adequate craftsman in Family Law doctrines; and we need only look at any set of briefs filed in any state Supreme Court to see that more craftsmanship would not be amiss. Moreover, there has been a running battle between those who believe that only the conclusions of any relevant empirical data should be included, 60 and those who believe that conclusions alone preclude "a student's comparative evaluation of the research methods of the various disciplines and grossly oversimplify the problem of law-science interaction by giving 'no hint of the arduous process of rational analysis, the search for relevant data, and the complicated statistical techniques that enter into' such research." 61 I tend to sympathize with the latter position, for what it's worth to you, but this view makes the problem of space even more seri-

59. Currie, supra, n. 51, at 36.
The first edition of the *Harper* book,\textsuperscript{62} for example, gave such short shrift to many of the essentials of an introduction to the lawyer's technical tasks that its utility to a group of law students was questionable — no matter how imaginative and enlightening the collection of non-legal materials was. An explanation to law students of some of the basic insights of psychiatry, in a form which is at once intelligible and useful, has not as yet been satisfactorily accomplished.\textsuperscript{63}

Nor can the problem of quality be ignored. Much of the so-called sociological material on the family can only be labelled humbug. How can a student, asked to examine the problem of paternity actions, consider seriously such contributions to the literature as the following comment on *Berry v. Chaplin*:\textsuperscript{64}

> As a matter of cold biological fact, the defendant in the *Chaplin* case was not the father. But in view of the circumstances, it does not seem unjust to require him to contribute to the infant's support. It was mere chance which rendered someone else the actual father, rather than any discretion or restraint on the part of the defendant. The defendant was eminently able to contribute . . . Further, the defendant was within the grasp of the court, whereas it appears that the other putative fathers were not; so for practical purposes, either the defendant was the father or no father could be obtained.\textsuperscript{65}

Moreover, it is an enormous task to find materials of relevance; others have indicated that this is not from a failure to cull the literature, but rather because "sociology, psychology, \textsuperscript{62} Harper, *Problems of the Family* (1st ed. 1952).

\textsuperscript{63} For some of the problems see Watson, "The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty," 11 *J. Legal Ed.*, 73, 74 (1958). In 1958 Dr. Watson indicated that "materials which have been used in this seminar [at the University of Pennsylvania Law School] . . . are fast approaching publication readiness." *Ibid.* In December, 1962, Dr. Watson told the author that he hopes to have the materials ready for use by other teachers "very soon." The author and two psychiatrists, consultants to a project at the University of Minnesota Law School, supported by a grant from the National Council on Legal Clinics, are currently seeking to develop such materials. The task is not an easy one. Whether it is possible at all to teach, even at a very primitive level, "a general theory of normal psychological functioning" (*ibid.*), without the collaboration of a psychiatrist as instructor is doubtful — at least at this stage of our experience.

\textsuperscript{64} *Berry v. Chaplin*, 74 Cal. App.2d 652, 169 P.2d 442 (1946).

\textsuperscript{65} Mumford, "Disregard of Scientific Proof by Juries," 41 *J. Crim. L., C. & P.S.* 320, 324-25 (1950). The comment in the text is unfair to Mr. Mumford. His essay simply argues that a properly functioning judicial system has room for jury verdicts which disregard scientific proof. To this extent, at least, his thesis is not unlike an argument the teacher or a student might make in examining the *Chaplin* case. Perhaps it would be more proper to say that if we are to have material in addition to the cases, the contributions should be realistic examinations of current legal standards and the implications, and values, of alternatives.
and psychiatry are concerned with their own structure, theories and methodological problems which tend to be far removed from the day-to-day problem-solving pressures of legal administration." It is not impossible, of course, that the researchers have not provided "answers" useful to lawyers because the lawyers have taken neither the time nor the trouble to enlighten them as to their needs, or to prove to them that the research can fit with the researchers' interests and disciplines. But we need not pursue solutions here; it is enough to recognize the problems. Equally noticeable is the not yet resolved (perhaps never to be resolved) disagreement between the experimentalist and the clinician as to the relative merits of statistical or case-by-case observational methods. I think I see some signs of a future rapprochement between the two. At Minnesota the graduate students in Clinical Psychology attend the medical school courses in psychiatry and each patient is given the Minnesota Multiphasic Personality Inventory; the medical students at least act as if it has something to teach them about their tasks. Again, it is enough merely to point out that this problem requires some compromise in the formulation of non-legal materials for the Family Law course — a compromise which is likely to satisfy neither side even as it results in an enormous expansion of the necessary reading material.

The quality of the non-legal materials included in a Family Law course, and even the decision to include them, is influenced, I think, by two tendencies which bear repetition here — if only to emphasize that care should be taken to avoid them. One is a certain kind of dilettantism. If it is the fashionable thing to incorporate non-legal materials, some nascent casebook editor (or, perhaps, law-science cooperationist) says to himself, then I shall not be left behind. I am not pointing a finger, understand, but only trying to indicate that the results of such an attitude must always be a disappointing product, as well as a set-back for those who would like to see a reasonable compromise between the traditionalists and the cooperationists. The other tendency is the more than usual interest that Family Law teachers profess and maintain in psychiatry. Dr. Andrew Watson, a psychiatrist with substantial

66. Foote, supra, n. 61, at 81. See also Donnelly, supra, n. 52, at 86.
68. See Foote, supra, n. 61, at 85.
experience in the kind of endeavor we are discussing, had this to say:

We now assume in psychiatry that most of us are led into this specialty, among other reasons, by the unconscious hope of working out private emotional problems in the guise of our professional endeavors. . . . We should anticipate, then, that lawyers interested in this work will share, to at least some degree, this unconscious emotional motivation.  

I would no more disparage this motivation than would Dr. Watson; I mention it only to indicate that it is not difficult for an editor to forget or ignore the primary reasons why psychiatric literature is being introduced into his materials; he might embark instead on a splendid psychiatric endeavor which is an unreasonable imposition on his own teaching ability and his students' time and capacity. Again, I would not point an accusing finger — even if I knew of such a case.

Perhaps our major concern should be with whether all of this non-legal material can be taught in the typical law school intellectual environment. For me, the answer is not an easy one — although I have not yet given up trying and do not expect to.

I do not mean to engage in what has been called arrogant "critical skepticism" about the state of behavioral scientific research. But no matter how accurate the non-legal data or valid the conclusions, coordinating the case law method with some non-platitudinous class discussion of non-legal materials is not a task for those who discourage easily. As a matter of fact, almost the only way to revivify one's courage is to use a traditional book from time to time and rediscover how depressing it can be to discuss social policy with this as background. I am not the first to discover "that student interest is directly proportioned to the tightness with which the . . . data can be integrated with concrete legal problems." Anthro-

69. Watson, supra, n. 63, at 76.
70. Ibid.
71. I would not ignore Professor Kalven's concern that we commonly operate with the mistaken premise that "the only test of relevance of research in the law school world is whether you can teach it." Kalven, supra, n. 66, at 98. If the argument was simply for more research regardless of its immediate utility to our courses, I can wholeheartedly concur. But teaching materials present a separable problem. It seems to me essential to utilize teaching methods, and thus materials, which will stimulate students' thinking in the classroom and in the future; above all, students must be kept engaged enough to be willing to continue their efforts to learn. With unteachable materials, we have lost before we start.
72. Kalven, supra, n. 66, at 96.
73. Foote, supra, n. 61, at 85. See also n. 74 infra.
polylogical information, for example, is far removed from the students' usual legal experience. It might be interesting to learn that among the Dobuans, intercourse with the mother is not seriously regarded if the father is dead;\textsuperscript{74} but since such data is of marginal utility for even the broadest view of the family and domestic relations legal doctrine, I think it would be best to forego the effort.\textsuperscript{75}

The difficulties are magnified by ambivalence about behavioral scientific material. Harry Kalven commented that the law "seems to be simultaneously skeptical and unbelievably gullible."\textsuperscript{76} Law students are not exempt. We are continually faced with "faith in psychiatric and other behavioral science expertise . . .",\textsuperscript{77} on the one hand, and "anxiety" because "psychiatric materials so inevitably cause one to identify oneself with the subject matter . . ."\textsuperscript{78} on the other. However the ambivalence is described, it can be felt in the class and must be overcome if the materials are to be useful. It is my current opinion that the problem, at least in an introductory course with a large class, is insoluble; some psychiatrists with whom I have spoken believe that a series of carefully conceived and appropriately delivered lectures might be successful.

The enormous difficulties of interdisciplinary communication add to the confusion. I remember wanting to examine the problems of contested divorce actions and court procedures for them; I had mimeographed Edmund Bergler's essay "Six Types of Neurotic Reaction to a Husband's Request for a Divorce."\textsuperscript{79} But the lack of an adequate explanation of the frequent references to \textit{oedipal} conflicts and other psychiatric terminology effectively deprived the excerpts of any real value for the students. To be frank, I can't be sure that Mr. Bergler was communicating precisely what he intended even to the teacher.

The Bergler material illustrates another, and perhaps the most serious, difficulty. For lack of a better term let me call it "focus." For a lawyer's use, much behavioral data and

\begin{footnotes}
\item[74.] Harper, \textit{op. cit.}, \textit{supra}, n. 62, at 9.
\item[76.] Kalven, \textit{supra}, n. 66, at 96.
\item[77.] Foote, \textit{supra}, n. 61, at 82.
\item[78.] Watson, \textit{supra}, n. 63, at 74.
\item[79.] 8 \textit{Mar. & Fam. Living} 81 (1946).
\end{footnotes}
opinion is generalized, undifferentiated, too unrelated to the problems he must discuss in class or think about at home. Bergler's six neurotic women don't seem very relevant to what a lawyer can do for a flesh and blood woman who sits in his office (even if the classroom hypothetical or the problem in the materials puts a good deal of meat on her bones). Kubie's interesting analysis of neurotic interaction in marriage is similarly separated from the real-life problems of divorce policy. Jacobs and Angell recognized the problem in 1930 and I am sure that most of you have experienced this frustration with non-legal materials. Professor Kalven commented: "In the handling of psychoanalytic materials . . . the evidence presented publicly is curiously dream-like, symbolic, terribly different from what it must have been like when it was received." This is not simply to object to the material because the behavioral sciences have not fashioned "their resources in order to answer the specific needs of the law . . . ." I can understand and sympathize with the absence of focused material—but I cannot ignore the pedagogical problem it poses. I have tried to solve the problem by developing individual case files—adoption records from welfare agencies, files and transcripts from Juvenile Court and divorce cases, the working files of social workers in custody investigations. I try to build into these files, which already include much reference to or reliance upon behavioral scientists, explanatory material and other data which seems important to an intelligent examination of the case. This seems to help; I don't think it is a panacea.

We are left only with the ultimate problem: are the risks too great, the perils too ominous? I cannot answer the question for you; I can only indicate, as I have before, that my own plan is to continue to try to use non-legal materials because I think the possible gains are well worth the risks. There are some methods of avoiding heartache: it seems unwise to me to try to develop your own materials quickly and without care—in an effort to get something, anything, in addition to the traditional cases; it seems better to indoctrinate the students with a transcript which includes, perhaps, a problem in psychiatric diagnosis, rather than with some experimental data

81. See Jacobs, Cases on Family Law, vii-viii (1933).
82. Kalven, supra, n. 66, at 97.
or sociological essay, because the transcript will be less removed from the world in which the students are comfortable; I think I am satisfied that it is not essential in an introductory course to accomplish the maximum in behavioral science integration; I suspect that a small group seminar is the only setting in which major progress is likely to be made.

Perhaps it would not be improper for this speech to end, as many do, with a fervent plea that my own experiments should be adopted. I can't really argue that thesis— but I can report that at Minnesota we are making an effort to incorporate non-legal learning not only in an academic exercise, but by means of clinical devices. In seminar sessions which follow each divorce interview, two psychiatrists and I make a rather primitive effort with group therapy of a sort. By focusing on the student's interview, on his response to the client and the client's response to him, we try to give students some basic insights of psychiatry which should be helpful to any practicing attorney. At the same time, the class explores together each student's reactions in a situation which frequently produces anxiety.

The risks in the endeavor are substantial; some of them have been suggested in the budding literature in the *Journal of Legal Education.*

**Conclusion**

Because of necessity, the length of this paper is limited and therefore I have not completely analyzed the risks, nor have I described the program in great detail. What I have tried to do is present the problem and set forth in general outline form my views concerning the proper way to approach the solution.