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THE SOCIAL SCIENTIST AS AN EXPERT WITNESS*

ARNOLD M. ROSE**

There is a possibility that social scientists will increasingly be used in the future as expert witnesses in court cases of several kinds, and therefore some exploration is needed as to the kinds of service the social scientists can provide, and as to their limitations as expert witnesses. Louisell¹ has made a most constructive start on this discussion in relation to the work of psychologists. Cahn,² also a lawyer, has analyzed the social science testimony in the school segregation cases, and, while his article is most thoughtful, he has made a number of statements which represent to the social scientists a serious misunderstanding of their work. The present article, written by a sociologist, will seek to contribute to the discussion by: (1) analyzing the characteristics of the social sciences insofar as they are pertinent to providing expert testimony; (2) suggesting the limitations of social science testimony; (3) indicating at least some of the areas of legal cases in which social science testimony has already been used and other areas in which it might well be used, (4) specifying how the methodology of social science differs from the traditional methodology of lawyers and judges, and indicate how the former may be used to supplement the latter; (5) suggesting some attitudes which lawyers and judges should have toward social scientists when they provide expert testimony in order to get the most value from their services. Since a thorough treatment of all of the above subjects cannot be achieved within the confines of a single article, this piece should be regarded as part of a continuing effort to discover the optimal relationship between law and the social sciences rather than as a definitive study. The field is too nebulous to permit a definitive study, and when the latter can be accomplished it will not be done by a sociologist working by himself. This writer's particular qualifications for contributing to the discussion consist of a single experience as an expert witness, participation in preparing some of the briefs in the school segregation cases, and a long interest in the relation of law to the social sciences.³

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1. Louisell, *The Psychologist in Today's Legal World*, 39 Minn. L. Rev. 235 (1955).

2. Cahn, *Jurisprudence*, 30 N. Y. U. L. Rev. 150 (1955).

3. The writer is also author of *Problems in the Sociology of Law and Law Enforcement*, 6 Journal of Legal Educ. 191 (1953), and co-author of

Herein "social sciences" means those theoretical disciplines which seek to understand and predict human behavior in terms of general principles empirically tested. This includes—in aim if not in achievement—most of sociology, psychology, anthropology, political science, economics and parts of psychiatry, history, and law itself. It does not include the study of particular cases for the purpose of handling them in some way, hence most of psychiatry, clinical psychology, accounting and other business school subjects, social work, and law are excluded. It also does not include the study of particular cases for the purposes of understanding these cases as special events in their own right, hence much of history and law are excluded. Of the fields mentioned, psychiatry,⁴ social work, accounting, law (of course), and perhaps history (in cases where the "intent of the legislature" is in question) have been used extensively in providing expert testimony. But these are not social sciences in our definition, and hence may have led to some misunderstanding as to the role the social sciences can play in court cases. Of the social sciences proper only economics seems to have been used extensively, and therefore will not be dealt with further except to cite a case in which it was pertinent, so as to provide an illustration of its similarity to other possible social science testimony.

In *Morton Salt Co. v. Suppinger*,⁵ the patentee was licensing a salt-vending machine and requiring the purchase of the salt tablets at the same time. The courts have held this illegal on the ground that the patentee is attempting to extend his monopoly beyond the area which has been granted to him. Economists pointed out that the only monopoly power the patentee has before and after the tie-in is based on the monopoly power of the patent (that is, on the machine, not the salt). If the monopoly power of the patentee is strong enough to compel the purchase of salt by the licensee, it would also be strong enough to compel the licensee to pay more for the license to use the salt-vending machine. Thus there are no economic consequences for the patentee or the licensee or the con-

Does the Punishment Fit the Crime? A Study in Social Evaluation, 61 *American Journal of Sociology* 247 (1955).

4. A good recent summary of the problems in the relationship between psychiatry and the law appears in Guttmacher and Weihofen, *Psychiatry and the Law* (1952). For a consideration of the even more recent Durham case (214 F. 2d 862 (D.C. Cir. 1954)), consult the proceedings of the conference on *Insanity and the Law* held at the University of Chicago, February 28, 1955, and, Schiele and Paulsen, *Psychiatric Evidence in Legal Tests of Insanity*, 26 *Bulletin of the University of Minnesota Hospitals and Minnesota Medical Foundation* 325 (1955).

5. 314 U. S. 488 (1942). This case was brought to the writer's attention by Levi, *Four Talks on Legal Education*, 1, 34 (University of Chicago Law School 1952).

sumer because of the tie-in requirement, although other wholesalers of salt are hurt. The testimony of economists in cases involving anti-trust legislation, licensing, taxation, labor law, corporations, and trade regulations seems to be widely used and accepted in the courts.⁶ While the general nature of economists' testimony is relevant here, main consideration will be given to case material from the testimony of sociologists, psychologists, and other social scientists where there seems to be questioning among lawyers regarding its pertinence and reliability.

The relevance of social science findings to court cases will have to be ascertained, case by case, by perspicacious lawyers. As yet, according to Louisell, "there seem to be few cases and little recent discussion directly concerned with the psychologist (or any social scientist) functioning as an expert witness himself . . . we search in vain for any substantial analysis . . . of the psychologist functioning as an expert witness."⁷ Louisell, who has scoured the literature, mentions only two reports of cases⁸ of psychologists presenting expert testimony other than of a clinical kind, and one of these is a case which he reports *in extenso* himself. Both of the cases cited by Louisell involve public opinion surveys done by competent psychologists—one regarding the meaning of a commercial advertisement to an average reader and the other involving the question as to whether the patrons of a certain theater regarded it as a "neighborhood theater" or as one which attracted them as a downtown theater would.⁹

The latter case may¹⁰ be used to illustrate how an opinion survey—to do which psychologists and sociologists have developed special techniques of research—differs from the usual methods of the lawyer. The theater was suing the distributor for treating it as a neighborhood theater rather than as a city-wide theater in the distribution of films. The theater was located outside the downtown area. A university psychologist was hired to make a survey of the patrons to determine two things; (1) the geographic distribution of

6. Levi, *op. cit. supra* note 5, at 7, 47

7. Louisell, *supra* note 1, at 236, 238.

8. United States v. 38 Dozen Bottles, 114 F Supp. 461 (D. Minn. 1953); Robbinsdale Amusement Co. v. Warner Bros. Pictures Distributing Corp., Civil No. 4584 (4th Div. Minneapolis).

9. Louisell, *supra* note 1, at 249-250. Discussion of other uses of public opinion surveys may be found in Waterbury, *Opinion Surveys in Civil Litigation*, 17 Public Opinion Quarterly 71 (1953); Kennedy, *Law and the Courts*, The Polls and Public Opinion 92-108 (Meier and Saunders 1949); Sylvester, *Consumer Polls as Evidence in Unfair Trade Cases*, 20 Geo. Wash. L. Rev. 211 (1951).

10. Robbinsdale Amusement Co. v. Warner Bros. Pictures Dist. Corp., Civil No. 4584 (4th Div. Minneapolis).

the patrons to ascertain if they were from the immediate neighborhood or from all over the city, (2) the attitudes of the patrons as to whether they would be willing to pay "downtown prices" for first-run films usually shown only at downtown theaters. The psychologist and his assistants asked a representative sample of the theater's patrons for their address and their opinion about paying downtown prices. The fact of widespread distribution of their residences and their willingness to pay downtown prices were presented in court to support the theater's claim to be treated as a city-wide theater by the distributor. Apparently in previous cases of this sort lawyers had relied on the location of the theater, had as witnesses a few patrons who lived a great distance from the theater and who would be willing to pay downtown prices, but never a representative sample of patrons. Thus, the selection of a representative sample of patrons for the beliefs and for facts about themselves is a technique which the public opinion specialist can contribute to certain court cases.

Kendler¹¹ reports a case in which experimental social psychological evidence was incorporated into a lawyers' brief *amicus curiae*. In 1943 the Territory of Hawaii passed a law prohibiting schools from teaching foreign languages to children under the age of ten or who had not completed the fourth grade or who were under the age of fifteen and were below average in English courses. Their purpose was to discourage ethnic enclaves, but the law's stated purpose was indicated by the clause holding that early bilingualism "may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments." The constitutionality of this act was challenged in the U. S. Supreme Court, and the American Jewish Congress submitted a brief *amicus curiae* which rested on three contentions. (1) The teaching of certain languages — *e.g.* Hebrew, Latin — is a religious obligation, and no law could constitutionally abridge religious freedom, (2) it has not been established that bilingualism has the negative effects attributed to it by the law, evidence from psychological tests showed no greater proportion of emotional disturbances or maladjustment, (3) the law was not an effective instrument for accomplishing its stated purpose, since sociological study showed that it was the home rather than the school which induced bilingualism. Before the Court considered this brief, it threw the case out on technical grounds, and shortly thereafter the Hawaiian legislature substantially modified the act, so that the psychological and sociological evidence never received judicial notice.

11. Kendler, *Contributions of the Psychologist to Constitutional Law*, 5 *American Psychologist* 505 (1950).

During World War II, the political scientist Harold D. Lasswell and some of his assistants appeared in court to testify in government cases seeking to show that certain "native fascist" organizations were in communication with the German government.¹² They demonstrated that the propaganda put out for American consumption by these organizations was in many cases identical with that prepared by the German propaganda ministry. The sociologist Robert Sorensen has analyzed the possibilities of using the same technique (called "content analysis") as evidence in literary infringement cases, although he and his lawyer-collaborator cite no cases where the technique was actually employed.¹³ A rough approximation of the technique has been used in the form of making a systematic summary of parallel statements in the two published sources when one is claimed as a copyright infringement on the other.¹⁴ Clearly, if there are other cases involving the use of non-clinical social science testimony, it would be valuable to have them reported, therefore a summary of a case in which the author presented expert testimony follows.

The case involved the disposition of a three-year-old child whose mother the court had previously declared incompetent on grounds of immorality. The county welfare office was now seeking to have the child taken from the father—who lived apart from his wife—and placed with foster parents, while the father was strongly contesting this action. No allegation was made that the father did not provide the proper moral surroundings for the child; the social worker in charge of the case specifically testified that the father provided the child with proper physical care and the affection expected from a parent. The county welfare office's contentions were three: (1) the father was 60 years old—too old to be a proper father for a young child (although he was in perfect physical health for his age); (2) there was no mother in the home (although the father agreed to hire a competent full-time housekeeper, and he had the income to do so); (3) the father was a mulatto identified with the Negro community whereas the child was white in appearance (the mother was white in all known racial antecedents). There was an implication that the father of the child was not the biological father (the biological father was alleged to be one of the white paramours of the mother), although no evidence was presented to

12. Lasswell and Leites, *Language of Politics* (1949).

13. R. C. Sorensen and T. C. Sorensen, *A Proposal for the Use of Content Analysis Evidence in Literary Infringement Cases*, 33 *Social Forces* 262 (1955).

14. See *Morse v. Fields*, 127 F. Supp. 63 (S.D. N.Y. 1954).

this affect (except a questioning oral statement made by the father to the social worker a year previously) and the mother denied it under oath. There was no question but that the father was the social father of the child, as it had been reared by him since its birth.

The attorney for the father had reason to believe that the third contention was most important in the minds of the social workers at the county welfare office. They seemed to believe that a white-appearing child could gain better opportunities in life by being raised by a white couple than by a mulatto father. Whether or not they were disturbed by the idea of a white child being raised as a Negro could not be said. As a sociologist who has studied the Negro community and race relations, this author was asked to serve as an expert witness for the father. After taking the witness stand, and establishing position and field of competences, the following relevant facts were testified to

1. While Negroes in Minneapolis had historically been subject to certain occupational and educational discriminations, these were rapidly declining and at the present rate of change could be expected to be inconsequential in a few years. The sources were decennial reports on the occupational, employment, and educational status of Negroes and whites from the U. S. Census, also a few miscellaneous reports from the U. S. Office of Education and the U. S. Employment Service.
2. Neighborhoods in Minneapolis were increasingly characterized by mixed occupancy, only a small minority of neighborhoods could be characterized as entirely Negro or entirely white at the time of the 1950 census (and even fewer by 1954, the time of this case) The sources were the block statistics of the U. S. Census and a special sample survey made in 1954.
3. A small number of persons identified socially as Negroes were not distinguishable in physical appearance from whites, there had been such persons in Negro communities for generations, and Negroes generally accorded high status to such persons. The sources were a number of community studies made by sociologists over twenty-five years.
4. Whites generally either were unaware that Negroes who appeared to be whites were socially Negroes or tended to treat them better than they did Negroes who physically appeared to be Negroes. In other words, a white-appearing Negro child would not be subjected to more discriminations than a Negro-appearing Negro child, and possibly fewer. The sources were studies of the differential status and "passing" habits of Negroes of different shades of skin color.

At several points in this testimony the writer brought out the fact that he knew nothing of the individual circumstances of this case, but was testifying solely on the basis of his own and other sociologists' published studies of the Negro community and race relations. The lawyer for the county welfare board, in cross-examination, did not contest any of the statements, but confined himself to asking two questions: (1) Whether the author's long study of the Negro question had not biased his point of view and observations (my reply was that social scientists were very much aware of the possibilities of bias and tried to hold it in check, but that bias was still possible), (2) Whether there were not special discriminations faced by a person known to be a Negro which were not faced by a person known to be white (to which the witness assented, but pointed out that such discriminations were decreasing).

The judge seemed to be greatly interested in this testimony and asked a number of questions. Apparently he never had previously been offered such a wide array of census reports and specific sociological studies; in such cases lawyers usually present a more limited body of reports and "common knowledge." One of the questions asked by the judge raised the issue of conflicting expert testimony. A competent geneticist had testified on a previous occasion that, on the basis of his observation of the physical and behavioral characteristics of the father and the child, "It is hardly necessary to list such differences, as it is apparent that Mr. W could not have been the biological father of this boy. A blood test of the mother, Mr. W and Gregory (the child) would demonstrate conclusively that Mr. W could not possibly have been the biological father of Gregory W." Following this, the lawyer for the father had a competent technician (a doctor of medicine) take a blood test of mother, father and child, and on the basis of this the technician concluded that, "On the basis of the above listed blood factors, in my opinion, G. W. cannot be excluded as the father of the child Gregory W." The judge asked the writer's opinion of the testimony of the geneticist. My answer was that an inspection of the physical and behavioral characteristics of two persons could not exclude the possibility of their relationship, that the blood test and any other known objective test could exclude certain categories of persons from relationship to another but could not possibly exclude all non-relatives, and that the only adequate test of relationship in this case was an honest statement by the mother. The judge was thus faced with conflicting testimony given by an expert geneticist and an expert so-

ciologist on a question more closely related to genetics than to sociology

There were other facets to the case (although everything pertinent to the points raised in my testimony has been reported) and the case was carried on for several days. Eventually the judge ordered that the child be allowed to remain with the father.

The expert social science testimony in the school segregation cases is part of the record, and is probably familiar by now to most interested lawyers.¹⁵ In briefest summary, the issue of all these cases was whether segregation involved discrimination. Discrimination, when practiced by an arm of the state, has consistently been declared unconstitutional under the Fourteenth Amendment. If state facilities were "separate but equal" they were considered legal following the 1896 Supreme Court decision of *Plessy v. Ferguson*.¹⁶ In a series of decisions beginning in 1938,¹⁷ the Supreme Court narrowed the interpretation of what it considered to be equal. The material discrimination declared illegal related to such matters as the size of classes, the salaries of teachers, the physical condition of the school plant, and the distance required to travel to school. By 1950, in the case of *McLaurin v. Oklahoma State Regents*,¹⁸ the Court had gone so far as to declare that professional school students were being discriminated against if they did not have the possibility—because of state action—of interacting with their future professional colleagues, even in college cafeterias and libraries. But the decision in the *McLaurin* case did not challenge segregation head on, and the *Plessy* doctrine presumably stood as law. In the South Carolina case of *Briggs v. Elliott*,¹⁹ the state acknowledged the facts of material discrimination and asked that the decision be solely on the question of segregation (the attorney general promised that material discrimination would be eliminated in five years.) Thus, by 1953, both sides were willing to argue on the single issue as to

15. One of the main briefs in the Supreme Court cases leading to the decision of May 17, 1954 (*Brown v. Board of Education*, 347 U. S. 483 (1954)) is reprinted in *The Effects of Segregation and the Consequences of Desegregation. A Social Science Statement*, 37 Minn. L. Rev. 427 (1953). The social scientists' brief in the case involved in the decree of May 31, 1955 (*Brown v. Board of Education*, 349 U. S. 294 (1955)) was partly incorporated in the regular lawyers' brief of the NAACP (This decree also disposed of *Briggs v. Elliot*, *Davis v. County School Board*, and *Gebhart v. Belton*). The leading social scientist in the preparation of these briefs for the NAACP was Professor Kenneth B. Clark of City College, New York. Lawyers may find his summary for social scientists interesting, *Desegregation. An Appraisal of the Evidence*, 9 Journal of Social Issues 2 (No. 4 1953).

16. 163 U. S. 537 (1896)

17. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938)

18. 339 U. S. 637 (1950)

19. 98 F Supp. 529 (1951)

whether racial segregation itself inevitably involved discrimination. This is a question of social fact, not a matter either of law or of ethics, and both sides brought in social scientists as expert witnesses. The social scientists began to bring in evidence as early as 1946 in the first case of *Sweatt v. Painter*.²⁰ By 1952, they were offering new kinds of studies that directly linked segregation with discrimination: Negro children in segregated schools were found to have a sense of inferiority and a lowered morale, and it was alleged that these hampered the learning process. Less evidence, but some, was adduced to the effect that white children were encouraged in a sense of racial superiority by segregated schools. Clark summarizes succinctly the types of evidence offered by social scientists in the various school cases:

- 1—That racial classification for the purposes of educational segregation was arbitrary and irrelevant since the available scientific evidence indicates that there are no innate racial differences in intelligence or other psychological characteristics . . . this line of testimony was consistently unchallenged by the attorneys for the states.
- 2—That contemporary social science interpretations of the nature of racial segregation indicates that it blocks communication and increases mutual hostility and suspicion, it reinforces prejudices and facilitates rather than inhibits outbreaks of racial violence.
- 3—That segregation has detrimental personality effects upon Negro children which impair their ability to profit from the available educational facilities. Segregation also has certain complex detrimental effects upon the personality and moral development of white children.
- 4—That the consequences of desegregation are in the direction of the improvement of interracial relations and an increase in social stability rather than an increase in violence or social chaos.
- 5—That, if non-segregation can work on the graduate and professional level, it can work equally well on the elementary and high school level since children at this stage of development are more flexible in their attitudes and behavior.²¹

Whether the Supreme Court relied heavily on this evidence is a moot point,²² but in its 1954 decision it did refer to this testimony in

20. 339 U. S. 629 (1950).

21. Clark, *The Social Scientist as an Expert Witness in Civil Rights Litigation*, 1 *Social Problems* 5, 7 (1953).

22. The issue has been raised by Cahn, *op. cit. supra* note 2. Neither the active advocates nor opponents of desegregation have questioned the crucial role of the social science evidence. See, *e.g.*, Speech of Honorable James O. Eastland before U. S. Senate, 101 Cong. Rec. 6068 (daily ed. May 26, 1955); and the speech of Will Maslow of the American Jewish Congress, *The Uses of Law in the Struggle for Equality*, December, 1954.

a footnote, and it did ask for further information regarding the probable effects of different procedures of desegregation — information which social scientists were obviously in the best position to provide. The social scientists involved in the school segregation cases presented studies of the behavior and attitudes of children, which studies are typically not made by lawyers but by psychologists and sociologists. According to Cahn, these social scientists provided weak or unreliable evidence to support what everyone knows unequivocally by intuition—or, to use a cliché, they “proved the obvious.” Regarding the school segregation issue, he states that “one speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil.” In stating this, Cahn points up the distinction between the lawyer’s approach and the social scientist’s empirical approach based on tests, attitude surveys, and systematic observation. It is obvious that Cahn is not aware that the overwhelming majority of white Americans in 1896 believed that segregation was right and just, and that practically all the relevant literature also took this position. Mr. Justice Harlan is one of the very few exceptions, but Cahn apparently thinks his splendid opinion was universal. Any survey of the literature would bear out the fact that, in recent years, it has been the studies of social scientists which have been building the case “separate cannot be equal” in contradiction to the *Plessy* dictum of “separate but equal.” It is true that not all the evidence presented by the social scientists had a high reliability, but Cahn misses the point widely when he concentrates his fire on the Clarks’ study, since the evidence he criticizes is merely a minor supplement to a more basic study published some years ago. He is correct, however, in stating that the social scientist should not present weak evidence without indicating its weakness.

We shall not know to what extent judges are significantly influenced by social science testimony until they tell us, and this is not customary, expedient, nor even wise from the standpoint of their relation to the public and to the losing party. It seems to the writer, however, that in the few cases cited, the social science evidence was contributory to the decision in that the judges allowed the testimony and responded to it by questioning and asking for more. This does not mean, of course, that more traditional lines of argument were not also important in these cases, nor that social science testimony

would be relevant in most cases. But there probably are a considerable number of cases coming before the courts every month in which some facts, now available to social scientists and not presently known to lawyers, are just as materially relevant to the judgment that has to be made as in the cases cited here. The pertinence of social science evidence will have to be decided by the judges in each case.

It is very important to note that in the cases cited here, the social scientist was in no way substituting for the lawyer; the social scientist cannot be an advocate in his role as scientist. It is equally important to recognize that the social scientist is not proposing a new rule to replace the law. He is not suggesting that principles of ethics or humanitarianism or majority rule (as determined by public opinion polls) replace the law, as some have suggested. What the social scientist can do in the courtroom is to present certain social facts that serve as conditions affecting the outcome of the case. That is, there are certain cases in which the judge must *assume* certain social facts to be true before he can arrive at any decision. He may or may not be aware that he is assuming certain beliefs to be social facts; there may or may not be evidence available to the social scientists that the beliefs are or are not true; the lawyers and the judge are most often not aware that social scientists could ascertain the validity of their beliefs even when they are aware that these beliefs are being used as necessary assumptions. Yet these are the situations in which social scientists could serve as expert witnesses in court cases and possibly affect the outcome of decisions. Clever lawyers will probably increasingly be aware of the possibility of hiring social scientists to serve as expert witnesses for their side, and—if this happens—conscientious judges will either have to acquaint themselves with the possibilities and limitations of social science to decide when the social science evidence is reliable or else rely on court-appointed social scientists who are presumably neutral.

Social science findings, like all scientific conclusions, have only a certain degree of reliability; the degree of reliability varies from one finding to another and can often itself be measured. The findings of sociology and psychology are, almost always, considerably less reliable than those in physical science, but far from always less reliable than those in certain of the biological sciences. The reliability of conclusions of sociological and psychological research is generally higher than diagnoses made by psychiatrists, which have long been accepted as expert testimony by the courts.

Another characteristic of social science findings is that they apply "on the average," to a category of cases, not to every single case in the category. When a finding is made, for example, that a foster home is better for the development of a child's personality—in terms of certain stated criteria—than is an institutional home, this does not mean that every child will respond better to placement in a foster home than in an institution. The judge who has to decide on placement may find the social science finding useful, but still take into consideration the qualities of the particular foster home and institution and of the personality of the child in relation to them.²³

While social scientists are human beings and humans are fallible, social scientists are trained to recognize the limitations of their researches—perhaps better trained in this regard than even the physical scientists because the methods of the latter are ordinarily beset with fewer limitations. The judge who wishes to make the best use of social science knowledge and yet be aware of the limitations of this knowledge can usually directly examine the social scientist witness as to the applicability and limitations of his testimony.

Some lawyers apparently think that social science evidence can be used to support any point of view or both sides of a given issue equally well. Cahn, for example, states that "Shrewd, resourceful lawyers can put a Brandeis brief together in support of almost any conceivable exercise of legislative judgment. In the last two decades, many Brandeis briefs have been conspicuously vulnerable in respect of statistical method, rationality of inferences from assembled data, adequacy of sampling, and failure to allow for—or to disclose—negative instances."²⁴ If this is what the Brandeis brief is, lawyers have been readers of the book, *How to Lie with Statistics*,²⁵ but know nothing of legitimate social science. In science, there are rigorous rules of proof and disproof, and while social scientists not infrequently find themselves hampered in the application of these rules by the nature of the data, they are aware as to when they are or are not using the rules.

Mr. Cahn can also be cited as an example of a lawyer unaware of the difference between a social science and a social ideology. He

23. Professor Monrad Paulsen of the University of Minnesota Law School has suggested that a valuable social science study could be done for presentation in divorce cases where custody of children is at issue. Is it better for the child to be raised by one parent or to be ordered to spend, say nine months with one parent and three months with the other parent?

24. Cahn, *op. cit. supra* note 2, at 154.

25. Huff, *How to Lie With Statistics* (1st ed. 1954).

states: "Recognizing as we do how sagacious Mr. Justice Holmes was to insist that the Constitution be not tied to the wheels of any economic system whatsoever, we ought to keep it similarly uncommitted in relation to the other social sciences."²⁶ A system is not a science, and if an economist advocates a given system he does so either as any other member of society, or as an economist who clearly specifies his value premises which are a matter of personal or group choice. Perhaps unfortunately, sociologists and psychologists are generally less given to advocacy in terms of certain specified values than are economists. But in any case, it is the lawyer's task, in a courtroom, to distinguish the value premises from the facts, the 'scientist from the advocate.

Levi puts his finger on another difficulty that will plague the lawyer who wishes to get the best use out of social science:

"I have no doubt that where the social science materials are both relevant and available, they will be used by lawyers in litigation. The competence of the trained lawyer engaged in controversy insures this. The difficulty, of course, is that for the greatest part, the material is only somewhat relevant in its present form and is mostly unavailable. Perfection of the material and its use are then likely to be beyond the resources of the individual lawyer or law firm."²⁷

The problem, of course, is one of the lawyer communicating the legal issue to a competent social scientist; the social scientist scouring the literature to ascertain if any relevant studies exist; if not, the social scientist indicating the expense and time necessary to do an adequate study; the social scientist communicating the scientific findings to the lawyer; the lawyer deciding the best way of bringing this evidence into court. Each of these steps can be very difficult; but they are not insuperable.

Louisell, as a teacher of law interested in the use of social science, has presented an excellent list of injunctions to the social scientist preparing to give expert testimony.²⁸ This writer, a teacher of sociology, who believes its findings to have high relevance to the law, would like to close this essay with a few suggestions for lawyers who might wish to bring in a social scientist to present expert testimony or who might be confronted with a social scientist presenting testimony on the other side. (1) Don't accuse the social scientist of being biased *because* he has studied a matter for a long while; this argument can readily be turned against a conscientious

26. Cahn, *op. cit. supra* note 2, at 167.

27. Levi, *op. cit. supra* note 6, at 47.

28. Louisell, *supra* note 7, at 257-258.

lawyer or judge and seems to make a plea for ignorance. (2) Don't assume that he knows everything about a given subject or that his reliable findings apply in all cases. (3) Don't assume that he can adduce an equally good argument on both sides of an issue. (4) Don't assume that he is unfamiliar with the logical rules of evidence, or that he cannot distinguish facts from values. (5) Do ask him what reliable findings he can bring to bear on relevant legal questions, and what the limitations of these findings are. (6) Do distinguish his role as scientist from his role of advocate, if he brings the latter into the controversy