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Michael J. Saks

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ON TAPP (AND LEVINE)

*Michael J. Saks**

LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES. Edited by *June Louin Tapp* and *Felice J. Levine*. New York: Holt, Rinehart and Winston. 1977. Pp. xv, 446. \$15.95.

The American Psychological Association is composed of thirty-six divisions, one of which, the Society for the Psychological Study of Social Issues (SPSSI), has existed since the 1930s as an organized forum through which social scientists (predominantly social psychologists) can address social problems. For years SPSSI has published the *Journal of Social Issues* as a vehicle for linking social science knowledge with what are seen in any period as its important social problems. This occasionally can be a depressing archive. As a graduate student in the earliest days of this decade, I dusted off some *JSI* volumes from the '40s, curious to know what the era's social problems were, only to discover that they were no different from those of the present. Some historical reflection may assure (?) us that these are the eternal problems, the fundamental issues of social existence: conflicts over goals and methods, over resources, over principles of distributive justice, over the power to decide, and between groups associated with competing sides of these questions. The "solutions" lie in improving our management of these conflicts, or in making them productive; we cannot expect them to disappear.

The law and its associated institutions, of course, constitute a major device for managing these conflicts. Recognizing this, *JSI* in 1971 devoted an entire issue to a collection of articles on law and psychology. That issue was edited by June Tapp, and it forms the core of *Law, Justice, and the Individual in Society*.

The book is the most recent in a series sponsored by SPSSI, more than a few of which ought to be of interest to legal scholars and practitioners. Among them are *Children's Rights and the Mental Health Professions*, *Towards the Elimination of Racism*, *Industrial Conflict*, *International Behavior*, and *Research Methods in Social Relations*. The SPSSI series is prestigious in its field, and its existence is a special tribute to the authors and

* Associate, National Center for State Courts. B.A. 1969, B.S. 1969, Pennsylvania State University; M.A. 1973, Ph.D. 1975, Ohio State University.—Ed.

editors who have produced it, because their contributions are literally that: all royalties go to the Society.

June Louin Tapp, the senior editor of the volume under review and this year's president of SPSSI, would make anyone's list of psychologists whose subject of study is the law and justice, and on more than a few such lists, her name would be at the top. A Professor of Child Psychology and Criminal Justice Studies and Adjunct Professor of Law at the University of Minnesota and a former fellow of the Harvard Law School, she has long been associated with the American Bar Foundation and has been an officer of the Law and Society Association and the American Psychology-Law Society. It seems that whenever an editor wants an article or chapter about the state of law and psychology, Professor Tapp is asked to write it, and apparently she usually does. Tapp and her co-editor Felice Levine, a social psychologist and Research Social Scientist at the American Bar Foundation, have put together a volume that updates and extends that 1971 issue of *JSI* and contains revised versions of the fourteen original chapters plus twelve new chapters. Most of the contributions are by superstars at the intersection of law and social psychology or, at the least, superstars of one field who make forays into the other: Johanneas Andenaes, Harold Berman, James Davis, Paul Freund, Lawrence Friedman, Lon Fuller, Sanford Kadish, Harry Kalven, Lawrence Kohlberg, Stuart Macaulay, Paul Meehl, Soia Mentschikoff, Ross Parke, Milton Rokeach, David O. Sears, Elaine Walster, Phillip Zimbardo, Franklin Zimring, and, of course, June Tapp.

Law and psychology "interface" (as the vernacular would have it) in three conceptually distinct and asymmetric ways. First, psychology as a science or a profession must operate under the laws of the jurisdiction in which it is practiced. Examples of current interest include legal protections for human subjects in federally funded research programs, tort liability for harm done by psychologists to clinical clients or research subjects, and the question whether clinical psychological services will be included under National Health Insurance. This first category is given no attention in Tapp and Levine's volume. This is not a weakness; I offer the fact simply to suggest what the volume does address. Indeed, most books on law and psychology ignore this area, perhaps because academic and scientific folks, unlike their professional counterparts in the ABA, AMA, or even the APA, tend to be embarrassed by organized campaigns or statements in their own interest.

Second, law, the legal process, the legal system, and law-like structures can be placed under the behavioral scientist's microscope. In this category, we find basic research, theory, and scholarly research and writing on psychology and law. And from this category come virtually all the chapters in Tapp and Levine's book. As the editors point out in their opening chapter, many of the favorite topics of research psychologists—"processes of conflict, persuasion, control, authority, compliance, and morality . . . socialization, decision-making, information processing, perception, memory, cognition, attitudes, group dynamics, and interpersonal relations . . ."—are remarkably relevant to the law's fundamental concerns about itself and society.

Third, psychological knowledge can serve the law. Lawyers, legislators, judges, and others call on (or at least receive) the findings of psychological research and theory to facilitate their own work. Research toward this purpose is the most applied and practical psychological research. The most familiar example is the forensic clinical psychologist's appearance in trial or probate courts to testify on questions of competency, dangerousness, sanity, and so on. This is also the most troubling example, because it combines the worst of both psychology and the law: the least sound psychological knowledge (e.g., Ziskin, *Coping with Psychiatric and Psychological Testimony* (1975)) used in what Szasz (e.g., *Law, Liberty, and Psychiatry* (1963)) and many others have called the worst illustrations of due process. More current examples of this category are perception and memory researchers testifying in court and contributing to evidentiary policy regarding eyewitness accuracy; social and personality psychologists assisting with jury selection; and psychologists (and other social scientists) assisting attorneys in preparing cases, appellate briefs, or drafting legislation on any number of substantive matters.

When the subject matter of the law involves human behavior (when doesn't it?), systematic, empirically based psychological knowledge may inform the decisions. To the degree that the law operates on itself—for example, to reform its own structure or practices or to decide constitutional questions—research of the second category can become instances of the third. Most of the contributions to the Tapp and Levine volume, however, reside comfortably within the second category. The contributions are by no means irrelevant to practical reform, nor are the contributors unaware of their work's possible utility. But our legal and political systems are not now actively employing most of this knowledge and appear unlikely soon to do so. The most dramatic exam-

ple of this is Shuman's conclusion (chapter 19) that the criminal law should be scrapped altogether and replaced by expanded tort remedies.

At first blush, *Law, Justice, and the Individual in Society: Psychological and Legal Issues* sounds like a label that could describe almost anything. The table of contents reveals, however, that the title is actually a careful description of what is between the covers. The book places law, justice, and the individual within the larger society. It is genuinely "social psychological" in that its interest is the effect of social structures and institutions, primarily the law, on individuals. The book examines all influences at the situational or structural level and measures all effects at the individual level. By so doing, it emphasizes the processes that mediate collective goals and social institutions in their effect on the behavior of individuals. The volume's four major sections consider (1) law as a socializing agency, (2) conceptions of justice as a matter of cognitive social development, (3) how people come to be socialized to perceive and behave in terms of legal systems, and (4) decision-making in legal contexts. The volume looks not just at our society's "law," but at law-like systems and behavior related to law, comparatively between cultures, and developmentally across age cohorts.

What is there to be learned from these chapters? Let me offer several discrete findings.

1. The American legal system is primarily adversary (Nimmer, chapter 20).
2. Although people naturally want to avoid compensating people whom their negligence has harmed, the legal system encourages the negligent to make equitable compensation (Macaulay and Walster, chapter 21).
3. If children are raised to have positive attitudes toward individual freedom, they are more likely as adults to tolerate the exercise of rights by fellow citizens (Zellman and Sears, chapter 11).
4. The decisions made by fact-finders such as arbitration panels or juries are determined primarily by the decision-makers' personal biases (Haggard and Mentschikoff, chapter 22).

The reader who regards these propositions as obvious and not requiring the resources spent on them has helped make an important point, one that Meehl (chapter 2) propounds, about the value of empirical social research to the law. Although the above propositions probably square with common sense, they are actually the opposite of what researchers found:

1. The legal process in the United States is characterized by cooperative relations, settlements, and the exchange of vital infor-

mation by opposing counsel; only a very few disputes result in trial and its attendant adversary procedures.

2. Except under specifiable conditions, people's sense of equity presses them to compensate those they accidentally harm; the processes by which lawyers, courts, and insurance companies resolve claims actually reduce the negligent's tendency to compensate.

3. Children, like adults, endorse freedom as an abstract principle but do not carry that endorsement through to concrete situations.

4. Although biases of fact-finders have clear effects, the issues identified as central to the dispute itself are more powerful determinants of decisions.

Presumably, had I given the actual findings first, those, too, would have been regarded as obvious facts not calling for research. This exercise illustrates a lesson about the study of law and justice—or, indeed, most other things—by social scientists: there are no “obvious” findings. Most outcomes are plausible. Ergo, once the findings are in, many commentators find them “obvious” whichever way they go. (Senator Proxmire take note.) The important contribution of an empirical study of the law and society is that it places some limits on theory, commentary, and speculation about the nature of law-related behavior and the solutions to our legal and quasi-legal problems. By using empirical knowledge to pin down borders, such a study confines conceptualizing within them. A theory derived within those borders limits speculation and expands possible solutions to problems.

Quite a few of the chapters of the book are noteworthy, if not outstanding. Some are excellently crafted, thoughtful essays (e.g., Kadish and Kadish, chapter 24). Others skillfully weave data with theory and social philosophy (e.g., Zellman and Sears, chapter 11). The volume includes important studies and theories by people centrally identified with the work reported (e.g., Macaulay and Walster on “Legal Structures and Restoring Equity,” chapter 21; Haney and Zimbardo on “The Socialization into Criminality: On Becoming a Prisoner and a Guard,” chapter 17). One contribution is nothing less than a classic and became so the moment it first reached print; no one interested in law and psychology should fail to read Meehl's “Law and the Fireside Inductions” (chapter 2). Some chapters are disappointing. Harry Kalven has elsewhere brilliantly and literately woven data and ideas (one of my favorites is *The Dignity of the Civil Jury*¹). But his contribution to this volume is not such a tapestry. By and large,

1. 50 VA. L. REV. 1055-75 (1964).

however, it is not difficult to find something worthwhile in almost all the chapters.

Stylistically, the contributions leave more room for debate. The chapters are uneven. One contains a lengthy, careful, and painstaking review of empirical research. Another is composed of conclusions loosely drawn from some soft evidence. Another analyzes legal practice in terms of a particular social psychological theory. Yet another is very brief and speculative. Others are original reports or re-reports of empirical research. I am not inclined to call this unevenness a weakness, however, particularly to those using the book as a teaching tool or as an introduction to law and psychology. The book's mix of original reports, reviews of literature, theoretical pieces, speculation, and theoretical analyses of the legal system offers students a sampler of the ways in which research and thinking go on in law and psychology.

There is much, then, to praise about *Law, Justice, and the Individual in Society*—its contributors; the broad, basic questions it addresses; and the personal moral wrestling several contributors, especially the editors, frankly do in identifying their own role in studying law, justice, and society. Shall we make the law more "effective," thereby taking a measure of autonomy from individual people; or shall we increase their capacity to scrutinize, decide, and, if they see fit, to disobey particular laws? Shall the law be a device for social control or a facilitator of greater independence? The editors opt for "critical compliance" and whatever that implies.

If I did not find something to complain about, in this or any book, I would be either remiss or disingenuous. We are now witnessing the greatest of the periodic explosions of interest by lawyers and social scientists in each other ever to occur. This decade has seen more J.D.-Ph.D.s, new journals, new organizations, new programs, new funding sources, new outlets, and new employment options than ever before. Containing as it does so many of the established stars of the law-psychology intersection, this volume represents largely a summing up of much of the scholarship of the 1950s and 1960s, pre-explosion, as it were. (It is impressive to see how much went on prior to the current explosion.) At least two of the contributors have already died, and most others are professors emeriti, deans, or at least full professors. Certainly I do not include every author in this broad sweep. Nor do I mean any derogation of those I do include, for their scholarly contributions are enormously valuable and have long been respected by the rest of the field, including me. Nor do I wish to

create a generation gap, when one of the most rewarding aspects of scholarly work is that one's vigor can increase with age. But while this is an esteemed assembly, it represents largely the accomplishments that have been, and less those that are.

A field of research is only as good as its next finding. The future of this field, if recent work by its rising stars—largely unre-presented in this volume—is any example, is bright indeed. Their work will be at once more rigorous and more relevant. They are altogether more comfortable with theory *and* with application. More of their work will occur in all three of the categories. It will be, and perhaps already is, what is represented by this volume, and then some. Both social science and society will be the beneficiaries.