

courts, generally limit requests for evidence to material that has already been exhibited. If a court decision is required—in most instances various forms of accommodation make it unnecessary—the court will balance the uniqueness and need for the evidence against a presumption that the media need to preserve their news-gathering role.

In other areas Japanese law reflects features of their culture that differ from ours. Thus Japan, probably uniquely among democratic societies, forbids political canvassing. This is partly because of a tradition of repression of popular mobilization, but it is also due to the fact that a visit by strangers to a house has quite different connotations—sometimes of threat, sometimes of obligation—in that society. Similarly, the serious Japanese attitude toward affiliations and the obligations they entail makes associational democracy complex and different; even assassination of those attempting to leave a party remains a familiar event in recent history.

What is striking is the extent to which there has emerged in Japan a societal impulse toward liberty, building upon historic foundations such as media efforts to be free and independent even under the repression that once prevailed. Trickier, but already partly successful, has been the taming and legitimization of older traditions of resistance—violent demonstrations and strikes—into more limited forms of approved behavior. The process by which so much has occurred in four decades has been complex. We are most fortunate to have so sensitive and careful a chronicler and analyst as Professor Beer. His admirable book will be valued for a long time. It may also help to strengthen the trends it so trenchantly describes.

**SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS, AND TEXT.** By Wallace D. Loh.<sup>1</sup> New York: Russell Sage Foundation. 1984. Pp. xxix, 778. \$37.50.

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This book is an impressive contribution to the study of constitutional change. It can be recommended both as a source book for scholars of constitutional history and as a text for courses in law

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and social science. The book is impressive not so much for the insights the author provides into the process of constitutional adjudication or the role that social science has played in the process, as for the scope of the materials collected. Chapter by chapter it documents the increasing tendency of the courts to refer to empirical research in deciding constitutional issues. In many significant areas of constitutional change over the last thirty years, including school desegregation, the death penalty, illegal searches and seizures, and various aspects of the selection and functioning of juries, the courts have consulted, if not relied on, the findings of social research.

Professor Loh's principal purpose in assembling these materials was to develop a textbook for students interested in the role of social research in the judicial process — mostly graduate students in the social sciences. Nevertheless, I think it will be of more interest to constitutional scholars, and not too unfair to Professor Loh, to evaluate his text as a source of questions about the role of social research in constitutional adjudication. What accounts for the increasing use of social science in constitutional cases? How has it been used by the courts and what has been its impact? What will be the rule of social research in future constitutional decisions? How adequately has Professor Loh addressed these issues through his choice of cases and readings and the comments that accompany them?

## I

In the introduction Loh explains that his book is mostly about the role that social research has played in the law. Accordingly, policy studies are more prominent than general theory. Yet he takes care to describe the historical context of the opinions and research findings. This not only establishes continuity in the text, but also provides the reader with a sense of the big picture that Loh seems to eschew in the introduction.

The book is organized in four parts. Part I is introductory and gives a general overview of the judicial process. While useful to students without legal training, much of this material can be skipped by more sophisticated readers. The guts of the work come in parts II and III, which deal respectively with social research in the appellate process and the trial process. Part IV is a historical, conceptual, and jurisprudential afterword on the preceding sections.

The substantive portion of the text begins with two comprehensive and interesting chapters on school desegregation. Here, as in the other substantive chapters, Loh describes the historical context: the enactment of the civil war amendments, the rise of Jim

Crow legislation, and the restrained posture taken by the federal courts in the early segregation cases. Reprinting substantial portions of the *Plessy* opinion, he suggests the impact on *Plessy* of Herbert Spencer's Social Darwinism and other theories of innate racial differences. The text then documents how the accepted view of racial differences began to shift as research by Boas, Klineberg, and Myrdal assaulted the biological theories. The NAACP began to use social research in its efforts to overturn *Plessy*. The chapter includes the celebrated appendix to appellants' brief in *Brown*, which summarized the opinions of social scientists on the effects of segregated schooling on blacks and whites, as well as excerpts from the trial testimony of expert witnesses in the South Carolina, Virginia, and Kansas cases. The full text of the *Brown* opinion is followed by Edmond Cahn's attack on the famous footnote 11, in which Cahn criticizes the opinion for appearing to rest on the "flimsy foundation" of the social science evidence presented. Psychologist Kenneth Clark, who coordinated the efforts of social scientists for the NAACP and whose doll studies were cited by the Court, responds. Clark argues that the social science evidence was relevant to the question before the Court and that Cahn's criticism reflects a lawyer's bias that courts should make decisions in isolation from other bodies of intellectual and scientific knowledge. The chapter concludes by stepping back from the *Brown* case in a section on the Brandeis brief and its role in *Muller v. Oregon*.

In true casebook form, the cases and readings are followed by detailed notes and questions that add supplementary information and draw out the analysis of the cases. Interspersed among the readings are brief statements on elements of constitutional interpretation, such as the differences in the standards of review courts apply in judging the constitutionality of legislation. This commentary was written with care, but its primary value will be to nonlawyers. As Professor Loh himself recognizes, there is the danger that the novice will come away from these summaries with an excessively simplistic sense of the law.

Chapter four examines the cases and research since the first *Brown* opinion, including *Brown II*, *Swann v. Charlotte-Mecklenberg*, and *Milliken*, as well as the findings of the original Coleman report, Coleman's reversal on desegregation based on his studies of white flight, and conflicting studies concerning the effect of desegregation on academic achievement, self-concept, and race relations. Loh summarizes the different perspectives on the rights and remedies identified in *Brown* and later cases as "input," "output," and "throughput" perspectives. The input perspective treats

*Brown* as identifying the right not to be subject to intentional discrimination. The output perspective interprets *Brown* as guaranteeing equal outcomes in the quality of education received by different groups, without regard to intentional discrimination. The throughput perspective treats the case as mandating remedial educational programs for disadvantaged groups, but according to Loh this perspective is unclear about the nature of the violations (if any) that trigger the provision of remedial programs.

Loh's typology, the readings selected, and the comments that accompany the text may confuse those who do not understand the constitutional analysis of the post-*Brown* cases. The materials imply that judicial orders to desegregate systems are in some sense contingent on finding that desegregation has tangible positive effects on minorities. While evidence about the impact of desegregation on educational quality and race relations may well influence the Justices, and even though the remedy in *Milliken II* requires expenditures by the Detroit School Board and the State of Michigan to improve educational quality, the gravamen of a constitutional violation remains the finding of purposeful discrimination by the authorities of a particular jurisdiction. The most vexing issue in recent post-*Brown* cases has been whether racial imbalances in schools are traceable to governmental discrimination or merely reflect the familiar pattern of racially segregated housing.

The chapter on the aftermath of *Brown* concludes with materials on discrimination against minorities by school administrators and employers. Social science evidence played an important role in cases alleging that the use of I.Q. tests to assign students to remedial classes had invidious effects on the educational opportunities of minorities. But the outcomes of the cases have varied. The chapter reprints Judge Peckham's opinion finding a constitutional violation in the use of the tests in California; similar evidence was not persuasive to a federal district court examining the practices of the Chicago Board of Education. Title VII of the Civil Rights Act of 1964, as interpreted by the Supreme Court in *Griggs* and *Albemarle*, has generated similar issues concerning the validity and impact of testing procedures in the context of employment discrimination. A striking aspect of litigation involving expert testimony concerning discrimination, which is suggested in Judge Peckham's analysis, is the enormous discretion that trial judges exercise when interpreting conflicting data. The results of such cases typically hinge on quite arbitrary and unpredictable standards for drawing (or refusing to draw) inferences from the data.

In chapter five Loh takes up the death penalty cases. He re-

prints the most significant constitutional decisions, from *Witherspoon* to *Furman* to *Gregg* and its progeny, as well as the empirical studies about the issues in the cases. With few exceptions (for example, the *Hovey* case, in which the California Supreme Court revised voir dire procedures in capital cases), the decisions have not rested on empirical research. Wolfgang's dramatic findings on the discriminatory application of the death penalty to black convicts in selected counties in Arkansas were not persuasive in an appeal by a black convicted in a different Arkansas county. According to the court of appeals, the study was not probative because it had not analyzed the particular county and the particular jury involved in the case. Similarly, when confronting the question of the deterrent effect of capital punishment in *Gregg*, the Supreme Court found the statistical studies "inconclusive."

Chapter six differs from the previous chapters in that it emphasizes almost exclusively the impact of court decisions on society rather than the impact of social research on decisions. The chapter deals with the rulings on the interrogation of suspects and searches and seizures. The *Miranda* opinion, reprinted here, rests on a skeptical conception of police interrogation, but does not rely on empirical evidence to validate that conception. It was only after *Miranda* that Skolnick and others began to examine empirically the Court's assumptions, as well as the likely impact of the procedural rules that the Justices laid down. Similarly, *Mapp* started an enduring debate over the costs and benefits of the exclusionary rule. Despite a substantial body of research, studies of the rule have produced conflicting and unpersuasive claims.<sup>3</sup> Drawing heavily on Skolnick's *Justice Without Trial*,<sup>4</sup> the chapter examines how the organization of the police affects the implementation of rules designed to control police behavior.

The focal point of the four chapters in part III is the jury. Chapter seven analyzes the selection of juries, covering jury discrimination cases, the techniques of scientific jury selection, and the impact of pretrial publicity on juror partiality. Chapter eight presents the cases and research dealing with jury size—the issue on which social science has had its most direct effect on constitutional decisions. Following the decision in *Williams v. Florida*, in which the Supreme Court approved six-person juries in criminal cases, there was an outpouring of research on the effect of jury size. When

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3. See generally Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. BAR. FOUND. RES. J. 611-90.

4. J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966).

a five-person jury was challenged eight years later in *Ballew v. Georgia*, the Court reversed itself, citing the jury research. Chapter nine contains studies of the effect of different evidence rules on jury decisionmaking, including the order in which parties present evidence, modes of presenting evidence, and the use of probability estimates at trial. Chapter ten deals with eyewitness identification.

Loh reserved the broadest set of readings for the last part of the book, on the theory that students could better deal with such generalities after exposure to specific case materials. After a chapter summarizing the history of psycholegal research, and the recurrent tensions between lawyers and social scientists, Loh reviews major jurisprudential theories about the judicial process: formalist, realist, and purposive reasoning. The chapter contains some classic essays from Fuller, Holmes, and Llewellyn, woven together with a description of the historical forces leading to the rise of different schools of American jurisprudence, from the scientific analysis of cases initiated by Langdell, to Pound and later the realists, to the emergence after World War II of the reasoned elaboration school, followed by Dworkin's natural rights model. The final chapter addresses when and how social research should be used in the judicial process. It replays a debate over whether the courts should rely on social science in reaching decisions, as well as Harry Kalven's essay on searching for the "middle ground" in social research on the law, that is, for empirical research that has a realistic possibility of affecting significant legal issues. After considering some of the obstacles to interdisciplinary efforts between lawyers and social scientists, Loh concludes on a realistic but upbeat note. Social science can seldom solve legal problems, and certainly cannot displace the act of judging. Such hopes necessarily invite disillusionment with the effort. But social research can inform judicial decisions and make them more responsible.

## II

What then does Loh's book tell us about why social research has become decidedly more prominent in constitutional adjudication? The first place to look is at the courts themselves. The expanding use of social science is tied in part to changes in the questions addressed by courts, the nature of federalism, and modes of judicial analysis. First, it is only relatively recently that appellate courts have defined constitutional issues in a way that regularly makes complicated questions of fact and policy relevant to the outcome. The Supreme Court's reference in *Muller* to Brandeis's brief was a poignant moment in this historical progression. For in

*Muller*, the first systematic attempt to use social research in the Supreme Court, Brandeis sought only to persuade the Justices that the maximum hours law had a reasonable police power rationale. He did not claim that the law was necessarily wise—although of course that was the implication of his evidence—only that it was sufficiently reasonable to pass constitutional muster. Today, many feminists would view *Muller* in a different light; they would call the law, limited as it was to women, unjust sex discrimination.<sup>5</sup> They would dismiss Brandeis's brief as a reflection of paternalistic ideology rather than objective science.

Brandeis and his allies sought to encourage judicial restraint. In contrast, the more recent and dramatic expansion of the role of social research came in the post-*Brown* era, as the Supreme Court expanded the meaning of due process and equal protection, and thus asserted its position as a national policymaking body. It was only after the decision that de jure segregation was unconstitutional that the courts had to confront questions about the causes of de facto segregation in housing and schools. It was only through the progressive incorporation of the Bill of Rights that questions about the deterrent effects of the exclusionary rule, discrimination in the selection of juries, and the coerciveness of custodial interrogation were presented to federal courts.

Shifting theories of federalism contributed significantly to the rise of social science in the judicial process by expanding the role of the federal judiciary. I suppose that federal courts are generally far more likely to entertain social scientific expertise than are state courts. First, federal judges are on the average more sophisticated than state judges, and consequently more receptive to academic expertise. Besides, the state judiciary is more intimately connected with local politics and the local judiciary. It is more likely to rely on its intuitions about local conditions and trial judges than on social science evidence.

Finally, changes in the structure of federalism accompanied the rise of a purposive jurisprudence in which courts began to engage more openly in policy analysis in the course of reaching constitutional decisions. As the courts moved away from more traditional legal modes of analysis, factual premises became critical to the legitimacy of decisions. (A judge relying on precedent or an authoritative text can be oracular; but one relying on "sound policy" needs evidence.) Social science became one means by which the courts could rationalize their decisions on seemingly objective, politically neutral grounds. It will be interesting to observe whether

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5. See generally Bryden, *Brandeis's Facts*, 1 CONST. COMM. 281 (1984).

this pattern changes in the opinions of the politically conservative appointees of the Reagan administration. If the federal judiciary returns to formalist reasoning, social research may become less important. The new judges may, however, change the substance of the law without changing the style of decisionmaking.

The changing importance of social research cannot be explained solely by reference to the courts. Without the growth of the social sciences since World War II, and the increasing methodological sophistication of social research, the social sciences would have had little to offer the courts. Moreover, there has been a steady expansion of socio-legal scholarship. Interdisciplinary associations have thrived since the late 1960's. An increasing number of social scientists have built research programs around the policy questions articulated by the courts. The cases on the constitutionally permissible size of juries, *Williams* and *Ballew*, are an excellent example of how a specific empirical question of constitutional import can generate a substantial body of social research within a short time.

Do these trends signal the emergence of a powerful role for social scientists in constitutional adjudication? I think not. Even in cases that rest on relatively narrow questions amenable to social research, the courts have often been unable to interpret social science evidence correctly or unwilling to change traditional procedures in light of the empirical findings. In the cases on jury size to which I alluded above, for example, the Supreme Court's analysis was riddled with technical errors.<sup>6</sup> Moreover, even though much of the research cited in *Ballew* attacked six-person juries, the Court refused to reconsider its earlier opinion on the propriety of such juries. Another glaring example that Loh documents concerns eyewitness testimony. Despite a long history of psycholegal research raising questions about the reliability of eyewitness testimony, the police and courts continue to rely heavily on such evidence. The moral seems to be that when social science conflicts with the longstanding traditions of the law, judges resist change.

In controversial fields experts usually divide along ideological lines. Loh's materials are replete with examples of such splits among groups of social scientists. It is no wonder that Kenneth Clark, the leader of the social scientists in the *Brown* case, felt a sense of betrayal when social scientists began to question the benefits of school desegregation. Shortly after *Brown* Clark had claimed that "proof [of the wrongfulness of segregation] had to come from the social psychologists." Twenty years later he found social scien-

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6. Kave, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CAL. L. REV. 1004 (1980).



tists to be “no more dependable in the quest for social justice than other citizens. . . . [and] primarily responsive to majority fashion, prejudices, and power.” What had happened, of course, was that the issue of de jure Southern segregation had been replaced by the issue of “school busing,” a much more controversial question in the academy.

Judges often are left to pick and choose among conflicting opinions to justify their decisions, or, as the Supreme Court did in the exclusionary rule and capital punishment cases, to ignore the social scientific findings as hopelessly inconclusive. The level of dissensus in the scholarly community is no doubt disconcerting to lawyers and social scientists alike. It means that there is no objective science of society to which the courts can turn. Social research cannot rescue the courts from the dilemma of how to make political judgments in a principled fashion.

**CHOOSING ELITES: SELECTING THE “BEST AND THE BRIGHTEST” AT TOP UNIVERSITIES AND ELSEWHERE.** By Robert Klitgaard.<sup>1</sup> New York: Basic Books. 1985. Pp. 267. \$19.95.

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In his *Bakke* opinion, Justice Lewis Powell presented the admission process at Harvard College as a model worthy of emulation:

The experience of other university admission programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program.<sup>3</sup>

A consensus as to the merits of the Harvard model was, however, not achieved by the Justices. Justice Harry Blackmun argued, “I am not convinced, as Mr. Justice Powell seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work.”<sup>4</sup>

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3. *Regents of the University of California v. Bakke*, 438 U.S. 265, 316 (1978).

4. *Id.* at 406.