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## Book Review: Lempert and Sanders, Invitation to Law and Social Science

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## BOOK REVIEWS

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Review of *Invitation to Law and Social Science*. by Richard Lempert and Joseph Sanders, New York: Longman, 1986.

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The strength of *An Invitation to Law and Social Science* is the coherent summary it provides of much of the best empirical research in the Law and Society Association tradition (well-represented by the work appearing in the *Law and Society Review* since it began publishing in 1966). The text introduces three broad perspectives on legal institutions, entitled Desert, Dispute and Distribution, focusing respectively on the assignment of responsibility by means of rules and the process of adjudication, on the functional fit between adjudication styles and social interaction patterns, and on the instrumental effects of law, viewed, among other perspectives, in light of John Rawls' empirical standards for a just society.

But the book is more than a thoughtful summary. The authors offer something daring and difficult, namely a description of a "new discipline: law and social science" (p.1) that not only summarizes much mainstream research but attempts "to construct, wherever possible, new theoretical syntheses (p. 2)." The claim that the book describes work within a new discipline raises questions about the construction of a discipline, its substantive focus, and its membership, questions which the authors do not answer. Since the authors do not define the discipline, nor is this project mentioned again, it might be passed over as an aside. Yet, because the authors clearly attempt to speak for mainstream

empirical research on legal institutions, the claim that they are describing a new discipline takes on some importance. I will describe their text, and return to the problem presented by this claim at the conclusion of my review.

The book also attempts to create "new theoretical syntheses." The new theoretical formulations take the form of sets of ideal types -- for example, types of responsibility rules, types of case processing "logics," types of adjudication styles, or types of legal autonomy. Each (four-fold) set of ideal types is defined by underlying dimensions of behavior which the authors describe at some length. In concept, the text is mainly description and elaboration of such dimensions of legal behavior, accompanying a four-fold (or sometimes many-fold) crossing of these characteristics to form ideal types which hypothetically identify distinct legal practices or institutions. In describing the dimensions of each set of ideal types the text draws not only on a rich literature of empirical research, but also on jurisprudence and moral philosophy, and on illustrations drawn from the authors' personal experience. The mixture produces an informed yet readily understood summary of research that should be accessible to many undergraduates as well as to graduate students and law students.

An illustration will make their method clear. The authors introduce Part One, on responsibility rules and adjudication, with the argument that an action frame of reference is essential to understand responsibility. Using illustrations from common experience, they show that an actor's intent and capacity to act must be known in order to assign moral or legal responsibility. The presence or absence of each attribute leads to different determinations about responsibility under different circumstances. Their discussion suggests a fourfold distinction between ideal typical responsibility rules generated by all possible combinations of intent and capacity to act:

**Rule Logics**

	Intention is relevant	Intention is irrelevant
Ability to do otherwise is relevant	CRIMES	TORTS
Ability to do otherwise is irrelevant	CONTRACT	STRICT LIABILITY

The table suggests a further "discovery," namely that the ideal type rule logics are appropriate for distinct areas of legal doctrine: crime, tort, contract and strict liability principles. They conclude their discussion of responsibility rules by examining how the rules are applied, that is, why responsibility is imposed on people differently under different circumstances.

The mixture of an empirical analysis of the role of actor orientations and the discussion of system justifications is a useful device in an introductory text. At the same time it suggests the authors' strong interest in jurisprudence, manifested throughout the book in the central place that they give research on the accuracy of precepts in Anglo-American legal practice.

The ideal types used in the book to synthesize empirical research are grouped in three broad areas, with a rather neat central focus to each. In succeeding chapters of Part One, the ideal type responsibility rules are contrasted with ideal types of case processing -- called case logics. In daily life, rules and events are linked by a process which the authors call typification, by which specific instances are determined to be members of a more general class. Ideal type case logics describe how typification is done in legal settings. Two features of attributing responsibility to people are used to distinguish the ideal types: the quality of

adjudication (the extent of factual detail required for attributing responsibility), and the perspective of those judging attribution (the actor's or an observer's). Quality of adjudication is further subdivided into uniqueness (the importance of fine-grained detail in rule application), and extensiveness (the scope of the search for relevant evidence), which resonate with the legal concepts familiar to any Evidence teacher as materiality and relevance.

Identifying "deep" and "shallow" case logics as ideal types allows the authors to accomplish several goals very neatly. First, they are able to describe differences in case processing in different legal settings, and to describe the strong historical tendencies toward shallower case logics. Second, they describe research on how effectively trial procedures produce extensive fact inquiry (i.e., "deep" case logic) and how attentive juries are to the kind of fact inquiry that a given responsibility rule entails. Finally, the authors are able to describe a tension between the case logic that the structure (and ethics) of responsibility rules entail and the shallower case logics that have tended to be adopted in practice. This tension is described both as an unintended consequence of the widespread conditions that incline case disposition toward quick and easy settlement, and, as a product of changing societal priorities in certain cases, such as workmen's compensation and no-fault auto tort liability reform. Summarized in this way, Part One is seen to be an extended argument about the relationships among a few major characteristics of adjudication in the Anglo-American tradition.

Parts Two and Three have similar underlying structures. In Part Two, the focus is the fit between the predominant types of relationships between parties to disputes and the adjudication style of a society. With many qualifications, the authors argue that across societies there is a tendency for patterns of social interaction and adjudication styles to converge. They define four ideal typical dispute settlement styles, which differ according to

**Preferred Mode of Dispute Settlement**

Density of Relationship	Future Dealings	
	Enduring	Episodic
Multiplex	Relationship settlement	Relationship decision
One-dimensional	Issue settlement	Issue decision

the scope of the issues that a forum is empowered to examine (i.e. a forum limited to issues versus a forum concerned with all aspects of the relationship between the parties) and the scope of the remedy which the forum may impose (i.e. a remedy limited to winner-take-all, versus a remedy involving multi-dimensional compromise). The authors argue, following a well-trodden path in anthropology, that the opposing ideal types, "binary-decision" and "relationship-settlement" tend, with qualifications, to be typical of modern and pre-modern societies respectively.

The use of ideal types, rather than causal arguments, allows a comfortable exploration of deviant cases, the tribal society with a binary-decision, a legalistic judicial system, as well the instances of relationship-settlement type dispute resolution in a modern society. Among the latter are grouped some well-known case studies, including the settlement of business contractual relationships described by Stewart Macaulay, and the structure of street encounters between police and juveniles described by Egon Bittner.

As in Part One, an important discovery is that a tension exists between what the authors see as an overriding system logic, which makes a particular adjudication style appropriate for the society given its orientations toward responsibility and its dominant modes of social interaction, and the practical constraints on the actions of persons in particular roles within the system.

The failure of attempts to reform the system of adjudication, specifically the small claims court and juvenile court movements, are used to illustrate the consequences of an inappropriate match between an adjudication style and the relationship between parties. The issue-settlement style of small claims courts (so-called because problems which are technically appropriate for a narrow, binary decision are diverted in the belief that a compromise will satisfy both parties at lower cost than formal adjudication) failed because most cases are winner-take-all conflicts in which the more powerful party has no motive to compromise. The relationship-decision style of juvenile courts (so-called because of the broad inquiry permitted the court in deterring a narrow issue -- delinquency or non-delinquency) failed because the judge lacked the capacity to conduct a flexible inquiry in the therapeutic manner that court reformers envisioned.

In Part Three, the authors set more explicit standards for their mixed jurisprudential and theoretical enterprise of evaluating the success of the legal system in achieving justice. John Rawls' *Theory of Justice* helps them frame the empirical issues by defining justice in familiar terms as the achievement of liberty and equality. Rawls explicitly raises questions about the dimensions of "liberty" and the meaning of "equality," and focuses particular attention on the conditions under which members of a society can choose and sustain just institutions. Two of the best chapters of *Invitation* are devoted to the relationship between the law and the capacity for private and public action for social change to achieve justice. Chapter Ten builds on Mancur Olsen's analysis of problems of collective action, tracing the legal history of corporations and labor unions as examples of those problems and the attempts to solve them by changing the law. The authors discuss the asymmetry of problems of collective action for these opposed interest groups and the tension it creates between private collective action and democratic political representation. Chapter Eleven provides a nice review of the "capability problem" in civil rights reform, contrasting, and explaining in structural terms, the relative success of voting rights legislation reform with the meager results of civil rights legislation in the areas of school desegregation and employment.

The concluding chapters of Part Three return to the main theme, the achievement of justice under contemporary legal institutions. Presuming the importance of legislative autonomy and judicial neutrality for any ideally just system, the authors are concerned in part with the reasons why contemporary legislatures

**The Quality of Applied Law**

Type of Legislative Endowment	Judicial Stance Toward Legislation	
	Substantive	Formalistic
Class-oriented Endowments	Unrestrained class domination	Bounded class domination
Differentially accessible general endowments	Illusory rights	Formal autonomy
Equally accessible general endowments	Egalitarian justice	Pure autonomy
Welfare endowments	Substantive justice	Formal justice

and judges can not function in this way. The thrust of their concern, however, is not an empirical explanation of contemporary politics, but rather a concern about the compatibility of underlying value orientations with social change. Like Rawls, the authors consider hypothetical societies displaying different legal and social characteristics. The ideal types, generated by combining hypothetical societies with different levels of social equality and judicial/legislative autonomy suggest to them reasons for the tensions, instability and likelihood that particular types will be transformed. The characteristics of each type are identified empirically, but also ideologically. In Anglo-American political and legal ideology, society faces the dilemma that inequality can not be addressed without violating a fundamental



political value liberty. The authors' empirical inquiry is, thus, constructed upon the basis of value orientations presumed to characterize law in each ideal type society. The conclusions they draw about the role that law will play in achieving justice are premised on the society's commitment to those values. Since the purpose of the hypothetical inquiry is to illuminate the prospects for change in our own society (rather than to explain variation across existing societies), the discussion is actually a way of laying bare the consequences of a commitment to particular values underlying the authors' own view of our society, a commitment which, like their commitment to particular qualities of adjudication in Part One, and their focus on the functional role of adjudication in Part Two, affects the questions they ask and the answers they propose.

This rather extensive (though not exhaustive) review of the contents of *An Invitation to Law and Social Science* seemed to me to be necessary to expose both its strengths and weaknesses. At its best, it provides an elegant summary of mainstream research. Yet, throughout I found it flawed by its implicit values and the sequence of implicit arguments which guide, and limit, the presentation of social science research on legal institutions.

Let me evaluate the book first as a text. I have used it twice to teach a seminar to law students. Although many of the law students felt quite comfortable with much of the research summarized in the first part of the book (for reasons I will discuss below), they frequently felt uncomfortable with the conceptual schemes used to integrate it. One of the primary, if subtly articulated, purposes of the book is to invite further research. The text itself, however, does not guide a reader toward this objective. Alternative conceptualizations are not considered, nor are open questions highlighted and possible methods of exploring them suggested. The reader nowhere becomes familiar with the methodological concept of an hypothesis.

The difficulty which my students had applying what they learned by reading this text is evidence of two serious problems. The first is that the text presents a curious view of social science

inquiry. Granted the authors are entitled to favor certain theories which appeal to them. However, social science must begin with the acknowledgement that alternative conceptualizations are not only possible, but correct. Much of the history of philosophy and social science has been about starting points. This book is organized in a way which not only conceals that fact, but actually creates the opposite impression. Further, the text leaves "society" in the background. Legal institutions are presented as if they have an intrinsic nature, and are embedded in uniform cultures which bear a definite relationship to the form of the legal institution. In fairness, the book does not purport to survey all research on law and social science or all points of view. Yet, the presentation of material, and the values it reflects are subtle, not explicit, and the student new to this field may be misled.

Second, much of the book has a thinly disguised bias, raising questions, ironically, about its appropriateness as a first text in law and social science. The intrinsic character of legal institutions will be recognized by any American law student. Concepts with which law students are familiar become the basis for social science without considering alternatives. Alternative conceptualizations of the role of law in society, in politics, in social control, in socialization, in conflict are not reviewed. Rather, the impression is that the authors believe that empirical inquiry may begin from the obvious, intrinsic features of legal institutions. This suggests that their social science is accepted by consensus and is value free, neither of which is true.

The theory of legal institutions presented and examined in the text is the official theory drawn from legal ideology. This observation does not detract from the authors' attempt to subject the claims of this theory to the test of empirical research. But, I believe that the implicit jurisprudence of the book seriously limits the presentation of social science research. In Part One, the focus is narrowed to research on the effectiveness of institutional roles on their own terms, -- do juries follow rules, do common law advocates do a better job of fact presentation, do police, prosecutors or defense attorneys focus on rule-guided typification in the performance of their roles? The nature of the research

tends to narrow the issue to the effective achievement of those roles. The findings are important, but this type of social science, like the authors' text, accepts the legal system's objectives as its starting point.

Starting from the legal system's stated objectives one is unlikely to ask about or perceive the full effects of social structure in which the legal system is embedded, effects which include systematic race, age and gender bias, as well as other systematic effects of stratification and morphology which may render adjudication incoherent unless understood in a larger social context (compare Black, *The Behavior of Law* (1976)). Further, in Part One, the system is exemplified as one that attempts to make appropriate rational judgments. The differences in the typification of racial discrimination in the North and the South by the Supreme Court is explained in terms which suggest that distinctions were appropriate and rule-centered, rather than ideological or political. Examples of law reform are presented in a pluralist framework that suggest that there was an achievement of political compromise rather than class manipulation. A reader may not be inclined to question these presentations at the moment of reading because the authors do not present such conclusions naively, but they are presented without alternatives.

In Part Two, the central issue is framed by the contrast between problems of adjudication in modern and pre-modern societies. There is now much work by legal anthropologists suggesting that the supposed difference in adjudication styles is simply not there. Moreover, in casting the question initially in functional terms -- does the ideal type pattern of social relations for the society fit the style of adjudication -- the authors relegate the history of the struggle to create and control particular legal institutions within societies to a subordinate role.

Their interpretation of other research in Part Two follows this pattern. Macaulay's superb study of the struggle between auto dealers and auto manufacturers over reforming franchise agreements is used as an example of the higher rate of litigation likely when business relations are not enduring. Yet, Macaulay's

own account does not suggest that this litigation was relatively frequent, and instead stresses the importance of the unequal power of the parties and the legal system's tendency to preserve the imbalance through doctrinal interpretation which undermined dealer suits both before and after reform. The authors thus cite the research for only one of many inferences which might be drawn from it, and their account of the need for adjudication fails to take into account Macaulay's observation that, as an institution, law preserved the inequality of power and displayed a preference for institutions which favored the economically powerful. Indeed, this example reveals how threadbare the continuing relations hypothesis really is, since the auto dealer and auto manufacturer must surely be characterized as having a continuing relationship (there being no alternatives), suggesting, in accord with the anthropological research mentioned previously, that power plays a role in maintaining many types of continuing relations.

Part Three reveals still more clearly the consequences of the authors' failure to consider alternative perspectives on their subject. Rawls' social theory accepts a pluralist view of politics, in which each of many divergent interests must agree to make distributive change practical, as well as legitimate. Because Rawls and the authors accept this as an accurate view of contemporary politics, the classic liberal dilemma, a choice between liberty and equality, follows.

What if the present political system were presented as resting on a less legitimate foundation, say a process of compromise in which a particular class is prevented from mobilizing effectively, kept from access to information which would expand the range of political choices, and is thereby prevented from making appropriate choices in its own interest? Lempert and Sanders do not deny inequality of power. Indeed, the contradictory nature of inequality -- as a by-product of productivity and as a quality of society which makes justice difficult to achieve -- is central to Rawls. Likewise, the degree of inequality of access to law making is one dimension used by Lempert and Sanders to distinguish among ideal typical societies. But a view which made class power

a central feature of the kind of society we now have would lead us to ask very different questions about the sustaining role of law. Such questions are implied in critiques of Rawls (Wolfe, *Understanding Rawls*. (1977)) and in non-liberal political theory (Cohen and Rogers, *On Democracy*. (1983)). In this alternative framework, the behavior of a relatively autonomous legal system would be viewed as invidious to the extent the autonomy is only apparent and as a valuable and remarkable cultural achievement to the extent it resists dominant interests, but it can not be viewed as merely passive. It must be viewed as complicit, an institution which legitimates many injustices: racial, economic, gender-based. Exploring this alternative view of law and justice must begin by examining the way in which legal behavior systematically reflects these inequalities in our society.

It is not inappropriate for the book to have a perspective or for that perspective to emphasize the authors' view of what is most important about the legal institutions of their own society. In the end, however, I believe that view has also affected how the authors present social science. Perhaps, in the quest for a new discipline which could be distinguished from existing behavioral science disciplines, the authors sought to ground their synthesis in research which in some way treated the legal system as possessing a special mission as an institution. This would explain both the compatibility with jurisprudence and the failure to consider legal institutions as simply further examples of general principles of social organization such as stratification, complex organization, ascriptive or kinship organization, and culture. It does not justify presenting social science as having only one perspective on legal institutions or failing to present social science as one particular method, among many, of constructing social meanings.

Finally, I would like to consider the implications of the authors' claim that they are describing a new discipline. What basis is there for distinguishing their new discipline from other social sciences? What issues are considered important within the new discipline? What theoretical starting points have been employed in the new discipline? These questions are not answered by the authors. The new discipline is not explicitly defined, nor

is it mentioned in the remainder of the text. The reader is left to infer answers to these questions from the contents of the book.

The authors' suggestion that there is such a distinct discipline has at least three unfortunate implications. First, such a declaration is likely to legitimate narrowing the focus of empirical research by limiting discussion of what constitutes an important issue to members of the discipline. Second, there may be a further tendency to believe that the discipline, through its attention to legal institutions, provides a unique perspective on behavior in the manner in which economics has been thought to study distinct aspects of behavior, to its detriment in my view. Third, and most extreme, definition of a new discipline may lead subtly to developing an essentialist approach to legal institutions, i.e. an approach in which legal institutions are known by some essential quality or characteristic shared in all cultures that have such institutions (and *a fortiori* existing throughout a unitary legal culture (e.g. North America)). It is not clear how serious the authors are about maintaining the existence of a new discipline in empirical research or how, at a conscious level, its existence has influenced their presentation. As I have tried to illustrate, the text exhibits all three limitations. It is appropriate to attribute these limitations to the perspectives of the authors, I think, but not to the field of research which they attempt to define.