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## Response—Francis M. Gaffney

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interesting introduction to the Cook and Schmidhauser studies that also fall within this general area.

The painstaking and thorough study of the socialization of new federal judges by Professor Cook presents both important theoretical conclusions as well as significant practical conclusions. Cook has thoroughly documented the need for policy makers to consider alternatives other than additional judgeships to eliminate the legal log jam found in the federal courts.

The Schmidhauser study presents strong evidence that members of the Congress who also are lawyers do not assume more favorable attitudes toward the Supreme Court than non-lawyers, as had been widely assumed by much of the public media and by many scholars. Such a conclusion is significant not only to scholars studying the role perceptions of lawyers but also to policy makers attempting to work toward a more favorable climate for the courts to function in.

As the studies reported here demonstrate, social science has important contributions to make to the law in all of these areas. However, applied research must be supplemented by significant basic theoretical research. Applied research without substantive theoretical base will lead sooner or later to the same condemnation of "infant social science" that was voiced in connection with the *Brown v. Board* decision. Problem oriented social science research cannot and will not endure unless it is grounded in sound basic theoretical research. Although this criticism is not applicable to the contributions in this symposium, if the present trend emphasizing policy oriented research continues, it will be only a matter of time before policy oriented research enters a state of decline. Therefore, it is regrettable that the present symposium fails to strike a balance between policy oriented research and basic theoretical studies.

### *Response—Francis M. Gaffney\**

Professor Huntington Cairns, writing in 1935 on the relationship between law and the social sciences, made the following observation:

No aspect of present legal thinking is more marked than its tendency to levy upon all fields of knowledge for assistance in the analysis of fundamental problems . . . . This characteristic results perhaps from the departure from the view that law was entirely self-sufficient—that a

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science of law could be framed on the basis of law itself—to an emphasis upon purpose and function.<sup>1</sup>

In contrast, Professor Kenneth Clark, writing 25 years later in defense of his and other social scientist's participation in the preparation of the brief for the petitioner in *Brown v. Board of Education*, found it necessary to argue that:

Serious discussion of whether a social scientist should play a role in the legal processes related to the desegregation of public schools would seem no more or less justified than discussion of the following questions:

Should social scientists play a role in helping industry function more efficiently—make larger profits—develop better labor management relations—increase the sense of satisfaction among workers?

Should social scientists play a role in helping governmental agencies and key policy makers make more effective and valid decisions.<sup>2</sup>

In part, the shift away from reliance on social science data in the solution of legal problems, evidenced by the contrast between Cairn's observation and Clark's defense, may be attributed to a decline in the importance of the Brandeis brief, which had proved to be relatively ineffective when the objective was to overturn rather than uphold legislation.<sup>3</sup> But to a greater extent, the shift may be explained by the reluctance of judges and lawyers to allow fundamental rights to hinge on the findings of "young, imprecise and changeful sciences".<sup>4</sup> Moreover, the legal profession's impression as to the ephemeral character of social science data, when coupled with Mr. Justice Holmes' injunction that the constitution ought not to be tied to the social statics of Herbert Spencer or to any other economic theory<sup>5</sup> further widen the cleavage between the disciplines.

It is against this background, of what may be termed reluctance and skepticism on the part of the legal profession, that the potential import and impact of these contributions must be assessed. The approach chosen places a heavy burden of proof on the political scientist; a burden of proof which goes to the substance and accuracy of the findings of the research presented in this symposium.

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1. H. CAIRNS, *LAW AND THE SOCIAL SCIENCES* 1 (1935).

2. Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 *VILL. L. REV.* 224 (1959).

3. Cahn, *Jurisprudence*, 30 *N.Y.U. L. REV.* 150, 153 (1955).

4. *Id.* 167. See also Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L. J.* 320 (1957).

5. Mr. Justice Holmes dissenting in *Lochner v. New York*, 198 *U.S.* 45, 75 (1904).

Professor Grossman's imaginative application of Systems Analysis Theory to the problem of the interrelationship between demand stress on the judicial system (heavily loaded dockets) and culture, although undoubtedly of heuristic value, suffers from a major limitation. Any research on the impact of sub-cultures on the number and type of demands placed on the judicial system presents, as the article clearly indicates, theoretical and conceptual rather than statistical problems. In short, before the research suggested by Professor Grossman can be systematically undertaken, an operational definition of sub-culture must be developed, a task which may unavoidably and paradoxically involve preliminary research.

The main value of Professor Schmidhauser's impeccably researched investigation of Congressional roll call behavior and interest group activity in response to Supreme Court Decisions, stems from the fact that the study lays to rest a number of rather naive hypotheses which some "professional" court watchers have generated concerning the attitudes of various groups toward the Court. In fact, so devastating is Professor Schmidhauser's attack that it may well be termed empirical over-kill. Additionally, the study conclusively establishes that the Court is inextricably involved in the American political process. A few may find the latter conclusion disquieting.

Professor Skogan's note on the persistence and operational validity of the judicial myth, although a good example of the analytical power of traditional survey research, is based on what I consider to be two unwarranted assumptions. First, Professor Skogan implicitly assumes that persistence of the judicial myth is necessary for the maintenance of sufficient levels of legitimating support for the judicial system. Second, he explicitly bases his choice of student population on the assumption that "the investigation of college students' perceptions of the foundations of legitimacy should give us some estimate of the parameters of that legitimacy."<sup>6</sup> The former assumption is, I believe, open to serious debate; the latter is an empirical question.

Mr. Fahey's study of the enforcement of the felony marijuana law in Chicago is an excellent example of careful empirical research. Mr. Fahey's findings on the deterrence value of felony sanctions, informal patterns of police and judicial enforcement, and the different standards employed by narcotic and precinct officers in making arrests, could well form the basis for a reevaluation of present narcotics laws. Moreover,

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6. Skogan, *A Note on the Judicial Myth* at 309, 322 *supra*.

Fahey's findings on minority group harassment should provide an additional impetus to reexamine the arrest standards presently employed by those responsible for narcotics law enforcement.

Professor Cook's analysis of the impact of seminar training for new judges on the judicial output in multi-judge districts, is a superlative example of applied social science research. Professor Cook's carefully researched findings should be of immeasurable value to decision-makers for two reasons. First, the study indicates that a mere increase in the number of judges is not a complete answer to the problems of congested dockets in the federal courts, thereby necessitating a search for other alternatives. Second, the research design and methodology employed by Cook could serve as an analog for continued and expanded research in this area.

Professor Burnham's study of the differential impact of the Texas voter registration system is undoubtedly the high point of the symposium. Burnham's skilled analysis based on aggregate voting and research data is evidence not only of Burnham's scholarship, but of the advances made in recent years by the social sciences.

In light of Burnham's, Fahey's and Cook's studies, and to a lesser extent those of Schmidhauser, Skogan, and Grossman, the question which Professor Clark posed to the legal community becomes tremendously important. Reformulated to correspond to the material presented in this symposium, the question is: does the social scientist have a role to play in helping judicial decision-makers make more effective and valid decisions? Even when this question is juxtaposed with the skepticism which has characterized the legal profession's attitudes toward the social sciences, the answer would seem to be yes. The research reported here does not bear the imprint of youth, imprecision or changefulness. The studies by Grossman, Schmidhauser and Skogan are indicative of a vital point in the maturation process of any science, the stage at which basic hypotheses and notions are subjected to empirical validation. Those by Burnham, Cook and Fahey are characteristic of a maturing science which has achieved a sufficient degree of internal development to enable its practitioners to turn to problem oriented research. With these two activities going on simultaneously, there will undoubtedly be changes within the social sciences, but the changes that do occur will result in increased maturity. Given these trends within the social sciences, and the law's desperate need for a reliable empirical base, these studies may well harbor a productive exchange between law and the social sciences.