From the Editor

In September of this year there was a conference at the University of Wisconsin Law School on "Law, Private Governance and Continuing Relationships." What was most interesting about this conference to one who was not there was what occasioned it. The conference announcement makes it clear that this gathering of scholars was intended to mark "the twentieth anniversary of the publication of Stewart Macaulay's pioneering study," "Non-Contractual Relations in Business: A Preliminary Study" (1963). This is a singular honor for an article, but as the citations that are still regularly made to "Non-Contractual Relations" attest, Macaulay's work singularly deserves it.

The article is important for many reasons. It stands apart from most research on law of its time as a true piece of law and social science, for it fit nicely into no other disciplinary niche. It was not the kind of doctrinal analysis that filled (and continues to fill) the law reviews, nor did it approach law from the perspective of an established social science discipline or subdiscipline such as criminology, the sociology of the professions, or the judicial behaviorism then common within political science. At the same time Macaulay's sensitivity to the importance of prospective future relationships in explaining his findings served to link his observations theoretically to other social science perspectives on the law, particularly those emerging in anthropology (cf. Gluckman, 1955).

What was perhaps most important about Macaulay's work (especially to those like me who have made their careers within law schools) was that it offered a new vision of how social science might relate to legal scholarship. It was not the social science in the service of the law that a number of the realists had called for and some of the social science enthusiasts within the law schools of the early 1960s expected. The article did not set out to provide legal policy-makers with rigorous, *scientific* information that could be immediately employed in efforts to wisely reorder society. Rather, it explored a topic that was interesting for its own sake, and in the process came up with results that challenged the way that contract law was (and to a large extent still is) being studied in every American law school. The challenge stems not from the

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demonstration of a "gap" between the law on the books and the law in action. This we know is inevitable. Rather, it exists because good contract law courses have long treated contract law not just as an amalgam of legal rules for making enforceable agreements but also as a fascinating, promise-based institution. After Macaulay it is clear that this institution cannot be understood by even the closest scrutiny of what appellate courts write. Most of the action lies elsewhere.

This is, of course, almost always the case when areas of law are approached from an institutional perspective. But too often we know little about the "elsewhere" because the subject has not received the concentrated attention that is required if scientific evidence is to cumulate to a sophisticated understanding of an institutional area. This, unfortunately, remains true of contract law. Macaulay is still cited regularly, in part because there has been no outpouring of research that might supersede his work by building on it. One result is that those who would bring a new institutional perspective to the teaching of contract law have little to work with.

The same can be said of most traditional law school subjects. But there is one area where I think law and social science research is likely, over the next decades, to transform our understanding of a subject and the way it is taught. This is administrative law—the law school's core course on government regulation and a topic that until recently was left largely to lawyers concerned with procedural doctrine and to economists interested in the efficiency implications of regulatory activity.

But the subject is core law and social science. One cannot understand law in the modern state without understanding how administrative rules are made and enforced by regulatory agencies and how these efforts come to affect social action and the structure of society. More and more work, both theoretical and empirical, is being directed toward these ends. In the last few years important books have been published, and since becoming editor of the *Review*, I have noted a marked increase in the number of submissions concerned with law in the regulatory state and problems of regulation. There may be no one article that will be honored at a conference twenty years hence, but the increasing flow of quality work is likely to change fundamentally our thinking about this increasingly dominant strand of modern law.

Two articles in this issue illustrate the tendency of regulatory law to replace or dominate other modes of legal

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ordering. In the article that opens this issue, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts," Robert Kagan both establishes and seeks to explain a puzzling fact. Drawing on the court docket research of recent years, Kagan shows that the proportion of debtor-creditor cases in the state appellate courts has diminished markedly during the last half century, and he suggests that a similar diminution has occurred in courts of first instance. Kagan's explanation for this phenomenon is not simple but includes many strands, the most important of which are legal rationalization, the political activity of debtors, and systemic stabilization in the form of institutionalized methods for loss spreading, diversification, insurance, and economic stabilization. It should not be surprising that many of the elements that make up these strands relate to the regulatory activities of the state. Indeed, as I read Kagan, it is not unfair to conclude that the marked change in the incidence of actionable debts and the way social actors deal with them is largely a function of governmental intervention in economic life.

Arie Freiberg and Pat O'Malley in their article "State Intervention and the Civil Offense" point to an equally profound change attributable to regulation. A new kind of law—the civil offense—has become widespread. Drawing on examples from the United States and Australia, Freiberg and O'Malley discuss how the needs of the regulatory process have led to a blurring of the lines between the procedures and ends of the civil law and those of the criminal justice system. Not only have civil sanctions and procedures been developed to allow regulatory modes that might be thwarted if penalty provisions could only be enforced through criminal prosecution, but some legislation, such as the anti-trust laws and the recent RICO Act, appears designed to enlist private litigants on behalf of what government otherwise sees as part of its own regulatory mission.

The other articles in this issue sound rather different notes. Philip Dubois' article "Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment" is a sophisticated effort to determine how voters select candidates for judicial office. The importance of the label "incumbent" is affirmed, but other factors also affect voter choice. Most importantly, Dubois' study shows that not all judicial elections are alike. Various cues have different implications for voter choice depending on whether the election is a primary or a run-off and whether it is

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held in a large or a small county. The clear lesson is that future research must attend closely to context in determining what influences voters for judicial office. Context is also likely to mediate the effects of different cues in partisan elections, particularly with marginal voters, but its influence may be harder to spot because of this special importance of party label.

In "Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination," Raymond Paternoster presents a careful study of prosecutors' decisions to seek the death penalty in 300 North Carolina homicides. The study's major conclusion adds to a growing body of research which finds that the race of the victim is important after "legal" variables are controlled.

This research will, no doubt, be cited in litigation that seeks to overturn death sentences on the grounds that the penalty is capriciously or discriminatorily imposed. Indeed, studies of discrimination and the death penalty are commonly conducted with this end in view. Unfortunately, the concern to influence the courts has generally meant that interesting scientific questions that might be elucidated by data on discrimination and the death penalty are largely ignored. In particular, one wants to know what determines the amount of victim-based discrimination in a jurisdiction and why its effects dwarf defendant-based discrimination, which was once thought to predominate. If we can answer those questions, we may learn more about the phenomenon of discrimination and the workings of the legal system. Paternoster takes a step in this direction when he suggests that the threshold of aggravation which generates a death penalty request is higher in black victim cases than in white ones. This suggests that any effects of racial prejudice on prosecutors are obliterated when a killing is sufficiently brutal. Clearly, much more needs to be learned.

This issue concludes with a research note by Richard Berk, Sarah Fenstermaker Berk, Phyllis Newton, and Donileen Loseke entitled "Cops on Call: Summoning the Police to the Scene of Spousal Violence." The authors are limited by the fact that they could not randomly sample abused women but had to rely on those in some formal program. Nevertheless, they have made a valuable contribution, for their note offers a rare look at how police come to be summoned to the scene of a crime and is to my knowledge a first look at this problem from the perspective of the spouse abuse victim. Important, but necessarily tentative, findings include the identification of variables that influence bystanders and victims to call the

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police, the fact that these variables differ with the identity of the caller, and the discovery that pre-existing attitudes toward man-woman relationships or toward the police have little effect by themselves on the victim's decision to seek police intervention. Perhaps most importantly, there is for victims a strong relationship between their past decisions to call the police and the decision to seek help during the most recent incident. This suggests that if abused women can be persuaded to call the police once, they will be likely to think of the police as a resource that can be readily invoked should they be beaten again.

Richard Lempert
September 1984

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