From the Editor

Among readers who have responded to me concerning my attempt to arrange particular issues of the *Law & Society Review* into themes, one response disturbed me: the question of whether certain kinds of papers would be more welcome than others because of some prior commitment to a theme. Let me repeat what I said when I first introduced the idea in volume 20, number 3. To the extent that these issues are thematic, they are that way because coincidence allowed me to group them that way. They are papers that I would have published anyway. No article was (or will be) accepted or rejected because of its conformity with these themes. This has simply been an attempt to group related papers for the sake of the readers' convenience.

In this issue, that thematic purpose has been only partially realized. Yet one can, without great difficulty or distortion, identify some common themes and concerns that run through this issue, even though the approaches taken do not cohere to just one school of law and society studies.

The first three papers allow us to explore the virtues and hazards of looking to broad portraits of culture as a means of understanding legal institutions. Legal consciousness is the subject, and we are able to explore it cross-culturally here. The remaining five papers incorporate ideas of culture in their more specific examination of American courts. In one way or another, they explore the influence of extralegal patterns of thought and action on the decisions made by courtroom personnel.

We begin with Stewart Macaulay's Presidential Address, given at the Association's Annual Meeting last June. His paper is a call for an expanded awareness of the sources of American legal thinking and law-related action. He is saying that legal consciousness needs to be studied directly in the United States and that in order to do so, we need to become sensitive to the vast variety of American experiences that contribute to American legal consciousness. As he shows with a delightful array of examples that will be particularly familiar to American readers, our lives open us every day to a nearly continuous barrage of lessons that build and modify our approaches to law. We will not find lessons about compliance and deviance only in courts

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or police stations. Instead, we need to pursue an agenda that develops a good description and synthesis of ordinary, everyday American culture.

As a nice complement to Macaulay's thesis, the next paper addresses a body of literature that its author says has sometimes been accused of overemphasizing legal consciousness. Setsuo Miyazawa makes a major contribution to American readers by reviewing the most recent Japanese research (most of it not yet translated) into the alleged nonlitigiousness of Japanese people. A number of Japanese scholars have come to the defense of Takeyoshi Kawashima's classic statement about the relationship between Japanese legal consciousness and the aversion to public litigation. As Miyazawa shows, the basic legal consciousness approach has received both theoretical and empirical attention with one scholar, Kahei Rokumoto (a member of the *Review*'s Editorial Advisory Board), proposing a distinction between consciousness and conception of law or rights. Miyazawa brings us, in addition to his discussion of this issue, conclusive evidence of the growing cross-fertilization of ideas between Japanese and Western students of law and society. I cannot help also pointing out that Miyazawa speaks of a Japanese tendency to see law as *indeterminate* and in need of being kept that way. I wonder if that rings any bells among followers of critical legal studies.

One of the central factual assumptions behind the phenomenon Miyazawa has discussed here is that Japanese people do avoid public confrontations of the kind we see so frequently in American courts. Joel Rosch, in his study of the Japanese Civil Liberties Bureau, raises the possibility that there may be much more public disputing than court statistics would lead us to believe. He describes the unique adaptation of a human rights institution for the purpose of settling a wide variety of disputes that, in the United States, might well have ended up in litigation. His paper is interesting not only for its description of the transformation of the agency from watchdog over fundamental human rights as defined by MacArthur's occupation forces but also because it suggests that public confrontation may not be so antipathetic to Japanese legal consciousness, though the acceptable arena for confrontation may differ for specific historical reasons from those available to Americans.

The rest of the papers in this issue all diverge from this broader interest in societywide cultural patterns. Though they differ in method and vary in theoretical background, they all focus on the decision making of American courtroom functionaries. In a variety of ways, they examine the relationship be-

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tween legal and extralegal factors that enter into the choices made by judges, prosecutors, and lawyers.

Kathleen Daly, for example, sheds new light on an old phenomenon—the tendency of courts to give easier sentences to women. By conducting in-depth interviews with judges, prosecutors, and defense attorneys in a particular court, Daly was able to discover an orientation she calls familial paternalism. She proposes that women only experience sentencing favoritism when there appears to be no other way to uphold the viability or integrity of the woman's family. This is not the same as saying that women are coddled by the courts because of sexist assumptions about the nature of females. Daly shows that court personnel make their sentencing recommendations and decisions not on the basis of gender but on a principle of protecting the other people associated with the sentencee. Thus, culturally based values are influential in sentencing decisions, but not the values of female paternalism that have appeared so influential in statistical studies of sentencing.

Celesta A. Albonetti uses a very different method to explore another aspect of criminal justice decision making—the prosecutor's decision on whether or not to proceed with prosecution. Her results show an overriding concern for the avoidance of uncertainty in deciding whether a jury trial is worth the risk. She shows that prosecutors tend to factor in both legal and extralegal features of a case in arriving at a decision because they are personally interested in developing a good "batting average" of successful prosecutions.

H. Laurence Ross and James P. Foley deal with similar issues, but in the context of mandatory sentencing. They show a variety of patterns of noncompliance by judges with new laws in New Mexico and Indiana requiring minimum forty-eight-hour sentences for repeat drunk-driving offenders. They explore their data to show several sources of this noncompliance. Some of the noncompliance derives from organizational features of courts and procedures, while some stems from the culturally based values and beliefs of the judges. Like many of Ross's earlier studies, this piece neatly dissects the structure of organizational relationships and incentives to show how they intersect with, and often deflect, broader political agendas of reform.

Bucking the tide of extralegal influences on courtroom operations, Charles A. Johnson steps in with evidence that lower federal courts actually are influenced strongly by the written opinions and majority rulings of the United States Supreme Court. When legal sources of influence on lower court rulings

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are compared with political factors, Johnson's data indicate a predominance of legal over political factors.

The weight of extralegal influence, however, or at least the extent to which it attracts the attention of law and society researchers, is reemphasized in our final piece by Herbert M. Kritzer. Focusing on civil litigation, Kritzer demonstrates that the fee arrangements by which lawyers are paid affect the strategies they devise for their clients. Because so much work is done on a contingency basis, Kritzer argues, lawyers are motivated to push disputes toward an adversarial rather than a problem-solving mode of procedure. The need to produce an outcome with a measurable, divisible "prize" that can be used to pay contingency fees thus influences the civil litigation process, though the contingent fee arrangement obviously bears no direct relationship to either the laws that ostensibly govern adjudicated outcomes or the social good that might ensue from the avoidance of adversarial confrontation.

Robert L. Kidder
January, 1987

Postscript April 1987: I have just learned of the death of Fred DuBow, editorial board member, friend, mentor, critic, and colleague. There is the urge to dwell on Fred's many endearing qualities and lament the many losses that are one loss. I could tell about the shudder I have felt passing immediately through the law and society community in interrupted work, sad phone calls, unfinished shared searches for reasons. I could write a treatise on Fred's role in this association as maker and keeper of the "Oberlin underground's" flame. I could fill pages with the names of people whose work was helped by Fred's input. Instead, I think this is the place simply to say, Sandy, Shane, and Sura, speaking for myself and I think for many others, may you find peace and consolation among your friends in the association.

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