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## A “Humanist Science” and Sociolegal Studies

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*A Humanist Science: Values and Ideals in Social Inquiry* (2008) was the late Philip Selznick’s last book. In my view, it is an important text for sociolegal scholars who do empirical research. It urges us to think deeply about the normative underpinnings of our empirical work and about the kind of research we choose to do. It encourages us to attempt integrate social scientific and value-based inquiry in a clearheaded way. It is a wonderful book to assign to graduate students in the field. It is short, so they might actually read it, and if they do, they will find it inspiring.

## A “Humanist Science” and its Feasibility

What is “a humanist science?” Selznick’s preface states it clearly (p. xviii):

Facts are the conditions affecting human achievements; values are ideals realized or undermined by those conditions. A discipline that brings out this interdependence is a humanist science.”

Embedded in that statement is a cautiously optimistic assumption about social life. Selznick writes that one major focus of a humanist science is “how ideals emerge from economic activity, the quest for justice, and the challenge of living a common life.” The core notion is that social life generates normative imperatives. “All societies,” Selznick says, “discourage neglect of duty, all demand obedience to lawful authority.” (p. 41) Each social setting “generates expectations of self-restraint and solidarity; each has its own way of encouraging a transition from immediate gratification to enduring satisfaction.” (pp. 41–42). The underlying

assumption here is that human beings learn from experience and that most people prefer justice and cooperation to cruelty, loss, and selfishness. When things go wrong, therefore, they seek to develop social norms and rules that give people incentives to act more responsibly.

On the other hand, Selznick lived more than 90 years in an era that has seen no shortage of disappointed hopes, selfish opportunism, and neglect of duty. In this book, therefore, he constantly reminds us that institutions don’t always generate good behavior. He insists, therefore, that a humanistic science must be empirical. It must pay close attention to the facts, seeking to develop reliable knowledge about the conditions under which ideals are realized or sabotaged. A humanistic science, therefore, can teach us to remain idealistic in a world of harsh realities.

The focus of a humanistic science, Selznick argues, should be on how social, economic, political, cultural and legal practices affect “the *quality* of human life.” (p. 14, 89). By that he means not just our standard of living. What “we need to know,” he writes, “is what difference a course of conduct makes for the moral character of a person, practice, profession or enterprise.” p. 34. Humanist social inquiry into any social or institutional sphere, he writes, should be alert to the extent to which human dignity, freedom, and security is protected; the extent to which our social arrangements promote mutual trust, good faith, appropriate self-restraint; the extent to which they foster satisfying and nurturant relationships.

In his chapter on law and justice, Selznick suggests that the “law and society” movement *exemplifies* the idea of a humanist science. One of the key premises of sociolegal scholarship, Selznick writes (p. 105), is that

law in action is distinguished from law on the books. Law in action refers to legal behavior as it responds to ambient social contexts ... Each context has its own constraints and temptations, influencing the course and integrity of official decisions.

Thus in sociolegal studies, he notes, “Social science turns a critical eye on the interplay of legal ideals and social realities.” (p. 105). Discovering how law really works, he implies, is an inherent part of that critical look. It exemplifies Selznick’s repeated emphasis on the fate in the world of abstract principles, how they affect – and are illuminated by – concrete human experience.

In that regard, Selznick draws this wonderful analogy between art and legal decisionmaking:

“The best literature, painting or music conveys a general idea – a vivid expression of love, despair or hope. The ideal product, however, is manifested in a particular work of poetry, narrative, drama, music, or sculpture.” (p. 15)

So too, the abstract principles in legal rules are important, Selznick writes, as is the concern for consistency and even-handedness that a regime of rules promises. But “justice,” he adds, must be “only partially blind to circumstances.” Much sociolegal scholarship investigates those circumstances, trying to find out to what extent the law and its agents are blind to them or, on the other hand, are too deeply influenced by particular circumstances and pressures, departing too far from principle.

Empirically-oriented sociolegal scholars are not always explicit about the ideals and values whose fate they study. Some scholars do regression analyses designed to tease out the effects of defendants’ race on criminal sentencing, but without pausing in their articles to articulate the nondiscrimination principle and its importance for how we live. But that principle surely inspired the scholars’ choice of that particular topic. They *are* studying the fate of values in the world.

The same can be said of empirical studies of the rate at which individual grievances eventuate in civil lawsuits.<sup>1</sup> Such studies may read as objective social science, recording actions, not thoughts and values. But the results are grist for the analysis of how fully our institutions facilitate realization of the ideal of equal justice – and that surely is why such studies are organized and funded.

Similarly, political scientists have studied whether three-judge US Court of Appeals panels decide differently when they include both Democrat and Republican judges than when all three are of the same party. (The answer is “yes,” indicating that the threat of an embarrassing dissenting opinion can make policy-oriented judges more attentive to *legal* argument).<sup>2</sup> In Selznick’s terms, those studies are designed to and do teach us about the institutional conditions and practices that enable distinctively legal values to thrive in a world dominated by partisan politics.

## Doing “Humanist Science”: A Personal Memoir

Like the uneducated person who was startled to learn that he had been speaking prose all his life, reading *A Humanist Science* made *me* aware that, more or less unconsciously, I have been striving to do “human science” in much of my own empirical work. Selznick’s book articulates the unspoken premises that have deeply influenced my choice of topics and modes of analysis. I would like

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<sup>1</sup> See, e.g., James Miller & Austin Sarat, “Grievances, Claims and Disputes: Assessing the Adversary Culture,” *Law & Society Review* 15: 525–566 (1980–81).

<sup>2</sup> See Frank Cross & Emerson Tiller, “Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals,” 107 *Yale L. J.* 2155–2176.

to discuss that personal scholarly journey, self-indulgent it may be, because it contains research experiences that I think will help explicate what *A Humanist Science* is getting at, while underscoring my argument that sociolegal studies is, or can be, a humanist science in Selznick’s sense.

In the Fall of 1969, when I was a beginning graduate student taking a sociology of law seminar Yale, the instructor assigned *Law, Society and Industrial Justice*, Selznick’s first book about legal institutions. Above all, that book taught me that sociolegal researchers could make the institutionalization of legal values, norms, and procedures – as well as organizational failure in that regard – the heart of one’s agenda as a teacher and scholar, the phenomenon to be observed and explained.

That idea must have lurked in the back of my mind, for my PhD dissertation, which ultimately became a book I called *Regulatory Justice*,<sup>3</sup> was about precisely that. I conducted a participant-observer study of decisionmaking in a regulatory bureaucracy in which officials decided petitions from individual business enterprises, labor unions, and employees, all seeking exceptions from government regulations that limited price and wage increases. I focused on what officials actually did when they purported to be deciding those cases according to the dictates of an increasingly thick manual of regulations.

What the officials did varied. Sometimes, like the judges mentioned in *A Humanistic Science*, they decided cases legalistically, using a formalistic reading of the regulations that rendered them “blind to circumstance.” Sometimes, overwhelmed by time pressures and factual or legal confusion, the officials temporized, delayed action, or acted as if they hoped the case would go away – a kind of “retreatism” that happens in too many legal and bureaucratic institutions. Occasionally, moved by an enterprise’s concrete circumstances – which Selznick’s humanism would encourage them to *consider* – the officials *disregarded* the law and decided on the basis of their own personal sense of fairness; higher agency officials frowned on that kind of legal disregard because, if it became more widely known, it could stimulate resentment and disobedience on the part of regulated enterprises that had been held to the letter of the law.

But *most* officials in the agency I studied, caught between the regulatory command and the arguably unjust result it would produce in a particular case, struggled and deliberated, like good judges, to craft a *principled exception* to the regulation. They would make a new sub-rule that, like a judicial opinion, was written down and could be used as precedent in future cases. This creative effort to elaborate the body or rules in order to realize legal values – which

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3 Robert A. Kagan, *Regulatory Justice: Implementing A Wage-Price Freeze*. Russell Sage Foundation, 1978.

I labeled a “judicial mode” of bureaucratic decisionmaking – arose from the *culture of rule-interpretation* that had developed in the regulatory office. The officials developed that culture of interpretation, I observed, through discussion and debate of hard cases. They did so to resolve a tension they felt, a problem that arises in virtually all legal institutions: how to implement legal norms *consistently* while simultaneously attending to the demands of fairness in concrete individual cases. This perfectly reflects Selznick’s conviction – referred to earlier – that ideals can *emerge* from the challenge of coordinating human activity.

Again, while those ideals and implementing practices *can* emerge from organizational practices, they do not always do so. In my dissertation research, therefore, I was led to try to discern what *contextual* factors – what social facts, to use Selznick’s language – encouraged that *judicial* mode of decisionmaking, as well as to observe and describe how and why officials were propelled into toward *legalistic* or *retreatist* modes of decision by other social facts, such as inadequate information, or a poorly-organized, dysfunctional inter-office culture of rule-interpretation, or overwhelming caseloads combined with political pressure for immediate decisions. To me, one lesson of that research project was that one *could* empirically study the intra-organizational and external political conditions of “doing justice.”

A few years later I embarked with a colleague – Eugene Bardach – on a study of the enforcement of health, safety and environmental regulations by governmental field inspectors. Bardach and I began with the intention of determining what made regulation effective in achieving regulatory goals. But close interaction with field inspectors from a variety of agencies gradually convinced us that a key challenge they and their supervisors faced was how to deal with the same issue that emerged in my dissertation research: the tension, as Selznick puts it, between the abstract rule and the concrete human impacts of applying it. That tension arises constantly in regulatory programs because of the legal *overinclusiveness* that stems from using prescriptive, prophylactic regulatory rules to govern hundreds or thousands of situations and technologies in a dynamic economy.

Many regulatory officials realized that it was counterproductive to simply follow the law and impose legal sanctions for all rule-violations, even when a rule made no sense in a particular circumstance. To do so risked alienating the regulated enterprise, generating defensiveness and evasion, and undermining the *cooperation* that is the key to achievement of meaningful regulatory protections. As Selznick puts it in *A Humanist Science*, “Law is more effective, as well as more just, when it is context-sensitive or ‘individualized’.” (p. 113). And he writes “principles of care, reciprocity and responsibility,” if they are be realized,

must be applied “in light of what a particular relationship or activity requires,” whether the context is “manufacturing products, interrogating prisoners, or managing a classroom.” (*Ibid.*)

After 2 years of countless rides with inspectors, interviews in regulated enterprises, and discussion with the chiefs of regulatory inspectorates, Gene Bardach and I were able to outline the traits and practices of what we called “the good inspector.”<sup>4</sup> The good inspectors, while quick to use the coercive power of law against uncooperative “bad apples,” achieved more social good than wholly legalistic inspectors because they also were sensitive to site-level protests against regulatory unreasonableness by basically cooperative enterprises; in such cases, good inspectors traded legal forbearance for constructive change, and counseled out-of-compliance companies about how to improve.

Again, lest one think that a humanistic focus on the realization of legal values is hopelessly idealistic, Bardach and I found that in the 1970s – basically the first decade of aggressive federal environmental and safety regulation – the good inspector was far from ubiquitous. In many agencies, enforcement often was legalistic; our study, accordingly, was published under the title *Going by the Book*. Legalistic enforcement helped trigger the anti-regulation, anti-government Reagan Revolution. And ironically, the primary cause of legalistic enforcement in many agencies was political distrust of government on the part of pro-regulation activists, journalists, and politicians, quick to react to any sign of regulatory ineffectiveness by demanding more specific regulations and more legalistic enforcement patterns.

## Challenges

Meeting the standards Selznick sets forth in *A Humanistic Science* is a daunting task. One empirical challenge is to operationalize variables such as “responsiveness” or “fairness.” In 2009, when President Obama mentioned that he thought a capacity for empathy was an important criterion in the selection of a U.S. Supreme Court justice, it touched off a storm of debate about what “empathy” really meant, or what it should mean for a judge also sworn to decide in accordance with law. Debate also raged about which social groups or populations deserve judicial

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<sup>4</sup> Eugene Bardach & Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. Temple University Press, 1982 (Reprinted, Transaction Books, 2002). The inspiration for the concept of “the good inspector” came from William K. Muir, Jr. *Police: Streetcorner Politicians* (University of Chicago Press, 1977), a superb example of Selznick’s ideal of a humanist social science.

empathy – and the inevitable disagreement about *that* was taken by some as a conclusive argument against judicial empathy for anybody.

The fundamental challenge here is that as in any community, people seek many values simultaneously. We want legal decisionmaking to provide consistency, impartiality and predictability *but also* responsiveness to the specific case – *and* we want it to be speedy, since justice delayed is justice denied. To use Selznick's terms from an earlier book, we want both autonomous and responsive law,<sup>5</sup> or rather, as *A Humanistic Science* emphasizes, a judicious blend of both, the precise mixture depending on the situation. Defining the metric for that "judicious blend" among conflicting values in any setting is a challenge to empirical researchers.

The next empirical challenge is to find *data* that would enable us to reliably *measure*, even roughly, the extent to which values are realized in different social or institutional contexts. Many important questions demand qualitative judgments, based on labor-intensive case studies. To refer again to the regulatory enforcement study described earlier, when a researcher sees that a regulatory official has issued a notice of violation and imposed a fine, the researcher cannot immediately tell whether the official decided legalistically, without regard to circumstances and consequences, or did so only after carefully considering all the circumstances and concluding that a legal penalty is both fully justified and wise. To make such an assessment, the researcher would need to know all the facts and evaluate the arguments on both sides. To do so persuasively, he or she must have deep knowledge of the regulatory context and must be able to explain his or her judgment. Consequently, for many significant sociolegal questions only small-n, labor-intensive case studies will suffice – and that research design may not satisfy contemporary demands for comprehensive studies based on quantitative evidence.

Let me provide another example, based on my own experience. A humanistic scientist, interested in the fate of values in the world, might be eager to know to what extent, in an environmental regulation program, regulated business firms have actually internalized and acted upon environmental norms, as well as what accounts for inter-firm differences in that regard. As one indicator, some scholars have done surveys asking firms whether they have adopted formal environmental management plans, particularly the ISO-14000 plans that have been certified by the International Standards Organization. The theory behind certification is that the multiple steps, internal written standards, and self-audits demanded by the ISO standard will, as Selznick suggests, create a set of obligations and routine

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5 Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law*. Harper Colophon, 1978, reprinted Transaction Books, 2005.

interactions that in turn will generate and continually reinforce intra-organizational commitments to environmental values. But does that really happen? Or, as environmentalist critics of such plans have charged, are they mostly for show, public relations gimmicks? And how can one find out?

Because of the enormous differences in different facilities’ environmental impacts, differences in enforcement intensity, and many other factors, official agency records of inspections and findings of violations usually will not help the researcher separate the truly green sheep from the wolves in green fleece clothing. To address that challenge, my colleagues Neil Gunningham, Dorothy Thornton and I decided, would require labor-intensive in-depth case studies of a limited number of firms. In one such study, we conducted in-depth field research on 14 pulp and paper mills, all of which had formal environmental management systems of one kind or another.

Our task, as we saw it, was to assess the level of *commitment* that managers invested in their environmental management plan and in trying to improve environmental performance. To do so, we specifically sought information on how hard and effectively each mill’s managers worked to find new cost-effective ways of reducing pollution, and how effectively they actually implemented the plans. It was helpful that most facility managers agreed to give us internal quarterly records showing how much pollution remained in their effluent. But to get to the core question about commitment, it was necessary for us to interview key environmental officials and overall mill managers at length.

To prepare for such interviews, we first learned a good deal about the pulping process and the evolution of pollution reduction technologies. We were then able to ask the managers detailed questions about whether, when, and why they had (or had not) adopted particular control technologies. We also asked them to describe, using specific examples, the chief challenges they faced in simultaneously meeting environmental and financial goals, and in what ways they feel they have fallen short on environmental progress and why. We asked them to recount specific conflicts that had occurred – internally, with environmental groups, with regulators – and how they had resolved them. We obtained information enabling us to assess how transparent each mill had been in revealing their environmental performance to neighbors, environmental groups, and regulators. We obtained information enabling us to assess how intensively and frequently mill employees received environmental training, and how closely environmental managers were integrated with mill management as a whole. We used information we gathered about each mill’s problems and practices to ask more pointed questions in subsequent interviews at other mills.



We feel we learned a lot. Our book on the subject<sup>6</sup> has been well received. But that was just one case study of a small sample of firms in one industry at one point in time. It would be costly and difficult to replicate in other industries or with respect to responses to other regulatory rules. We do not have nearly enough cases to do the regression analyses that could prove, even to our own satisfaction – not to mention to the economists who don't trust qualitative data – what factors *account for the variation* we detected across pulp mills in levels of commitment to effective environmental management. Those and similar data-challenges arise *whenever* a sociolegal scholar makes value-based behavior the dependent variable.

Those challenges, however, do not undercut the validity of doing humanistic science. The challenges suggest, rather, that the road is long and riddled with potholes. But Philip Selznick, I believe, was absolutely right in telling us that it is the high road, the road on which sociolegal scholars should set off. And I think they should carry this short, intellectually rich book, *A Humanistic Science*, in their back pockets.

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6 Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Shades of Green: Business, Regulation and Environment* (Stanford University Press, 2003). We conducted a similar in-depth study of regulatory performance in 16 firms that operated truck fleets powered by heavy-duty diesel engines (a major source of dangerous particulate emissions). See D. Thornton, R.A. Kagan & N. Gunningham, "When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry," *Law & Society Review* 41: 405–435 and "Compliance Costs, Regulation, and Environmental Performance: Controlling Truck Emissions in the US" *Regulation & Governance* 2: 1–18 (2008).