From the Editor

This issue of the *Review* contains four articles that examine the operation of legal institutions around the globe: in Asia (Tanase's work on automobile accidents in Japan), in Africa (Burman and Scharf's study of people's justice in South Africa), in Europe (Van Koppen's article on the political activity of the Dutch Supreme Court), and in the Middle East (Shamir's study of the independence and legitimizing decisions of the Israeli High Court). It is the first issue of the *Law & Society Review* in which half of the articles are written by authors from outside the United States, and indeed from outside the Americas. A knee-jerk reaction is simply to applaud this international representation and to see it as a validation of the decision to hold the 1991 meeting of the Law and Society Association in Amsterdam. Both are fair responses, but in fact these articles represent a more substantive set of achievements.

Scholars writing about sociolegal research often call for greater attention to context-contingent relations. Such context-sensitive research is costly, both in terms of data collection and in the knowledge it demands about the variations in behavior across multiple settings. Yet the authors of each of these articles seriously examine the role of context in their research. Unlike many U.S. researchers who imperialistically generalize from U.S. data and thus miss the opportunity to assess contingent relationships, the authors of each of these articles explicitly analyze the characteristics of the setting they have investigated against the background of other possible settings.

Takao Tanase's research on the use of law in Japan documents the low rates of formal litigation in Japan relative to other industrial nations. While some scholars have attributed this low use of legal resources to national character and institutional barriers which have produced a paucity of lawyers, Tanase finds that Japanese nonlitigiousness is instead a product of the sophisticated management of demand for legal services. In addition, he presents evidence that this nonlitigiousness comes at a cost. While on the surface Japan appears to have a highly standardized system of compensation to deal with, for example, the common case of automobile accidents, Tanase finds that as a by-product of the careful dispute management system, which minimizes conflict, there can be large inequities in compensation. He offers the intriguing proposition that the very structures that now discourage contentiousness may, if unchecked over time, weaken the vigor of law by

LAW & SOCIETY REVIEW, Volume 24, Number 3 (1990)

stunting the evolution of legal standards and threatening the legitimacy of law.

Sandra Burman and Wilfried Schärf's research on informal courts in South Africa also carries implications for future changes in court structure and legitimacy. Analyzing the roles played by informal courts since the first white settlers arrived in South Africa, Burman and Schärf demonstrate the tensions and the compromises of the informal street committees and formal state courts that have existed side by side, adjudicating disputes that arose in the same community. Against this background, a politicized youthful population initiated the Youth Brigade Court, an effort hostile to cooperation with the state and with elders and ostensibly aimed at achieving a more democratic approach to social control. Yet the short life of this newer informal court suggests the fragile nature of methods of social control that do not have broad local support and a stable political base. The tensions evidenced indicate the serious obstcles that will be faced by any court that operates in a post-apartheid South Africa, or indeed in any community in which there is significant dissensus on values, enforcement approaches, or remedies.

The two remaining articles in this international group explore the independence and legitimacy of appellate courts. Peter van Koppen considers the relation between judicial activism and partisan political participation in the selection of justices, showing that partisan political influence is greatest in democratic countries in which the highest courts are most active. He examines the unusual case of the Dutch Supreme Court, whose considerable political influence contrasts sharply with its freedom from partisan appointments. Van Koppen offers both historical and structural explanations for this pattern, including the legitimizing value of a high court protected from political appointment.

Ronen Shamir finds a similar legitimizing effect of the apparently independent decisions of the High Court of Justice in Israel on at least some constituencies. He observes the tension inherent in a state institution which claims to be unbiased and independent and yet tends systematically to support the actions of state rulers. Shamir identifies a series of decisions by the Israeli High Court in which outcomes in opposition to the government concerning the occupied territories were pictured as demonstrations of the independence of the Court in the news media, thereby conferring legitimacy on the Court as well as on the state as a whole. Yet his close analysis of the decisions suggests that these exceptional cases in which the High Court opposed state action had other key characteristics: In most of the landmark cases the High Court acted to protect its jurisdiction or discretionary power and the state's action was blocked only temporarily or symbolically. It is perhaps not surprising that the Palestinians, unlike the Israelis, remained

skeptical about the Court's independence and unconvinced of its legitimacy.

The remaining two articles in this issue both make significant advances in established areas of sociolegal study. Gregory Caldeira and John Wright continue the tradition of scholarship attempting to explain the behavior of the United States Supreme Court. They show how the Court builds its agenda by constructing a preliminary list of cases for discussion that reduces the substantial number of cases submitted for certiorari. But Caldeira and Wright do not focus here on the explanatory variables of judicial background and ideology that characterized earlier work. Instead, recognizing that selection is a dynamic multistage process, they are able to show that the Court initially sifts through the cases using low-cost indicators, relying in the final stage on the more costly but more reliable cues. Decisionmakers faced with complex tasks often develop shortcuts to reduce complexity. What we still need to learn is what substantive consequences such shortcuts have on ultimate decisions.

Harold Grasmick and Robert Bursik make their contribution by merging two theoretical traditions, rational choice and deterrence models. They suggest that traditional conceptions of deterrence are unduly constricted, focusing only on the threat of legal sanction as a deterrent to criminal behavior. They propose that a more complete picture would include the socially imposed cost of embarassment and the self-imposed cost of shame. Their empirical work offers preliminary support for a generalized model of social control that includes the threat of shame as well as legal sanction.

I have been editing the *Law & Society Review* for two years. As I look ahead to my final year, I have a few observations about the several hundred manuscripts and reviewers' evaluations I have read, and the articles published in the *Review* during this time.

I have worried about whether we have been using the wide-angle lens called for by Macaulay (1984) to survey the forest or if we have simply been counting trees. I have listened for signs of "comfortable, but rather boring, 'clackety-clack' " (Abel, 1980: 805) in the manuscripts and for hints of the development of the grand theory that Friedman (1986) says we cannot reasonably expect to achieve in our study of law. Is there evidence in the distribution of manuscripts received by the *Review* that the field is generating the broad perspective, innovation, and theoretical progress so earnestly called for? My own sense is that while the gains are measurable, the clackety-clack continues unabated.

But the clackety-clack that continues is neither "comfortable" nor mechanical. Research on sociolegal issues is hard to do well, and if normal science is not always dramatic, it is crucial. Reviewers (and editors) often complain that a manuscript is merely offering yet one more in a string of empirical results that provide no

new theoretical insights. Demand for innovation is high. The joy of trashing is evident. In fact, it is important to recognize that any accumulation or at least modification of imperfect knowledge depends upon partial replications of earlier work. If our tools are imperfect and any single perspective is incomplete, why should we think that a fresh approach will not require further refinement and extension? If we accept that legal culture and context are crucial determinants of the behavior we study, shouldn't we expect and welcome further research that explicitly tests their influence? Such research of course need not simply be more of the same. There is so much that we do not know about legal institutions and processes that it is hard to imagine a solid piece of research, even one that purports to be simply a replication, that does not touch on new aspects of the phenomenon it examines. Thus, the pages of the *Review* are and ought to be open, if not to clackety-clack, to the clickety-click that draws connections and continues to question assumptions with persistence and elaboration.

Shari S. Diamond
September 1990

REFERENCES

ABEL, Richard L. (1980) "Redirecting Social Studies of Law," 14 *Law & Society Review* 805.

FRIEDMAN, Lawrence M. (1986) "The Law and Society Movement," 38 *Stanford Law Review* 763.

MACAULAY, Stewart (1984) "Law and the Behavioral Sciences: Is There Any There There?" 6 *Law & Policy* 149.