BOOK REVIEWS

Law and the Social Sciences: The Second Half Century. **Julius Stone (Minneapolis, Minn.: Univ. of Minn. Press, 1966, 121 pp., $4.50.)**

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In a slim volume of eighty-three pages (fleshed out by twenty-five pages of notes), Julius Stone has tried to provide order in the world of law and the social sciences. This is an eminently worthwhile goal, but it is a seductive enterprise. Although the scientific mind certainly recognizes that diverse phenomena partake of underlying uniformities, there is a growing realization that all knowledge cannot be held simultaneously within our grasp, to be sorted out methodically into bits and pieces like children's blocks.

Giambattista Vico did a fair job of it in the eighteenth century, but even then the neat world of classical studies was breaking apart in the recognition that Western Europe lacked a monopoly on civilization. Stone, however, has gone ahead on the assumption not only that the world is unitary but that it may be collected and set in order. In *Law and the Social Sciences* Stone tries to grasp the world, only to see total order and understanding flow off in another direction. This dilemma could be hidden by sheer monumentality in his other works, but it can hardly be camouflaged in this short text.

The point here is not the flaws of a single book or even of a set of books, but rather the limitations of a whole outlook on the understanding of human behavior. For the methodology of this and other Stone works is in large measure Common Law methodology: proof is by citation, with the books and monographs of a dozen disciplines substituting for cases. Since the point of the job is to eliminate as many exceptions and contradictions as possible, the degree of verification increases with the weight of authorities cited. For every three pages of text, there is nearly a page of supporting materials. There may be nothing conscious in

Stone's adoption of proof by citation. Indeed, it seems on the surface to have been animated solely by his own prodigious erudition. Yet, perhaps it is not too much to say that this torrent of footnotes springs from a deeper source, from an approach to proof common to Anglo-American practitioners. If that is so, then the scholarship is seriously misplaced. Inductive proof commends itself far more to the practice of law than to the development of science.

In terms of the substantive contents of the book, the lengthiest section is devoted to a recapitulation of the thought of Talcott Parsons. Stone argues that Parsons would have done well to acquaint himself with supporting evidence from legal studies. Conversely, he seems to be saying that lawyers have something to gain from familiarizing themselves with even so recondite a writer as Parsons. Lawyers for Stone, as for so many others before, remain brokers among the diverse elements in society and they must in consequence utilize whatever knowledge will aid them in integrating society.

These are defensible and indeed laudable goals, but in terms of *Law and the Social Sciences: The Second Half Century,* they are somewhat parochial. It was once sufficient for the social sciences to intrude themselves upon the lawyer's horizon on the ground that the social sciences could make his task easier and more effective. This purely instrumental view, however, neglects the larger jurisprudential problems. While there is nothing wrong in the social scientist joining the lawyer in ministering to social ills, there is something quite wrong, it seems to me, in his doing that to the exclusion of all else. Stone, unless I disastrously misread him, is content to leave the social scientist in his original instrumental capacity. For all the rhetoric about a law-social science dialogue, communication seems destined to go in one direction only, outlining to the social scientist the lawyer's and society's needs.

In the meantime, the great jurisprudential questions remain unanswered, and, what is more distressing, often go unasked: Why do men obey the law? What is the relationship between procedure and substance? What are the real as opposed to the merely apparent functions of legal institutions? What determines whether and when a dispute will enter the purview of the legal system? There is nothing in this volume that indicates much sensitivity to the role the social sciences might play in answering such questions.

It is only at the end of the book, when Stone turns to the mystery of judging that he goes to the center of a major problem. Here, too, the

discussion is characteristically set within the framework of a reproach to the social sciences. For the context is, as the chapter heading has it, "Man and Machine in the Search for Justice, or Why Appellate Judges Should Stay Human." Stone warns that quantitative analysis of appellate court decisions and the general application of computers to legal problems carry with them the seeds of dangerous role distortion. For the lawyer there are inevitable gains, both in planning tactics and in freedom from research drudgery. Even for the trial judge there may be a valuable payoff, since accurate prediction frees him from the risk of appellate reversal. But at the appellate level, the electronic revolution may well free the judge from the petty tyrannies of routine, only to enslave him to the larger tyrannies of machine-made justice. Stone tells us (pp. 84 to 5), "The judge of justice so influenced would be a self-frustrating judge, dulled to the sense of final human responsibility hitherto found in men's questings after justice." Social scientists would seem to have within their grasp the ultimate in labor-saving devices.

Yet, it is by no means clear at whose door Stone lays the responsibility: at the door of social scientists unaware of what they owe society or at the door of judges eager to escape the burdens of office. In any case, what seems never to intrude into the discussion is the idea that perhaps social scientists seek knowledge more than power (even cliches can be true) and that they may in the long run contribute to the smooth functioning of the legal system through disinterested research.

In any case, Stone closes the lectures with some close-knit and incisive pages on the mystery of judging, demonstrating primarily how obscure the whole subject remains. It is now thirty-seven years since Judge Hutcheson's heretical article on judicial intuition[1] and it is sobering to reflect upon how little more we know now about the process. Stone rightly affirms its cloaked and ill-understood character. He brilliantly discusses the leeways of the law and of the necessity for human direction in appellate cases. He points out what we often forget, that we demand of words—in statutes and judicial opinions—a precision they cannot give. As a result of this, and of changes in the environment in which words are used, statutory and judicial pronouncements never have the certainty and specificity which is often imputed to them. The "plurisignation" of words injects into the legal system both flux and the necessity for choice.

1. J. C. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1928-1929).

These considerations militate against "slot-machine justice." "Neither lawyers nor behavioral scientists are entitled to leave the judgment seat quite untended while the computers stand ready to process the outcome of its ever-renewing struggle for justice through but beyond the law" (p. 85). It may be useless to try to read the future in this matter but, it seems to me, an equally good case can be made in quite a different direction.

While Stone compounds confusion by lumping together all law-related research in which electronic data-processing plays a role, there is in fact no precise, clear line between man and machine. We may exclude at the outset efforts merely to retrieve precedents. Stone concedes that danger does not lie in this quarter. We are then left primarily with statistical analyses of voting patterns on collegial courts. We might for a particular court on a particular issue predict future voting patterns. The danger for Stone is not that we study voting patterns but that we set in motion self-fulfilling prophecies.

There may be potential danger here, but if so, the means to avoid it lies with judges, not with those who study them. The judge who sees his burden eased by the readily available extrapolation of past decisions poses a social danger, no less than the legislator who pays too much attention to roll-call analyses. But the danger of the self-fulfilling prophecy is mitigated by the existence of competing pressures. Little as we know about the process of judging, we do know that it involves a series of classifications. Most of the judicial quantifiers regard the classificatory process as non-problematic—as a given. In fact, it is the most problematic element of all, far more so than the judges' votes. It is simply a case of the votes being far more accessible and manipulable than the interior process by which judges conceptualize a dispute. No amount of extrapolation from past votes will perform the job of classification of fact clusters into legal categories. A dispute is not "due process" by divine fiat but by human decision. Existing work provides no grounds for the fear that this element of decision-making will be mechanized out of existence. Indeed, the judges' votes are in a way trivial data, though to be sure at the center of the universe for individual defendants and litigants. We are tempted to equate their visibility with significance, but in fact they are simply the visible results of a process of categorization which most students of the courts have chosen to ignore.

Because data concerning fact-norm categorizations seems hard to get at; because we accept our culturally conditioned picture of the judges' isolation and aloofness, we look instead at the immediate, public output of the appellate courts. And here, as elsewhere, trivial questions breed trivial answers. We learn much about votes but little about how they were arrived at; much about voting blocs but little about the pressures that play upon the decision-maker. Stone is correct in pointing to the superficiality of our knowledge and correct, too, in suggesting the gap between the process of judgment and the moment of its promulgation. Yet the danger he paints is in the end extravagant and unrealistic: we do not yet know enough to be dangerous. Social danger is a function either of extreme knowledge or extreme ignorance and for the most part we float in the limbo between. Until we know more of how judges weigh and classify facts, of how they match facts and norms, and of how constrained they are by role expectations, we are unlikely to shake them from their seats.