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Limitations on the Uses of Behavioral Science in the Law

Geoffrey C. Hazard, Jr.

In response to Professor Kaplan's article regarding behavioral sciences' challenge to the law, Professor Hazard adopts a position of less enthusiasm than that advanced by Professor Kaplan. In exploring several limitations in the application of behavioral science to the law, Professor Hazard concludes that the direct utility of behavioral sciences in resolving social conflicts — the essence of the legal process — is more remote and expensive than is commonly assumed.

I WOULD LIKE to make two preliminary observations in order to put into context my more deliberate, more ponderous statements. First, I agree very much with Professor Kaplan's observation about the difficulty in the application of behavioral science to

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law, and that arises from the form and the content of behavioral science: A great deal of behavioral science is cult oriented rather than problem oriented and the behavioral scientists are more interested in

sharing with each other niceties and displays of technical erudition rather than sharing with the larger community some useful disclosures. This may be the intrinsic nature of science.

The second observation is that one of the difficulties in talking about applications of behavioral science to the law lies in the enormous breadth and ambiguity of the term "the law." "The law" sometimes refers to lawyers, sometimes to the legal profession as a professional collectivity, sometimes to government, sometimes to government as it ought to be, and sometimes to all of these. The use of so indefinite a term in juxtaposition with "behavioral science" almost invariably begets confusions that are difficult to dispel.

Within this set of bounds, let me first say that Professor Kaplan properly places the relation between behavioral science and the law in the context of the aims and limitations of legal order considered as a whole. The difficulties that are confronted in the application of techniques of behavioral science to legal problems arise out of fundamental differences between legal processes and processes of scientific inquiry. My purpose is to comment on some of those dif-

ferences in the hope that the sources of difficulty may be made a little clearer.

The essence of legal process is the resolution of social conflict concerning objectives to be realized and methods for realizing them. Where there is assent to social objectives and to the means for their achievement, legal processes are unnecessary and their functions meaningless. Where processes anterior to the legal system exist to command or to induce such assent, the systems of the law are redundant and unused. Characteristically, legal controversies center on matters people really care about and in which they have vital interests immediately at stake. The questions that the law must consider are real; their context is one of more or less ripened dispute; and the results of their resolution are of decisive significance to interests of life, liberty, and property.

At the same time, the conflicts with which legal processes deal are formulated in terms of principle or fact, or both. Where a conflict has advanced so far that no one considers questions of principle or of fact to be determinative, the conflict is resolvable only by force of arms and not by force of mind. Conflicts of arms are, of course, typically accompanied by arguments of principle and fact, for most human beings are sufficiently advanced in civilization to be concerned with the justice and propriety of their aims and means even when they are at war. Nevertheless, a legal controversy is not a war, however many the respects in which they resemble each other. Legal processes presuppose an abiding commitment to the social enterprise of which they are a part. They presuppose a commitment to principle and to fact which is preferred to armed conflict by all participants. Without this commitment and this preference, legal processes are also redundant and worthless.

Questions of social principle and social fact are also in the domain of moral philosophy, logic, and behavioral science. Legal processes, therefore, entail inquiries that are in form and content no different from the inquiries that are the subject of these disciplines and their subsidiaries. The methods of illuminating the questions of principle and of fact, moreover, are no different in the law than they are in these disciplines. Legal inquiry differs in the practical significance that attaches to the answers to the questions.

Questions of principle and of fact can be resolved in the end only by the process of reaching agreement, or its equivalent. There are no imperative and ineluctable forces of revelation that unmask the solutions of social dilemmas. A fundamental operational task

for legal processes is to provide procedures in which the relevant questions can be determined quickly, cheaply, and finally. If agreement between the disputants is not reached on a consensual basis, then the legal system must establish a substitute for agreement. There are a variety of methods for establishing such substitutes, and at one time or another the law has used all of them. Their common theme is that they involve an appeal to the disputants' recognition of constituted authority.

The most primitive method is magic. The appeal to authority consists of invoking the disputants' acknowledgment of the decisive magical significance of an indicative event — an acknowledgment reinforced by a superstitious fear of the mortal consequences of disregarding the event. A more sophisticated form of such an appeal, characteristic for example of Western European society in the medieval period, consists of reference to more generalized concepts of religious authority in which human arbitrators are ascribed wisdom and capacity for decision that is divinely determined or guided. In such a regime, sanctity of the decision is sustained by references to the religious sanctity of the decisionmaker. In secularized society, this sanctification is more dilute, more materialistic, and more frankly a matter of social expedience. The decisions of the legal arbitrator are accorded authority by reference to the source of his authority to make decisions — ultimately, the constitution — and such authority is sustained by pointing out that the alternative is social chaos.

All of these ways of legal decisionmaking use the mechanism of authority. The decisionmaker is attributed the authority to make a decision that will be taken as true or right. The recognition of authority is itself a kind of undergirding agreement. The practical implication is acquiescence in the decisions made by the authority — whatever the decision might be and however wrong it may seem when assessed by some other criterion of truth or rightness. So long as the basic agreement about authority remains viable, any of these systems works. They all are capable of performing the essential legal task of resolving disputes of principle or fact. They are all practical alternatives to the method of empirical inquiry, the most modern mode of resolving such conflicts. They are also cheaper, at least in the short run, than empirical inquiry. And for questions that are *not* reducible to questions of fact, they are the only method for resolving disputes without armed conflict, because

empirical inquiry can go no farther than the availability of discoverable and significant evidence.

So far as the law is concerned, science¹ is thus competitive with other processes of decisionmaking that are functionally equivalent to it. Whether, as a matter of fact, a culprit is determined to be such by magic mark, by divination, or by comparison of fingerprints is all one to the needs of legal process. Whether, as a matter of principle, the rightfulness of human sacrifice is determined by a voice from on high or by calculation of the deterrent effect of the death penalty is likewise all one to the needs of legal process. Of course, from a perspective external to the law we might make different assessments as to the soundness and propriety of these various modes of legal decision. The point is that for the immediate purposes of legal ordering, any decisionmaking method will suffice so long as it is decisive.

In comparison with these authoritarian methods of decision-making, for legal purposes, science has some special shortcomings. A scientific demonstration, to be accepted as such, requires an agreement of much the same kind as any other procedure for establishing a proposition of fact or of principle. If someone refuses to accept the evidence of the senses, or rejects the inferences that might be drawn from it, there is no scientific way to overcome his refusal. Persuasion and additional demonstration of course may induce him to change his mind. But in the absence of assent to its significance, a scientific demonstration has no more intrinsic acceptability than a religious doctrine.

The ethic of scientific inquiry requires that scientific demonstrations be accepted voluntarily and freely by those to whom they are addressed. A scientist would regard it as absurd to suggest that a person who was unconvinced by a demonstration should be told to accept the demonstration willy-nilly. For example, people who still believe that the world is flat can only be given more pictures taken by the astronauts; if these do not suffice, then in scientific terms the matter has to be dropped so far as they are concerned. To try to impose acceptance by authority, rather than to induce acceptance by persuasion, would rightly be regarded by scientists as soliciting acceptance on unscientific grounds.

The scientific method of investigation thus involves a principle of autonomy in reaching conclusions that is in fundamental conflict

¹ The "behavioral" part of "behavioral science" refers only to the subject matter of inquiry.

with the exigencies of legal process. People involved in legal controversy are in a notoriously unreceptive frame of mind. This is true whether the controversy concerns the microcosm of an automobile accident or such larger questions as the fairness of fair-housing legislation. The more proximate the conflict to strongly felt interests and the greater the personal stakes involved, the less readily are the participants likely to accept a verdict, whether based on science or on authority. And if science requires, by its own terms, that its verdict be voluntarily accepted, then scientific method has little or no place in the direct processes of legal decisionmaking. This is a fundamental limitation on the uses of behavioral science in the law.

To the extent that a problem has ripened to the stage where legal process is required for its resolution, so also to that extent has it ripened beyond resolution by scientific procedures. This mutual repulsion between legal process and scientific process is not widely recognized. Because it is not recognized, behavioral scientists and law men are often found talking past each other. The behavioral scientist wants his demonstrations to be accorded the universal acceptance that is presupposed in the concept of scientific proof. The law man wants to resolve a controversy that would not have existed if the proposition in question had found universal acceptance. One result of these disengaged soliloquies is mutual bafflement. It is to be hoped, but not necessarily expected, that the bafflement can be reduced. Such a reduction, however, will only mean that the limitations of behavioral science in relation to law will become clearer, and not that they will be avoided. In any case, it may be helpful to explore these limitations a little more extensively.

One of the most immediate limitations arises out of the fact that science requires the agreement of minds, whereas legal process begins with their disagreement. In practical terms, this means it is most probable that behavioral science will find its greatest application in those legal processes furthest removed from direct and immediate conflict. Behavioral science is most conspicuously applicable in regard to the administration of legal institutions, to legal activities that consist of planning for the future, and — with reservations — to legislation. It is least likely to be helpful in litigation, as the "battles of the experts" attest.

Another fundamental limitation of behavioral science is that, compared with its authoritarian competitors, it is very expensive. Although it is not easy to say, for example, how one would go about establishing scientifically whether or not racial segregation in

schools has destructive psychological effects on children, it is safe to say that a satisfactory scientific demonstration would involve intensive observation and the testing of a large number of school children over long periods of time. The cost would run into millions of dollars and millions of man-hours, and the results would in all probability be somewhat indeterminate. On the other hand, by processes of authority nine men can establish the same proposition in the matter of time required for them to say so — if their verdict is accepted. The same is true of lesser problems. General Motors, for example, may have to spend millions of dollars to determine the safety of an automobile design that a jury could assess after a few days of trial. Of course, the results of the processes of authority are less than satisfactory from a scientific point of view. For legal purposes, however, they have much to recommend them, at least in the short run.

This characteristic of science carries with it the implication that not all legally relevant questions are worthy of scientific investment. The greater the urgency to reach a decision and the more various the occasions for making decisions, the less are the competitive attractions of the scientific method as compared to the method of authority. Hence, behavioral science is most economical in its application to legal questions that are enduring in significance and repetitive in occurrence. By and large, this means research into basic social processes that shape the flow of legal events, rather than the proximate causes of particular instances.

Finally, behavioral science cannot resolve questions that are put in the form of questions of principle. Behavioral science, like any other science, can illuminate only questions that are in form ones of fact. I believe that most, if not all, questions of legal principle can be reduced to a series of constituent questions of fact. The task of doing so is laborious, and not all the questions of fact so formulated are susceptible of investigation yielding reliable results. In any event, the process of reduction entails retraction of the generality and therefore the practical interest of the propositions under consideration. Indeed, when the process of reduction has advanced far enough to make the question scientifically meaningful, it usually results in making the proposition trivial for any immediate legal purpose.

In the end, as against the exigencies of the law's processes, the uses of behavioral science are relatively remote, its methods relatively expensive, and its results relatively inconsequential. Its find-

ings are, of course, more satisfying to the modern mind than the conclusions advanced from authority. That, however, is not much consolation for law men, whose concerns are for immediate, cheap, and significant decisionmaking. For them there are continuing attractions in the Delphic Oracle.