

1967

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### Recommended Citation

Nathan D. Grundstein, *The Relevance of Behavioral Science for Law*, 19 Case W. Rsrv. L. Rev. 87 (1967)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol19/iss1/12>

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# The Relevance of Behavioral Science for Law

*Nathan D. Grundstein*

*Professor Grundstein is of the opinion that the primary utility of behavioral science as applied to the law is in its possible application to legal autointelligence. Beginning with the proposition that, for analytical purposes, law as a term of reference must be differentiated, Professor Grundstein discusses the relevance of the behavioral sciences within each of the following areas: law and logic, law and justice, and law and society.*

**B**EHAVIORAL SCIENCE is not characterized by any single, uni-dimensional, across the board relevance to law. At the same time, the relevance of behavioral science to law cannot adequately be probed by picking up a scattering of pragmatic social concerns and tacking on behavioral data

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to whatever legal aspects they may disclose when these concerns are approached as problems to be dealt with through the instrumentalities of law.

For analytic purposes, law as a term of empirical and conceptual reference is too undifferentiated. Yet, to assert that there is need for a differentiating structure with respect to what law is must be followed immediately by the further assertion that such a differentiating structure exists, and that it has been in existence since 1946. I refer to that magnificent, sensitive, and detailed volume, *The Province and Function of Law*,<sup>1</sup> in which Professor Julius Stone elaborated a primary differentiation for the organization of legal thought as it stands in midtwentieth century — law and logic, law and justice, and law and society. This publication has since been supplemented by a three-volume work covering the developments in legal thought since the now-classic work of 1946. Thus the intellectual infrastructure, the foundation for relating behavioral science to law within some generalized analytic framework (which may or may not have practical implications for legal technology) is here. For analytic purposes, therefore, for purposes of comprehension, and for the manageability of inquiry, the essential disaggregation of law has been achieved. What I will try to do

<sup>1</sup> J. STONE, *THE PROVINCE AND FUNCTION OF LAW* (1946).

is to make apparent the differences in the relevance of behavioral science to law within each one of these areas into which law has been disaggregated.

Still by way of prelude, however, one should always keep in mind that there are alternatives to the data and the methods of behavioral science that have been and that are still used by law for legal purposes. There are history, philosophy, and metaphysics as alternatives to behavioral science. (What would human freedom be without metaphysics? I shudder to think of the implications for that freedom of the death of nonempiricist thought.) There is also speculative social theory. The whole body of legal thought about law and society is based on nothing more than a speculative theory of interests in law; and the whole theory of pragmatic application of law to social ends rests upon a structure of social theory. This, too, is an alternative to empirically focused behavioral science. There is logic, and linguistic analysis in law without logic is inconceivable.

The point of the matter is that we are not confronted with an "either-or" situation when the relationship of behavioral science to law is considered. The situation that confronts us is more like one of comparative advantage. From the standpoint of law, the question addressed to behavioral science is: What is the comparative advantage that will come to law from using behavioral science? Unless that question is answered the cloud of irrelevancy or, at most, of indifference, will shadow the relationship of behavioral science to law.

From the perspective of an academic I suggest that the primary utility of behavioral science for law lies in its possible application to legal autointelligence. Put another way, its real value to law is likely to be what behavioral science will offer in the way of enabling thought in law to gain from turning its attention on the content and processes of legal thought. So far as the logic of its design and of its own functioning is concerned, and of the validity of its own concepts, law is relatively ignorant. It is a mistake to think of law today as the province of a learned profession. It is a profession with an insatiable appetite for dipping into other fields of knowledge, but self-serving eclecticism is no longer enough for a profession to be learned. Law as a field of knowledge knows nothing about its own knowledge generation and utilization processes. It has an inadequate autointelligence. It is incapable of developing its own special body of legal knowledge at anything like

the rate at which the body of science-based knowledge is today being generated. The implications of this are clear enough; for example, they have already been institutionalized in medicine, where there has been a separation between fundamental medical knowledge and the practice of medicine. To view contemporary advances in medicine as resting upon the practitioner is unthinkable today. To think that advances in law will rest upon the practitioner should be equally unthinkable. Behavioral science will not have any significant impact on law if it is subordinated to the litigious needs of the practitioner.

### I. BEHAVIORAL SCIENCE AND LAW AND SOCIETY

The revised descriptive language for this differentiated field of law, as used by Professor Stone, is the "Social Dimensions of Law and Justice."<sup>2</sup> Given this particular subfield, where and how might behavioral science relate to law? Well, behavioral science is capable of generating social facts. Since legal cognizance of systematized social facts goes back to the "Brandeis brief," we may say that social facts are certainly not new to law. They were introduced into law for the justification of early social legislation. Here behavioral science only offers more of the same. Any assertion that it can offer a superior method of ascertaining and organizing behavioral data is to say that it can derive a higher quality of social fact from a superior mode of inquiry.

What I surmise will take place in this area is that law will put a pragmatic test to behavioral science. The test will deal with the following: At what level of refinement does law need social facts for purposes of choice and decision? If we accept that law has ways of looking at the quality of the fact basis of decision in the form of cross-examination, or of judicial notice and the like, we might then say that the level of fact refinement will be settled pragmatically by the level of literacy of practitioners, judges, and legislators. As a contributor to the generation of social facts, however, behavioral science will introduce no fundamental change whatever into law. It may yield increments of refinement of social fact, but the basic problems in this field of law, and the method of approach to these problems through law, and the grounds of decision for these problems will not change, nor will the structure of reasoning about social facts for decision purposes change.

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<sup>2</sup> J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966).

There is another possibility for the application of behavioral science to law. It has to do with the rationalization of systems of managed law that has emerged. It is not irrelevant that in the area of law and society the synonym is law and social control. The phenomena of administrative law disclose a change in the institutional structure and function of law. What has emerged is a structure for the management of law and its social function. In short, a system of managed law has emerged. But the structures by which decisions are managed are not well rationalized. What behavioral science could do is contribute to the improvement of the logic of a legal subsystem, (such as the Securities and Exchange Commission) or the improvement of the logic to guide the interrelationships of a set of such subsystems (like the interrelationship of the Department of Justice and the Civil Aeronautics Board in an airline antitrust proceeding). In reality the logic of systems is being developed autonomously as a separate, science-oriented discipline. It is not a behavioral science, although behavioral aspects of systems of which man is a part are within its province, but a component of a more embracive management science. It is possible, therefore, that the development of systems analysis within the context of management science would open the way for large contributions to be made by way of changing the design of present decision structures for the management of law. Insofar as behavioral science links up with the foregoing, it could contribute to the identification, description, and design of the social decision structures by which decisions are made.

While all the foregoing has some significance for law, it does not appear to rival that of philosophy and social theory. The applications of behavioral science have nothing to do with the postulates, the structure of concepts, and the theoretical framework that give shape and meaning and focus to empirically derived data. Pound's theory of interests, and year-round resort to the concepts of social utilitarianism have a more fundamentally pervasive effect than does particularized, minute, highly controlled, empirical inquiry into some strictly defined phenomena in the search for social fact. Behavioral science, in the area of law and society, does not touch upon that which transcends social data. Here the primacy of philosophy and speculative social theory over behavioral inquiry is unbudgeable. What is fundamental is the logic by which social phenomena is ordered and interpreted. What will be accepted as behavioral data is subordinate to aggregative perception of social

existence, social order, and social reality. The long term function of behavioral science may be to reverse the order of subordination, but to achieve this it will have to build adequate social theories of its own that are good enough to displace those to which the law now turns.

The normative in law and society is not dependent on social facts. It may be postulated, as in Pound's theory of interests. There are no dominant ends and no relative ordering of preferences in the conceptual structure of sociological jurisprudence. For Pound, everything is on the same plane for purposes of analysis. He has raised fundamental normative and methodological problems of legal choice. These are problems that behavioral science has not yet come to deal with, nor has it as yet shown either analytical techniques or instrumentation for dealing with them. The theoretical problems that are now central to law and society have not been set by behavioral science. It remains to be seen whether they will also be accepted as the problems of behavioral science. Beyond aiding the pragmatic resolution of legal conflict is the advancement of legal knowledge about the social dimensions of law.

## II. BEHAVIORAL SCIENCE AND LAW AND JUSTICE

Two generalized and characterizing statements may be made about legal thought concerning law and justice. They will serve to establish reference points for assessing the relevance of behavioral science to this field of law. The first of these statements is an assertion of the inability of jurisprudence to confirm at any satisfactory level of adequacy the normative content generated within law to deal with individual and social phenomena. Put another way, in this area law has no hard knowledge. Is there anything really there, or is it all a form of social rationalization; is it nothing more than plausible teleological rationalization of the historic task of adaptive law? Is it possible to get beyond the level of plausibility in dealing with the normative content of law and justice? For the practitioner, if the plausible is good enough to win the case, it will be accepted as adequate for law. But this is not a point of repose for the academic, for he must address himself to the problem of whether legal learning and scholarship in the normative area of law is good enough. And if it is not good enough, the academic must ask whether behavioral science will help it to become better.

It may also be asserted about legal thought concerning law and

justice that it is dominated by speculative thought and philosophy. The descriptive terms for its constituent bodies of philosophic thought are many — natural law, metaphysical individualism, utilitarianism, sense of injustice, pragmatism, and so on. The normative area of law is preeminently the area of philosophy and of philosophizing. The question here is whether or not behavioral science, under the principle of comparative advantage, can do better. Does behavioral science foreshadow the demise of philosophy and speculative social theory as the basis for a moral component of law? The direction of the challenge is really not from behavioral science to law, but from law to behavioral science. Can behavioral science demonstrate that it will provide and is capable of providing a more adequate foundation for the normative in law? The very influential late Roscoe Pound cleverly postulated a nonnormative foundation for norms, which is a neat trick if you can do it. That is to say, for Pound no human claim on existence need be justified; it is a *de facto* thing and, therefore, there is no need for a normative theory to support the morality of a claim, individual or social. All human claims on existence are facts to be taken into account by law. As between each other, however, the preferential ordering of claims does involve normative judgments.

Can behavioral science do it better? Here again we must ask what is likely to be the function of the behavioral sciences with respect to the normative in law. Is it to be substitutional; that is, is it to displace philosophy and speculative thought as a basis for the normative? Is it to be cumulative; that is, just tack on data to entities established by the logical, the analytical, the philosophical, and the metaphysical? Is it to be validating, that is, given particular teleological and normative propositions, is it to find supporting empirical referents in the form of bundles of social, psychological, and economic data?

What might be done through the behavioral sciences in the normative area that is law and justice? The large general function of behavioral science might be this: It might contribute to the clarification of normativeness as a human attribute, of the special character of the normative that is brought into law, and of the use of the normative as decision rules. By way of illustration, consider the following:

1. Behavioral science can delve into and disclose the normative structure underlying and permeating human activity. In fact, this is what is now being done through the discipline of social

psychology under the leadership of Professor Hadley Cantril. Through such studies we should be able to refer with increasing definiteness to the value realities external to the normative in law that are to be found in human character and social relationships.

2. Behavioral science can reveal the cognitive structure by which form and content is given to the normative, the moral, and the teleological in law. No matter how they are designated, they represent an intellectual ordering of human experience. The familiar terms of right, just law, civilization ideals, sense of injustice — all these are linguistic characterizations of cognitive structures intended to systematize the normative components of law. These cognitive structures are intellectual artifacts. What is the logic by which they are created and utilized as structures of law related knowledge? The normative is an object of cognition and an expression of a sequence of cognitive patterns, but law has not engaged in self-conscious inquiry about the processes of cognition. Law today has an inadequate autointelligence about the generation of its own intellectual structures regarding the normative.

3. Behavioral science can be used to develop an empirically based, normative theory of social decision. For this to be accomplished, two disciplines within the behavioral sciences — economics and psychology — will have to apply their knowledge to law. The two disciplines of economics and psychology have developed two bodies of knowledge which really constitute the theoretical foundations for an empirically based, normative theory of social choice. I refer to utility theory in economics and to value theory in both psychology and economics. Here behavioral science can help us to understand (in the sense of turning attention to a method within law) a logic and the datum of normative ordering in situations of social choice — the way in which preferences for empirical choice can be generated and put to use. Within law there is much to be learned about the ways in which the normative can be used as a decision rule.

### III. BEHAVIORAL SCIENCE AND LAW AND LOGIC

There is an important difference for the applicability of behavioral science to law between the subfield of law and society (the social dimensions of law and justice) and the subfield of legal thought brought together by Professor Stone and designated law and logic. He is quite aware, as a sophisticated jurisprudent, that within the boundaries of law and logic "we are dealing with intel-



lectual and not with sensory data."<sup>3</sup> It is in the mind that patterns of legal order are formed for imposition upon law. While the concerns of law and society deal with the world that is external to law and the lawmakers, by contrast law and logic (or legal system and lawyers' reasonings, as Professor Stone has rephrased it) is concerned with law as an object of cognition and the system of law as the analytic expression of a cognitive product. It is one thing to view law as a socially generated product capable of relating and adapting itself to changes taking place within an external world, and quite another to regard law as an intellectual artifact generated by human cognitive processes.

If there is a challenge, it is not from behavioral science to law, but from law to behavioral science. In its essentials, the challenge is one that calls upon behavioral science to contribute significantly to a revision of analytical jurisprudence. The human processes of logical thinking and reasoning which enter into the formation and interrelationship of legal propositions and decisions are the objects of jurisprudential inquiry. The question is put by Professor Stone for analytical jurisprudence:

What are the definitions and premises, methods and principles, which will permit us to view the propositions of law which make up the perceptual element of the legal order (or any part of this) as a self-consistent system, or to increase our awareness of the logical relations between them?<sup>4</sup>

Behavioral science will be called upon to demonstrate that it has more powerful modes of inquiry and analysis than have so far been developed within law for the study of its own logic processes as these are applied to generate the structure, pattern, and inter-relatedness of the corpus of law. Behavioral science has been able to give to *intellectual* data the qualities hitherto associated solely with *sensory* data. The analytic processes involved in cognition represent a human activity with respect to which behavioral science has developed modes of schematic representation, relatively powerful modes of inquiry, and techniques of instrumental manipulation. All this is best represented by the work done in behavioral science regarding human problem solving and human decision processes. Not only has theory been developed to deal with both complex human problem solving and decisionmaking, but the computer and its technology have provided behavioral scientists with an instru-

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<sup>3</sup> J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 43 (1964).

<sup>4</sup> *Id.* at 41.

ment for replicating the processes of human intelligence associated with them. These activities can now be put into a replicative form for instrumental manipulation that allows parallel examination and experiment. In sum, behavioral science has potentially more powerful theory and tools of inquiry than does analytical jurisprudence for examining the cognitive processes within law itself.

Law and logic would not be completely unfamiliar terrain for the behavioral sciences. Given its present level of instrumentation, documentation, and theory, it is possible for the behavioral sciences to proceed to apply the method of experimental replication to the cognitive processes whereby law is formed in the human mind. The replication of the cognitive processes of an individual decisionmaker acting in a particular decision situation has already been performed in a number of instances. There is no reason why the application of these simulation techniques cannot be adapted to the processes of judgment by which persons make legal decision rules and propositions. What has been done for investment portfolio management could also be done for adjudication. Law has not done as well as behavioral science might do in dealing with the theory and logic of its own legal decision processes. However, there has been a start on the application of computer based simulation to legal decision processes and we can expect a more explicit, a more rigorous, a more schematically representational, and a more controlled inquiry into these processes.

Behavioral science is also more advanced than is law in dealing with the logic and character of a decision system. The legal system includes sets of decision structures in which individual decisions are generated. The logic of law must include the logic of the design of the decision structures themselves. Modes of reasoning with respect to the decision instance is not by itself enough to explain the logic of law that emerges as a product of the decision structure. The design of the decision structure can be taken as a mode for imposing a logic upon the product that emerges from the structure itself. Systems concepts provide a theoretical basis for differentiating the varieties of logic that are implicit in the design of different decision structures. Through a systems based theory it should be possible to interrelate the design logics of decision structures and the logic of the legal relationships produced by the law generating structures for decision.

Law has yet to experiment with its own decision structures. A combination of models, organization theory, systems concepts, and

social psychology have been utilized by management science to design decision structures that can be manipulated through simulation and gaming techniques. The progress that has been made in the simulation of organized social structures, however, has yet to make its impact on the study of the decision systems within law itself. Ideally, it should be possible for law to get beyond the level of trial and error and pragmatic adjustment for the improvement of the institutional design of its decision structures. What is needed from the behavioral science is a way of innovating institutional design with respect to legal decision structures. Social invention, rather than incremental improvements in fundamentally badly designed decision structures, is what is needed by law. The task of law here is to find a way to utilize behavioral science in order to enable it to perform the current need of social invention in the institutions of law itself.

A legal order is different from a legal decision or a decision instance. The individual case is nonaggregated, but the legal order is comprehensively aggregated. A focus on the individual decision, or on the decision structure within which the decision is produced, is not adequate for dealing with the logic of a legal order. What is put forth as the unity of law, that is, the legal order itself as an interconnected corpus of law, is really a problem in the logic by which the law is itself interconnected so that it can be said to have a unity. To deal with the legal order is to deal with the most comprehensive level of aggregation in law and the problem that presents itself is at what level of aggregation can the logic of law deal with what is known as the legal order itself. It is clear that the concept of a legal order and the unity of a legal system is presently an inchoate one. Resorting to language used by Professor Stone:

Such unity as a legal system has is thus multi-fashioned, emerging not from mere logical interrelations of its parts, but from psychological elements of shared beliefs, emotions and aspirations in the community generally or even only its lawyer-class; not to speak of the historical bonds which tie it to the social and physical environment. This unity, apparent from so many angles to macroscopic observation, is curiously at odds with the teeming disorder observable when we look microscopically at the hurly-burly movement of legal norms in the legal process.<sup>5</sup>

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<sup>5</sup> *Id.* at 26.

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A further elaboration of two of the suggestions set out above will be found in: (1) An address by the author setting out the application of systems logic to the design of

So put, the problem of the legal order as a generic problem of law and logic is too ill structured to be amenable to behavioral science inquiry. The form in which a problem is put is important for purposes of inquiry. There is no basis for assuming that the resources of behavioral science can usefully be brought to bear on every problem of legal thought in the form in which that problem is put for law.

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regulatory decision structures in the *Proceedings, Federal Hearing Examiners, Fourth Annual Seminar*, September 26-28, 1966, Washington, D.C. (The Law Center, George Washington University); (2) the findings of a research report by the author on the character of the normative in ethical decisions of city managers and the ethical decision as a class of managerial decisions to be published in 1968.