environment, and are stated as a series of nine directives. Perhaps the entire review should have been devoted to their discussion; one is tempted to say that the book might have been. For much of it is prolegomena to this set of propositions. But let them speak for themselves:

> I. Social arrangements must leave everyone free to form and assert his own interests, treating every adult moral person as autonomous.
>
> II. The adjustments or shifting of advantages and burdens (including rewards and punishments) for purposes of social control through law, should proceed in terms of the goods and evils of this world only.
>
> III. It is always incumbent upon an actor to discover with maximum possible accuracy all aspects of the situation in which he acts or fails to act. . . .

It may be that these three will do to reveal the author's bent of thought; for these highly normative sentences surely are a creed rather than a description of behaviour; for where is the actor, whether industrial man or other, that has ever been able to proceed according to III? There may be exceptional situations of vital concern, where some of us may at some time do so, but most of the time men move along in established grooves of habit, custom and established valuation, and tend to think that to do so is just—and this includes lawyers and even law professors. But then, the author considers them "ideals" which constitute "quasi-absolute precepts". Having critically examined and put aside as too "formal" the positions of Perelman, Rawls, Fried and Selznick, *inter alia*, Stone properly stresses the need for substantive (a better term than "material") content of the idea of justice. He is surely right when he—with a sigh, it seems—concludes "that it is not given to any generation of men to complete the tasks of human improvement or redemption; but no generation is free", he adds, "to desist from them". To participate in these tasks is the noble purpose to which Stone's pages are dedicated.

*C. J. FRIEDRICH**

SOCIAL DIMENSIONS OF LAW AND JUSTICE[1]

The late Dean Roscoe Pound hailed Professor Stone's *Province and Function of Law* as "a book which will find a place among the master works".[2] With this massive volume, twice the size of the *Law and Society* part of the *Province and Function of Law*, the trilogy that is successor to the earlier work is completed. Now Dean Pound's encomium is triply justified.

The best advertisement—even for a book—is a personal testimonial. I began to teach law shortly after the Australian edition of the *Province and Function of Law* first appeared. This work and the successor books have been my constant companions. I have profited from everything Professor Stone has written—whether in the field of jurisprudence or international law—and my writings attest to this indebtedness.

Professor Stone also manages to write the best reviews of his own books by way of the prefaces. So he tells us that the present volume attempts "to state in orderly fashion the contexts and the range of tasks confronting modern democratic governments in using law as an instrument of social control, and

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[1] Sydney, Maitland Publications Pty. Ltd., 1966, xxxv and 933 pp. ($13.50 in Australia).

[2] Pound, General Introduction to Simpson and Stone, *Law and Society* xvi (3 vols., West Publishing Co., 1949).

as a means toward justice" and "to clarify these problems in the light of knowledge from the juristic, political and social sciences. . . ."[3] While the book will serve the social scientist as an invaluable history and critical analysis of juristic ideas concerning the legal order in its social context, it will not equally satisfy the legal scholar seeking the ideas and data the social sciences may have to contribute to this inquiry. This is not a deficiency of the book, but the result of the fact that few social scientists—outside of political science—have focused attention upon the legal order. It is, therefore, difficult to dig out—and surprising to discover—findings or propositions of the social sciences that are significant for juristic purposes.

Recently, a Law and Society Association has been formed in the United States to provide a means of communication between social scientists and legal scholars, the lack of which, as Professor Stone deplores, had led to "the sacrifice of mutual benefit".[4] This book reflects Stone's warranted concern for continuity in the stream of juristic and social-scientific thought and will give great impetus to fruitful collaboration between social scientists and legal scholars in the study of law in society.

I wish, however, that I could share Stone's optimism that Professor Talcott Parsons' highly abstract analysis of "The Social System" is "of particular promise" for the study of law in society.[5] Stone's treatment of Parsons' thought illustrates the great strength of this book. He succeeds in resolving Parsons' "involuted and esoteric language" into "half a dozen or so fundamentally simple notions".[6] And he is understanding, yet critical.

Thus Stone points out that with subject-matters like law, government, economics and psychiatry, "which require daily action, and therefore daily choices, systematic theory can rarely be of aid save in the long run" and "For this long run, *present* decision-makers cannot usually wait".[7] Specifically, in relation to legal ordering, Stone insists, "we are entitled to ask for and expect the assistance of social scientists in the alleviation of practical evils and the handling of practical problems. . . . For generally some action-response must be made by citizens, lawyers, judges and administrators in the here and now to these evils and these problems; and the response ought to be as adequate as our generation's state of knowledge can make it".[8] Stone also sees this "imperative need . . . for substantial intellectual resources to remain *engagés* with the *ad hoc* problems thrown up by contemporary society" not only "in terms of the social relevance of knowledge", but also to "provide bases for adequate provisional conceptualization . . . in these segmental areas" and "for the necessary checking of systematic theorizing by the inflow of empirical data not hand-picked for this purpose".[9]

But these salutary, cautionary reminders help to lay bare the reasons why the Parsonian style of theory construction is not congenial to legal scholars and why it has not been generally used even by other sociologists. More is involved than the dichotomies—to which Stone alludes—between general and middle range theory and between basic and applied research.

Parsons' *Social System*, essentially, seeks to explain the processes by which things get done in society and, therefore, is means-oriented and concerned with social interaction. The study of law in society, however, must also be ends-oriented and concerned with the societal environment in which human action takes place. While Parsons' mode of analysis is centered on the notion of equilibrium—the ability of systems to maintain themselves—the study of

[3] *Social Dimensions of Law and Justice* at 1.
[4] *Id.* at 24. The Association has published the first issue of its *Law and Society Review.*
[5] *Id.* at 16.
[6] *Id.* at 23.
[7] *Id.* at 15.
[8] *Id.* at 27.
[9] *Id.* at 15.

law in society must be centered on the problems of change and development in society. Parsons assumes that social relations are completely interconnected and therefore offers concepts that purport to yield total explanations. Thus he studies the "social system" as such and finds the "actor-role" to be the sufficient unit of analysis. However, the study of law in society must engage in empirical investigations to determine the extent to which social structures are, in fact, interconnected and, therefore, its units of analysis must be variegated. Finally, while Parsons seems to analyze all problems—for example, the family, the economy, personality—as "social systems", the study of the legal order in its social context must remain open to the data and various approaches of the different social sciences.[10]

While Stone indicates that he is aware of these difficulties with the Parsonian style of theory construction and, as indicated, stresses the inadequacy of systematic theory for the solution of the "*ad hoc* problems thrown up by contemporary society", he nevertheless concludes the first chapter of the book dealing with the *Scope and Nature of Sociological Jurisprudence* by arguing that "for the major problems of the legal order now looming, both the social sciences and the legal inquiries for which these serve as pre-ordinated bodies of knowledge, will increasingly have to seek understanding of the whole working order of relations. They have to identify key points for adjustment in it, rather than particular trouble spots for merely *ad hoc* therapy".[11]

I am afraid, however, that the search for these "key points" will prove to be chimerical. We have experienced just such a search in connection with the struggle against racial discrimination in the United States. At first we thought the "key point" was the educational system, then the right to vote, then job opportunity, then access to housing outside the Negro ghetto and then the Negro family. Now we appreciate that *ad hoc* therapies are needed to attack all the trouble spots simultaneously and on an adequate scale.

Furthermore, much planning and effort will be required before the "preordinated bodies of knowledge" essential for legal inquiries will come into existence. There does not now exist "a large body of social science findings directly relevant to lawyer-like concerns".[12] Nor will it come into being until legal scholars and social scientists collaborate in the selection of research subjects and research designs that grapple with problems of importance to the lawyer and significance for the society and, at the same time, promise findings that will be theoretically exciting to the social scientist.

The next two chapters of the book put the works of Savigny, Maine, Vinogrodoff, Durkheim, Duguit, and Dicey in a contemporary setting and draw lessons from their writings for the "leaders of tens of new nations in Asia and Africa" who "seek sanguinely to import constitutions and codes of law modelled on the experience of Western peoples".[13] Stone warns that "numerous failures and frustrations are surely to be expected".[14] However, he does not explicitly formulate and defend his own theory of the mutual dependence of legal and social development. Stone's views of the role of law in social change must be quarried out of the mass of his criticism of the writings of others. In spite of his warning to the leaders of the new nations, it is clear that Stone does not regard law as simply a function of society and

[10] The above, brief analysis of the Parsonian style of theory construction is the result of many conversations with Morris Janowitz, Professor of Sociology at the University of Chicago. But Professor Janowitz should not be held responsible for what I have written.

[11] *Social Dimensions of Law and Justice*, at 81.

[12] J. H. Skolnick, "The Sociology of Law in America: Overview and Trends" in *Law and Society* (1965 Supplement to Summer 1965 Issue of *Social Problems*) 4, 9. I have elsewhere tried to amplify Professor Skolnick's bibliography. See Auerbach, "Legal Tasks for the Sociologist", (1967) 1 *Law and Society Review* 91.

[13] *Social Dimensions of Law and Justice*, at 105.

[14] *Ibid.*

does not wholly despair of the use of law as a means of social control that, under certain circumstances, may succeed in transforming an existing social structure and related community attitudes. The study of the use and limits of law for such purposes is a most challenging field for collaboration between social scientists and legal scholars.

In the following five chapters, Stone greatly expands the analysis contained in the *Province and Function of Law* of how law has adjusted conflicting interests in western, democratic societies—principally Great Britain and the United States. I agree with Stone that Pound's survey of interests provides a most valuable tool for such legal and social analysis.[15] No one has used it with more skill and insight than Stone and it is to these chapters that I find myself turning most frequently.

Stone points out—not by way of criticism—that, in making his survey, "Pound relied more on an imaginative use of case-law and statutory materials than on social investigations *stricto sensu*".[16] Exactly the same point must be made—also not by way of criticism—about Stone's efforts. The danger of this reliance, as Stone states, is that it "may sanctify such adjustment (of conflicting interests) as is found in the *status quo* of the legal order, rather than reveal the interests actually pressing in society".[17]

We have seen this danger materialize in the course of the current "war against poverty" in the United States. Case-law and statutory materials reflect the claims made by individuals and groups in society who are strong enough to draw the attention of the legislatures or resort to the courts. They do not reflect the claims of the poor and disadvantaged who may not even know when they have suffered legal wrong or be aware of the means of redressing their wrongs, let alone have the resources with which to hire lawyers and lobbyists to press new claims in the courts and the legislatures. Furthermore, the making of claims for legal support may be alien to the cultural tradition of the poor in democratic societies, just as Stone tells us it is alien to the cultural tradition of India.[18] Investigations to reveal the claims actually pressing in society, which are not reflected in case-law and statutory materials, must be given high priority by the social scientists interested in the legal order.

Once these actual claims are ascertained, as Stone writes, it will be necessary (1) to define the limits within which they will be given legal support; (2) determine what legal precepts, concepts and machinery are available to enforce the claims which it has been decided should be secured; and (3) determine the limitations upon effective legal action which may prevent or limit the legal support which can be given even to interests which it is desired to secure.[19]

The determination whether, and to what extent, particular claims should be given legal support, as Stone points out, involves questions of ethics, social policy and justice. But social science can illuminate these questions by defining the ends or values which the legal order would be authoritatively choosing if it supported or rejected particular claims and by analyzing the extent to which various claims and ends are compatible with each other. If claims and ends conflict, it will also be the task of social science to ascertain the probable consequences, unintended as well as intended, of satisfying or rejecting particular claims. The means, if any, available to satisfy claims will also have to be ascertained. This task, too, is primarily the social scientist's. However, task (2) above is primarily the lawyer's, while the accomplishment of task (3) will require collaborative efforts.

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[15] *Id.* at 165.
[16] *Ibid.*
[17] *Ibid.*
[18] *Id.* at 180. See also, Stone, *Human Law and Human Justice* (1965) 279-280, 284-285.
[19] *Id.* at 168.

I should like to comment only very briefly on a few aspects of Stone's discussion of the individual and social interests seeking support in western, democratic societies. There is general consensus, I think, with Stone's view that "claims to free belief and opinion and expression should, . . . in democratic countries, approach nearer absoluteness than perhaps any other single claim"[20] and that the corollary of the "individual" interest in free belief and opinion and expression is the "social interest in cultural and political progress, and . . . the maintenance of free political institutions".[21] But Stone, in my opinion, does not exhaust the social interests that are sometimes sought to be secured by limiting "free speech" when he categorizes them as "the general security, or the general morals, or existing political and cultural institutions".[22]

For example, I have elsewhere argued that in outlawing totalitarian political parties, a constitutional democracy may be acting not to protect the *status quo* but the very same social interest which freedom of speech itself seeks to secure—peaceful progress under freedom.[23] From this perspective, I have drawn the conclusion that the First Amendment to the Constitution of the United States should not be used by the Supreme Court of the United States to curb the power of Congress to exclude from the political struggle those political parties which, if victorious, would crush democracy and impose totalitarianism.[24] On the contrary, the suppression of a totalitarian political party at any particular time should be regarded as raising questions of wisdom and expediency for Congress' sole determination—and not a question of constitutional principle to be decided by the Supreme Court.[25] Stone raises this general issue in terms of "whether fascist groups should be allowed to demand freedom for themselves in the name of democratic principles, and deny it to others in the name of fascist principles"[26] but never states his own views on the matter.

The war in Vietnam has once again brought this issue to the forefront in a most difficult context. It is being argued that North Vietnam might enter into negotiations to end the war if the National Liberation Front, and the Communist People's Revolutionary Party which dominates it, were openly guaranteed the legal rights of other political parties in South Vietnam. If the end of the war depends upon such recognition of the NLF or the PRP, perplexing questions will confront the Government of South Vietnam and its allies. They will be more wisely answered if they are recognized as involving matters of expediency and not principle. Today South Korea, Malaysia, Turkey, West Germany—and even the United States—outlaw Communist parties. No one can say that South Vietnam in the immediate future will be so much more secure than these countries that it will be able to assure that the NLF and PRP will not succeed in crushing the political liberties that are just beginning to evolve in that unhappy land.

Stone's views of the interests in play in defamation are similarly constricted. They are not merely the interest in freedom of speech, which would limit the scope of the law of defamation and the interest in reputation, which would enlarge it. For the law of defamation also protects the interest in freedom of speech because a public official would be inhibited from freely expressing his opinions (for example, in opposition to the war in Vietnam) if he could be defamed (for example, called a Communist) with relative impunity for doing so. It will be interesting to see whether the Supreme Court of the United States recognizes this aspect of the law of defamation as it elaborates

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[20] *Id.* at 225-226.
[21] *Id.* at 223.
[22] *Ibid.*
[23] See Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech" (1956) 23 *Univ. of Chic. L.R.* 173, 186-202.
[24] *Ibid.*
[25] *Ibid.*
[26] *Social Dimensions of Law and Justice* at 227, 788.

the doctrines announced in *New York Times* v. *Sullivan*.[27]

The interest-analysis as expounded by Professor Stone should open up other vistas of importance for the sociologist of law. For example, it offers a significant framework for comparative analyses of the legal orders of different societies. Stone and the late Professor Sidney P. Simpson have given us a sample of what can be done in this regard.[28] But this work has not been carried forward.

The last seven chapters of the book discuss the basic factors making for legal stability or legal change and add most significantly to the comparable part of the *Province and Function of Law*. One of these chapters is devoted to a new discussion of the roles of judge and administrator in legal ordering. These last chapters contain some of the most brilliant writing in the book.

It is here that Stone explores and refutes the tradition of sociological thought that views law as socially derivative and non-autonomous. "(A)ll these denials of the identity of law", he acutely observes, "depend on unqualified faith in the harmony of interests and drives among individuals or group members of society."[29] But to "trust so much to a spontaneous social harmony which is simply not there is, tragically, to invite 'takeover' by forces which stand ever ready to impose their own brand of artificial harmony".[30] This, of course, was the invitation that Soviet Marxist theory extended to Stalinist totalitarianism. Yet as the 50th Anniversary of the Bolshevik Revolution approaches, it is apparent, as Stone says, that the "Marxist doctrine of the withering away of state and law . . . remains . . . without any substantial empirical evidence to support it".[31] In fact, Stone concludes, "Soviet and Western experience together indicate an interaction between legal and economic factors and not the determination of the legal by the economic, much less its necessary determination by the class structure of society".[32] Indeed, it could be added, the Soviet Union has used law as a principal means of effectuating the modernization of its underdeveloped regions—for example, Azerbaidzhan.

As Stone recognizes, however, it is not a great contribution to understanding to say that social change and legal change interact.[33] The "real problems are as to the conditions under which legal initiative will succeed, in given situations in a given society; and the conditions under which law will readily adapt itself to changes in the wider culture".[34] But as I have already stated, Stone leaves the matter at this point and does not hazard his own answers to these "real problems".

However, the earlier chapters on how law adjusts conflicting individual and group claims in western, democratic societies also serve to show how law effects significant changes in these societies. These changes are influenced by a "rule of law" which includes not only precepts as to "equal application" and organizational and procedural safeguards, but also, substantively, "a minimal justness of rules, and a dynamic responsiveness . . . to the needs of social and economic development", which presuppose "respect for the dignity of all individuals by legislative as well as judicial and administrative action".[35]

The excellent new chapter on *Judge and Administrator in Legal Ordering* continues themes which run through the two companion books and stress the choices of policy and justice that constantly confront judge and administrator. My agreement with Stone on this matter is so strong that I think he has

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[27] (1964) 376 U.S. 254.
[28] See Simpson and Stone, 3 *Law and Society*.
[29] *Social Dimensions of Law and Justice* at 479.
[30] *Ibid.*
[31] *Id.* at 511.
[32] *Ibid.*
[33] *Id.* at 591, n. 4c.
[34] *Ibid.*
[35] *Id.* at 620.

closed the debate about "neutral principles" of adjudication. Nevertheless, I wish to make one qualifying remark which may facilitate wider agreement.

Stone does not do full justice to the views of Professors Hart and Sacks. He insists that he is not asserting that "whenever a court cannot find clearly applicable rules pointing only one way it should always feel free to take creative initiative, rather than exercise restraint and leave the matter for legislative attention".[36] Nor is he "questioning the value of seeking distinctions to guide courts somewhat in choosing between valorous initiative and cautious restraint".[37] However, Stone does not undertake to draw these distinctions. But this is precisely what Hart and Sacks have attempted to do.

When Professor Hart, for example, asks courts to rest their actions upon a "reasoned elaboration of the law" or "a coherent and intelligible fabric of principle",[38] I do not take him, as does Stone, to be advancing criteria for the just disposition of cases or calling for *neutral* principles.[39] I take Hart as saying that we should insist that our courts rest their decisions on general principles and policies, whereas we should accept the fact that our legislatures may react to the *ad hoc* conjuncture of political forces pressing upon them in ways that cannot be justified by general principle. Hart is thus trying to delineate the respective, distinctive functions of courts and legislatures in a democratic society.

I should also voice some disappointment because of Stone's relative neglect of the modern legislative process, compared with the attention he pays in all three volumes to adjudicatory processes. It is fair to say that legislation has been the relatively most important instrument of social change in western, democratic societies. Yet Walter Lippmann has recently voiced fears about the vitality of modern parliamentary institutions in all democratic countries. Nevertheless, legal scholars and social scientists continue to be fascinated by the process of adjudication. While the fascination is understandable, the diversion of major intellectual resources to the study of the legislature is an urgent necessity.

No single review can pretend to give an adequate account of the riches stored in this volume—the host of books it subjects to critical evaluation; the concepts and issues it clarifies ("power", "discretion", "public interest"; "rule of law"; "the form and limits of adjudication"; *laissez-faire* versus planning); the spirit of charity and tolerance, towards all who labour in the intellectual vineyards, that shines through it; the compassion and optimism about the human condition that pervade it. Because Professor Stone himself hopes, "above all, that the tasks here for the time being laid down will always command the dedication of successors",[40] I have tried to indicate some of the work that remains to be done. But I do so with the certainty that this unique book will live as a fundamental contribution to the preservation of what is precious in Western democratic thought. And so I close by congratulating Professor Stone on the occasion of the 25th anniversary of his appointment to the Chair he now holds. I am certain, too, that I may congratulate him on behalf of the law-teaching fraternity in the United States which regards Professor Stone as one of its own. We join him in the hope that many other tasks may still come to his hand.

*CARL A. AUERBACH**

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[36] *Id.* at 670.
[37] *Ibid.*
[38] See, for example, Hart, "Comment on Courts and Lawmaking" in *Legal Institutions Today and Tomorrow* 42, 43 (The Centennial Conference Volume of the Columbia Law School, 1959).
[39] *Social Dimensions of Law and Justice* at 658, 669.
[40] *Id.* at 5.
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