BOOK REVIEWS

THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE. By Lawrence M. Friedman.* New York: Russell Sage Foundation. 1975. Pp. viii, 309. No price listed.

"Bull" Warren used to begin his classes in Property I with the sentence: "The law is part art and part science, but a good deal more art than science." Lawrence Friedman has written a book, full of pith and vinegar, about the science of that art.[1]

From the manifest subject matter—the description of legal systems in behavioral terms—one would expect the book to be aimed at an audience of lawyers, legal scholars, judges, social scientists, or a combination of these. My guess is that, whatever the aim was, the target actually reached is the general public, and more particularly undergraduate students of the social sciences. In form, the book stands midway between a semi-popular review, with comments, on the literature of law-&-social-science, and a semi-popular commentary on the problems of law-&-social-science, with supporting illustrative references.[2] Nowhere are technical questions—whether of legal doctrine, social philosophy, or method—pursued deeply enough to turn off an interested general reader, who should be attracted also by the cantankerously reasonable tone in which the author converses.[3]

Friedman's canvas is wide. After chapters on the legal system and legal acts (that is, behavior with authority under the legal system), he discusses the impact of legal action and the sources of the effectiveness of that impact. A broadly historical chapter on the origin of law and laws takes him to his central statement on law, power, and social structure (Chapter VII). This is followed by chapters on "legal culture," general and internal, and a concluding chapter on legal and social change.

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1. L. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE (1975) [hereinafter cited as THE LEGAL SYSTEM].

2. The extensive bibliography makes no claim to encyclopedic comprehensiveness but reflects the author's variegated curiosity and generous intellectual hospitality. Those qualities do not appear to have led him to use or mention any of the extensive literature produced by Harold D. Lasswell, Myres S. McDougal, and their colleagues in the approach that has become known as "Law, Science and Policy." Much, though far from all, of the published work in Law, Science, and Policy has been devoted to questions of international law, to which Friedman's book devotes little attention; but it would have been easy to find in Law, Science, and Policy a more thorough elaboration not only of the notion of law as a process of decision whereby values are authoritatively allocated (*cf. id.* at 11, 17), but also of the manifestoes, proclamations and frustration that are exhibited in Friedman's sources and work.

3. On occasion the common sense descends so far into the reasonable as to condescend to the edge of the obvious; for example, "The last word on the subject has not, of course, been spoken." *Id.* at 20 n.42.

The reader, warned by the conscious dynamism of the titles of chapters (acts, impact, effectiveness, origin, power, change), will expect to meet a historian or a social engineer, not a lawyer; and in fact he is informed in the preface that the book looks at law from the outside, that it tries to deal with the legal system from the viewpoint of social science, that it will describe and explain legal systems in behavioral terms.

The heart of the book is a "social theory of law," which is stated in many places but analyzed in few. A fair distillation of the statements would amount to this: that though law and society interact, and though some interesting events in the legal system seem adequately explained by factors within the legal culture, yet the primacy of causal direction belongs to social forces, not to legal rules or legal institutions. Society is Base; Law is Superstructure. The outcome of legal conflict or dispute, at least in the main and on large issues and over considerable duration, is determined chiefly by the interplay of those social forces. Among the channels through which the social forces work toward an effect on outcomes is the channel of the individual, who is moved by sanctions, by the pressure of peers, by conscience, and by habit or inertia. Ideals and values make some difference, too, but they often can in their turn be traced to social forces, by a route that sometimes is complicated. Legal rules, actors, and institutions play the role of the rope in a tug-of-war, not the role of the tuggers.

Much of Friedman's argument takes on the tone of admonition to lawyers to keep their voices low. Law by itself seldom solves problems; legal factors are secondary to social factors; law is a means in the larger culture, though within the legal culture it may be mistaken for an end. In his zeal to celebrate an "instrumental" view of law,[4] he points out that " '[d]ue process' would be nothing, or nearly nothing, unless it produced due results";[5] but some lawyers think one of the reasons that due process is worth striving for is that it tends to produce due results, and some hold in addition the stronger opinion that in many areas of controversy we can reduce the risk of undue results better by insisting on due process than by focusing only on result.

Some of the most interesting observations in the work concern questions of time and history. As an accomplished historian of law,[6] Friedman may be more alert than many legal scholars are to problems of evolution and change. He has several thoughtful sections on evolutionary theories of legal development. His wide reading in the law of non-European countries makes him doubtful of the notion that law can be scaled on a linear progressive curve toward higher complexity, justice, or even rationality over time. He also advances a suggestive but fragmentary sketch of the change in rules and rule-systems from the stage of clear but rigid directive, to that of eroding exceptions, to that of a new directive

4. *See, e.g., id.* at 211, 213, 243.
5. *Id.* at 205 n.27.
6. *See, e.g.*, L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965).

reflecting the changed balance of social forces;[7] he says too little to permit us to say whether he has more in mind than one more application of thesis-antithesis-synthesis.

The arrangement of Friedman's thought follows his metaphors, which are mainly economic and hydraulic. In the early chapters he casts several ideas into a form that makes them suitable for market-talk. Thus, his section on law as an allocative system relates law to market on several different levels: law rations scarce values; law protects market operations; court services themselves are a part of the time-and-effort market; criminal justice, licensing and administrative regulation are, along with the market, mechanisms by which society controls and channels behavior and carries out policy.[8] More pervasive is the hydraulic metaphor, by means of which Friedman expresses his belief that legal events are numerous, often almost continuous, rapidly moving, relatively incompressible, amenable to control but likely to escape it.[9]

It has been characteristic of Legal Realists and their successors that they insisted on the importance of power, and criticized earlier jurisprudence for neglecting the vertical dimension of command-obedience, dominance-submission, "Who-Whom?" Friedman's political and social sympathies reinforce his analytical scruples—and, doubtless, *vice versa*—so that he misses no opportunity to call attention to the elite, to the rich and powerful, to abuses of power, to the unequal operation of ostensibly equal rules.[10] The emphasis on power also fits his demand-pressure-hydraulic idea. The trouble is that no simple observation about the location of power in a society or a polity will account for all the outcomes of disputes about allocation, unless it be the truism that things worked out that way because that was where the constellation of forces came to rest. Courts are agents (and part) of the elite, in some broad sense; but then how does it happen that they sometimes step out in front as defenders of civil liberties and rights, against the (other) powerholders? Again, Friedman finds it "amazing" how seldom in the United States a dominant majority overturns the work of

7. THE LEGAL SYSTEM at 304-09.

8. *Id.* at 20-23, 93.

9. Heavy penalties imposed on certain kinds of deviant behavior are "like pouring water into a sieve." The system of enforcement against some crimes is "like a garden hose, punctured with holes." The number of Prohibition cases in the federal courts was "a drop in the bucket compared to the rate of violation." *Id.* at 89-90. The Kinsey report and similar communications made a "splash"; hostile deviance requires a particular "flow" of information and opinion; rules in modern systems are "in flux." *Id.* at 130-31. "Active, ambitious agencies test the boundaries of neighboring agencies looking for . . . weaknesses through which power can ooze." *Id.* at 257. Rules "flow from the social setting. . . . They rise and fall with these forces, like a tide." *Id.* at 309.

10. It is curious that Friedman sometimes takes his idea less far than it might readily go. For instance, he wonders whether it is true of the law as a whole that messages are more successfully transmitted upward than downward: "If channels [for upward movement, as with judicial appeals] are clearly marked and easy to use, there is no reason why messages should not move as swiftly and smoothly in one direction as in the other." *Id.* at 62. Yet "surely" (meaning: I think you must agree, though I'm not sure) one of the generally understood prerequisites of your high position is that what *you* say has the right-of-way.

the courts, and how often "the majority, which sometimes includes rich and powerful people, allows the courts to push it around."[11] He is well aware of the puzzle. Is he aware of what it does to his "social theory"?

Part of the trouble is that the theory is too grand for the questions; another part is that the methods are too coarse for the theory. Friedman shows that he knows this, as when considering studies of partial structures, of influence on the behavior of judges, and of different theories of legitimacy in various parts of the legal system.[12] He calls attention here and there to complexity. He notes the diversity of norms and rules, and the intricate play of sanction, legitimacy, and habit.[13] He even shows some unease at the danger that the "social theory" will slip into tautology.[14] Yet he must cling to the vision of the importance of having a vision.

A carper might find other, lesser faults. References are made to several currents of sociological thought, including labeling "theory" and role "theory." Room might have been found also for game theory and play theory; that is, for strategic, aesthetic, and dramatic or autotelic perspectives. Stricter editing might have reduced the repetition of illustrations, like the several contrasts of laws against murder with laws against parking; the frequent references to the popular resistance to Prohibition; the man who keeps seeing a "No Smoking" sign in front of which many are smoking; and the repeated observation that a motorist is unlikely to violate a traffic regulation under the nose of a policeman.[15] The bibliography includes 43 reports of legal cases, but little of the book deals with technical case-analysis. If the one example I looked into was representative, the minutiae of legal casework do not draw the author's keenest attention.[16]

Whatever the leakiness of his craft at the center (as he might put it), Friedman flies several brave pennants. He has a shrewd observation on the fact that objective rules, the workhorses of the law, are often subrules of broader, discretionary rules.[17] He makes a good statement of the case for certainty of rule.[18] He says some sensible things about lawyers as brokers of communication.[19] He notes the relative scholarly neglect of reward, as contrasted with punishment.[20] He acknowledges the difficulty in measur-

11. *Id.* at 279; *cf. id.* at 217-18.
12. *Id.* at 158, 175-76, 245.
13. *Id.* at 286, 122-23.
14. *Id.* at 161-62.
15. *Cf. id.* at 95, 108 ("No Smoking"); *id.* at 83, 86 (policeman nearby); *passim* (murder and parking; Prohibition).
16. The treatment (*id.* at 249) of Paramour v. Yardley, 2 Plow. 539, 541, 75 Eng. Rep. 794, 797 (K.B., 1580), appears to have mistaken the import of the sentence that Friedman quotes; moreover, it may not be appropriate to the larger purpose for which he uses it, because, though the quoted reasoning shows technicality, it is questionable whether it shows "legalism."
17. THE LEGAL SYSTEM at 33.
18. *Id.* at 34-35.
19. *Id.* at 60-61.
20. *Id.* at 79.

ing units of reward or punishment for purposes of comparison.[21] He notes with candid freshness, "Nothing is more typical of law [enforcement] than the constant internal haggling over deployment of money and troops,"[22] and that technological improvements in the efficiency of detecting violations may not be desired by the very population that in general wants crime to be fought harder.[23] These, and many other gleams of common and uncommon sense, illumine the book and enlighten the reader.

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21. *Id.* at 82.
22. *Id.* at 99.
23. *Id.* at 100-01.

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