Social science
and
the courts

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From the time, at the beginning of the century, that American legal scholars and jurists began to speak of the "science of law" it was rather to be assumed that the courts would in time find themselves involved with the social sciences. This was perhaps more a matter of probability than of certainty, for it was at least possible that the "legal realists," or "progressive realists," as they are variously denominated, would have found the social science of that and subsequent periods insufficiently rigorous for their standards—a case at least some social scientists, then as now, would have volunteered to make for them. But Pound and Cardozo and Holmes were indeed realists, and seemingly were prepared to make do with what was at hand, especially when there was such a correspondence with the spirit and structure of their own enterprise.

In 1908, Pound in a seminal article, "Mechanical Jurisprudence," in the Columbia Law Review declared: "We have... the same task in jurisprudence that has been achieved in philosophy, in the natural sciences, and in politics. We have to... attain a pragmatic, a sociological legal science."

This passage suggests, of course, an alternative explanation for the easy acceptance of the social sciences by the lawyers: to wit, that
Pound and his associates were not themselves intolerably rigorous. For what else are we to think of the suggestion, even in 1908, that philosophy and politics had been advancing arm and arm with the natural sciences toward some presumed methodological maturity!

Equally we may wonder at the legal realists' seeming perception of "natural law" as pre-scientific. It may have been for them, but it was nothing of the sort to the framers of the Constitution, for whom "natural law," as we think of it, and scientific law were parts of an integrated understanding of the behavior of both physical objects and human beings. As the late Martin Diamond has reminded us, the framers' respect for human rights, which constituted liberty as they understood it, was not an idiosyncratic "value" of a remote culture. Rather, liberty was seen as the primary political good, of whose goodness any intelligent man would convince himself if he knew enough history, philosophy, and science. Indeed, it was because our constitutional principles seemed so self-evident, so much at harmony with the results of enquiry in other fields, that the Founders felt such confidence in them.

But this is perhaps to cavil. The point is that as between the legal scholars and jurists of two and three generations ago, who were seeking to establish a "science of law," and those seeking to establish scientific principles and methods in, say, sociology, there was indeed that symmetry of technique and purpose which Paul Horgan has observed in the arts and sciences of most eras.

There was a corresponding bustle of organization and the discovery of likemindedness among persons who may have thought themselves quite alone in their new and sometimes radical purposes. At the same time that a new judicial philosophy was making its appearance, the social sciences were organizing themselves. The Anthropological Association was founded in 1902; the American Political Science Association in 1903; the American Sociological Association in 1905. The innovators in the legal and academic realms were, in the popular saying of the period, made for each other.

**Progressive realism**

Even so, the process whereby social science argument became more prominent in the proceedings and decisions of American courts was gradual, and followed the equally gradual rise to ascendancy of the "progressive realists," to use Alexander M. Bickel's term, from whom, as he wrote, "the Warren Court traced its lineage."

In its most famous decision, *Brown v. Board of Education* (1954),
the Warren Court drew upon a spectrum of social science—ranging from discrete psychological experiments to broad-ranging economic and social enquiry—in reversing the Court’s earlier ruling in *Plessy v. Ferguson* (1896), which had established the separate-but-equal standard in racial matters. Taking their lead from the Supreme Court, subordinate Federal courts began to resort to social-science findings to guide all manner of decisions, especially in the still troubled field of schooling, but extending to questions of tax policies, of institutional confinement and care, of crime and punishment, and a hitherto forbidding range of ethical issues.

Social science had become familiar to the courts in the course of hearing advocacy before them. From the time that Louis D. Brandeis began to argue facts and figures before various courts—arguing, however, for judicial restraint in the face of legislation establishing minimum labor standards—judges had had to contend with social-science arguments presented to them. Brandeis’s data consisted in the main of social statistics, the early measurement devices on which most subsequent social research has been based. But it should be emphasized that the “Brandeis brief” did not assert that its view of the facts was totally accurate; its purpose was merely to demonstrate that the legislature, in acting as it did, had a reasonable basis, that the facts might be accurate in holding, for example, that minimum standards were necessary to protect workers’ health.

The Supreme Court itself soon became accustomed to and comfortable with this kind of brief. The Court’s capacity to cope with social-science arguments was much on display, for example, in *Witherspoon v. Illinois* (1968). At issue was the constitutionality of an Illinois statute providing for the exclusion of jurors having scruples against the death penalty. Mr. Justice Stewart, for the Court, took note of the social-science arguments presented by those contending that the statute was illegal:

> To support this view, the petitioner refers to what he describes as “competent scientific evidence that death-qualified jurors are partial to the prosecution on the issue of guilt or innocence.”

The Justice, in a footnote, took further note of the academic papers—nicely and accurately describing them as “surveys”—which the petitioners had presented. He went on, however, to declare:

> The data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.

In a footnote to this passage, the Justice commented on these studies
in language that will be familiar to graduate student and thesis committee alike:

We can only speculate... as to the precise meaning of the terms used in those studies, the accuracy of the techniques employed, and the validity of the generalizations made.

Having thus acquitted itself in the matter of methodological rigor, and having in effect rejected the social-science data presented by the petitioners, the Court went on to rule for them, and to rest its decision on other social-science data! Specifically, Justice Stewart found that ours is a nation "less than half of whose people believe in the death penalty." To establish this he cited opinion polls for the year 1966, as compiled in the International Review on Public Opinion, and judged that an Illinois jury culled of "all who harbor doubts about the wisdom of capital punishment" would thus speak only "for a distinct and dwindling minority." Accordingly, the statute was deemed to fail under the Sixth Amendment.¹

Law, social science, and the future

In these changed—or perhaps it were better to say these now-developed—circumstances it would seem useful to suggest, from the point of view of the social sciences, something of the limitations of this kind of information in the judicial process. If it is quite clear that the courts employ social science with considerable deftness on some occasions, then it must be allowed that on other occasions the courts have got themselves into difficult situations by being too casual, even trusting, about the "truths" presented to them by way of research on individual and group behavior. Here it is not necessary to get into the question of where the courts might have erred. If there are those who wish to challenge particular decisions, they are free to do so under the arrangements so ably, indeed wonderfully, presided over by the American judiciary itself. It is enough to state that the social science involved in a great many judicial decisions—including, for that matter, Brown itself—has been sharply criticized by social scientists with differing or competing views.

Hence there are two points which a social scientist would ask jurists to consider before deciding how much further to proceed, and in what direction:

¹ It may be that few persons will think of public-opinion polls as social science, but they represent one of our largest achievements in the field of direct measurement, having been developed largely by Lazarsfeld and his colleagues at Columbia University in the 1930's and 1940's.
The first point is that social science is basically concerned to predict future events, whereas the purpose of the law is to order them. In this respect both are unavoidably entangled with politics which, as Maurice Cranston has put it, is an argument about the future. But where social science seeks to establish a fixity of relationships such that the consequences of behavior can be known in advance—or, rather, narrowed to a manageable range of possibilities—law seeks to dictate future performance on the basis of past agreements. It is the business of the law, as it were, to order alimony payments; it is the business of social science to try to estimate the likelihood of their being paid, or their effect on work behavior and remarriage in male and female parties, or similar probabilities.

In the end social science must be a quantitative discipline dealing with statistical probabilities. Law, by contrast, enters the realm of the merely probable at some risk. For the law, even when dealing with the most political of issues, must assert that there are the firmest, established grounds in past settlements on which to order future settlements. The primary social function of the courts is to preserve the social peace embodied in such past settlements, and to do this by establishing a competent, disinterested forum to which parties in dispute can come, ask, and be told what it was we agreed to. Hence Marshall's dictum in Marbury v. Madison: "It is emphatically the province and duty of the judicial department to say what the law is."

To restate, for emphasis: The courts are very much involved with the future; indeed to declare the future is what they do, and not infrequently they do so in the largest conceivable terms. (Bickel writes that the Warren Court "like Marshall's, may for a time have been an institution seized of a great vision, that it may have glimpsed the future, and gained it.") But the basis for ordering the future is that which the judges conclude were the standards and agreements reached in the past for the purpose of such future ordering.

Hence, also, the concern of the courts to be seen to be above politics. If they are to keep the King's peace they had best not be seen to be involved in planning the King's wars. And so long as the courts confine their references to established past agreements—constitutions, customs, statutes, contracts—they are protected by the all-important circumstance that among the things we have agreed to is that for these purposes the past is what the courts say it is. It is a living past, and clearly enough it changes, but only the courts can make these changes. It is all very well for others to have opinions about what the Sixth Amendment intends with respect to
the composition of juries, but it is what Justice Stewart says, in the company of a sufficient number of his colleagues, that decides, and there is no way to disprove him. In this sense, what the court decrees to be the past thereupon has the consequence of being the past. On the other hand, when the courts get into the business of predicting the future by the use of various social-science techniques for doing this, then others, who need not be lawyers even, much less judges, can readily dispute them, and events will tell who is right and who is wrong.

In this circumstance, perhaps the first thing a jurist will wish to know about the social sciences is: How good are they? How well do they predict? Have they attained to any of the stability that Pound observed in the natural sciences in the early years of the century? The answer must be that the social sciences are labile in the extreme. What is thought to be settled in one decade is as often as not unsettled in the very next; and even that “decent interval” is not always observed. Consider, for example, the cycles of professional opinion concerning the desirability of putting persons with various behavior disorders in institutions, as against maintaining them in their communities. True, there are some areas of stability. With a sample of 500 or so persons, a “psephologist” can predict the popular vote in a Presidential election within a few percentage points. But who will foretell the fate of the administration that follows?

It is fair to state that the unsettled condition of the social sciences represents something of a disappointment, even a surprise. It was thought, especially in economics, that matters were much further advanced than they now appear to be. With respect to the slow progress, or nonprogress, of the social sciences a range of explanations is put forward. It is said that the subject matter is more complex than that of the physical sciences. Experimental modes are usually unattainable. The disciplines are relatively new. They probably have not attracted their share of the best talent. Other reasons come readily enough to mind. But the fact of slow progress is clear enough. The judiciary is entitled to know this, for it needs to acquire the habit of caution, the more perhaps when the work presented to it declares itself to be the most rigorous and “scientific.”

Consider the venerable, yet always troubled and constantly shifting “advice” which social science has to offer in the matter of crime and punishment, a subject of the greatest relevance to the judiciary. For the longest while, 20th-century criminology, such as it was, tended to hold that capital punishment did not deter capital crimes. This tendency persisted until the 1960’s, when a number of empirical
analyses appeared which seemed to establish a "negative association between the level of punishment and the crime rate." Concepts borrowed from economics were employed, often with great elegance, and once again (!) it was discovered that as price goes up demand goes down. We began to talk of the "elasticity of the crime rate to changes in the probability of imprisonment." Next, studies appeared which seemed to establish that capital punishment saved lives, as it were, by preventing subsequent capital crimes. This was important and responsible research, and bid fair to make a considerable impression on public and even judicial policy, coming as it did at a time when the courts were banning capital punishment and elements in the public began to demand its return.

In 1976, however, the National Academy of Sciences established a panel to study the relation between crime rates and the severity of punishments. Two years later, the panel concluded that "the available studies provide no useful evidence on the deterrent effect of capital punishment." Thus, research lends support to the decision of the Supreme Court in Gregg v. Georgia (1976), in which Justice Stewart, for the Court, declared:

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive.

It could perhaps be argued that Justice Stewart was judging just a little ahead of the evidence, Gregg having preceded the NAS panel report by two years. But if it is accepted that the Courts ought to be hesitant to the point of reluctance before accepting any social-science finding as final, Justice Stewart's 1976 cautionary decision seems warranted indeed.

For it is a melancholy fact that, recurrently, even the most rigorous efforts in social science come up with devastatingly imprecise stuff. Thus, a few lines after the Summary of the National Academy of Sciences study informed us in plain enough language that execution may or may not deter murder, another murkier passage sums up the evidence on the effect of imprisonment on other kinds of crime:

Since the high-crime jurisdictions that are most likely to be looking to incapacitation to relieve their crime problems also tend to have relatively lower rates of time served per crime, they can expect to have the largest percentage increases in prison populations to achieve a given percentage of reduction in crime.

As English composition, the sentence itself calls for punishment of some sort. To say that high-crime jurisdictions can expect to "have"
the largest percentage increases in prison populations, rather than to "require" them or some equivalent term, is to leave the reader with a sense of surpassing fuzziness that all manner of mathematical notation does not overcome. Or conceal. Thus, further in the same study, we are told that the lower bound on the probability of arrest for an "index" offense is given by the formula

$$q^\wedge > \frac{\lambda q^\wedge T \left( \frac{V}{A} \right)}{\frac{C}{A} - \frac{V_i}{A}}$$

and we are also told that if prison use is expanded there is a potential for "two to fivefold decreases in crime." Now one need not be much of a mathematician to know that a twofold decrease in anything will likely lead to antimatter, and that a fivefold decrease might well produce a black hole.

The profession, in a word, has a way to go.

**Social science and politics**

The second point is that social science is rarely dispassionate, and social scientists are frequently caught up in the politics which their work necessarily involves. The social sciences are, and have always been, much involved with problem-solving and, while there is often much effort to disguise this, the assertion that a "problem" exists is usually a political statement that implies a proposition as to who should do what for (or to) whom. (This essay, for example, which suggests that there are limits to the value which social science can have for the courts, will almost certainly be searched for clues as to whether its implications are politically liberal, or conservative, or whatever.) Social scientists are never more revealing of themselves than when challenging the objectivity of one another's work. In some fields almost any study is assumed to have a more-or-less-discoverable political purpose.

Moreover, there is a distinct social and political bias among social scientists. In all fairness, it should be said that this is a matter which social scientists are quick to acknowledge, and have studied to some purpose. It all has to do, one suspects, with the orientation of the discipline toward the future: It attracts persons whose interests are in shaping the future rather than preserving the past. In any event,
the pronounced “liberal” orientation of sociology, psychology, political science, and similar fields is well established.

This observation, however, leads us to one of the ironies of the present state of the social sciences. The explanatory power of the various disciplines is limited. Few serious permanencies are ever established. In a period of civilization in which the physical sciences are immensely advanced, when the methodology of proof is well established, and when discoveries rush one upon the other, there are not many things social science has to say. To the degree that it strives for the rigor of the physical sciences, its characteristic product is the null hypothesis, i.e., the discovery that two social phenomena are not causally related. In some circumstances this can be rather liberating for social policy. There are, for example, few recent works in social science that have had the immediate impact of James Q. Wilson’s *Thinking About Crime*. After examining the research concerning the effect of rehabilitation programs on criminals in this country and abroad, Wilson concluded that no consistent effects could be shown one way or the other. Seemingly, all that could be established for certain about the future behavior of criminals is that when they are in jail they do not commit street crimes. Two centuries of hopes collapsed in that proposition, and not a few illusions. But out of the wreckage came the idea that fixed and predictable prison terms are a sensible social policy, and in short order this was being advocated across the spectrum of political opinion. Indeed, if anything, while social scientists tend to be liberal, the tendencies of social-science findings must be judged conservative, in that they rarely point to the possibilities of much more than incremental change. In 1959 the Yale political scientist Charles Lindblom set this forth as a necessity, the one law of social change, in a celebrated article entitled “The Science of Muddling Through.”

The political orientation of the social sciences has been particularly evident (and is, I believe, least objectionable) in the shifting fashions in research topics. One will find a score of books, mostly of the period 1910-1950, about trade unions and strikes for every serious study of a middle-class organization such as the American Bar Association. But it is also to be noted that these preferences change with some regularity. Trade unions, having been judged “conservative,” are not much written about any longer. Of late, community organizations, such as those funded by government anti-poverty efforts, have been in vogue. Tomorrow, doubtless, it will be something else again.

This is not to be understood to suggest any deliberate attempt to
distort. One has little more than impressions to offer here, but it
seems mostly to be a matter of a somewhat-too-ardent searching
for evidence that will help sustain a hoped-for conclusion. Some-
times the search succeeds; just as often it does not. Where there is
deliberate fudging in the research, success is brief and retaliation
can be truly termed draconian. The social sciences are serious profes-
sions, seeking to become ever more professional. They are also high-
ly competitive, at times perhaps damagingly so. Edward C. Banfield
has described this as the Fastest-Gun-in-the-West-Effect—which is to
say, the melancholy knowledge of anyone briefly on top of any par-
ticular subject matter that the graduate schools are abrim with
young scholars who dream of making their own reputations by
bringing him down in a brief, violent encounter. Such efforts may
or may not succeed. But anyone who brings questionable data or
methodology into the various fields can expect to be devastated.
And even the most impeccable work will be challenged simply be-
cause "it is there."

The prudent jurist will be aware of this, and take it into account.
That this can be done was splendidly demonstrated by the Supreme
Court in its decision in San Antonio School District v. Rodriguez
(1973). Here a class action on behalf of certain Texas schoolchildren
was instituted against school authorities challenging the constitu-
tionality, under the equal protection clause of the 14th Amendment,
of the state's system of financing public education. The system was
characterized by a heavy reliance on local property taxes, which is
associated with substantial differences in per-pupil expenditure.
Now it happens that just a very few years before this issue came to
the Court, a series of research findings appeared which were quite
devastating to the previous assumption that achievement in educa-
tion was more or less a direct function of spending. Best understood,
this new research seemed to show that, after a point, this just wasn't
so.2

The Rodriguez case was the culmination of an effort, primarily the
work of academics, to disestablish the general American pattern of
local-school-district financing in favor of statewide, or even nation-
wide systems, with uniform per-pupil expenditures. (In passing, it
may be noted that moving an issue upwards in the federal system
has been well documented by political scientists to be a technique of

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2 In the interest, as lawyers say, of full disclosure, I should state that this is
the interpretation that Frederick Mosteller and I presented in a reanalysis of
the Coleman data, in On Equality of Educational Opportunity (1972). Mr.
Justice Powell cites our work, along with that of others, in a passage in his de-
cision in Rodriguez.
effecting social reform.) In briefest summary, these scholars did not anticipate that their research establishing differentials in school expenditure would be vitiated, at least in part, by the enquiries that were simultaneously taking place which cast grave doubt on just what significance was to be attributed to such differences.

In any event, the matter did not escape the attention of Justice Powell, who, writing for the majority, observed:

On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education—an assumed correlation underlying virtually every legal conclusion drawn by the District Courts in this case.

Further on, Justice Powell declared, "We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 states," and found that the Texas system of school financing met the constitutional standard of the equal protection clause. It is not necessary to side either with the majority or the dissenting justices in this latter judgment to state with some confidence that, if the District Courts depended overmuch in their decisions on the existence of a "demonstrable correlation between educational expenditures and the quality of education"—which Justice Powell says they did, and no dissenting Justice said they did not—then the District Courts either did not know their social science or, perhaps, did not know their social scientists.

The impact of social science

The attentive reader might well be given pause by the somewhat remonstrative suggestion that "the District Courts ... did not know their social science." Since when, it might well be asked, has this been required of judges? Is it not sufficiently demanding to expect that they will know the law?

No, alas, it is not. Herewith we encounter what is arguably the major impact of social science on law.

The social sciences may be at an early state of development, but this has not in the least inhibited their assertiveness. It may well have served to abet it. For the moment their ambitions are truly imperial. There is little by way of human behavior which the social sciences do not in theory undertake to explain, to account for.

As a result, there are fewer and fewer areas of social behavior for which traditional or "common-sense" explanations will any longer
suffice in serious argument. A cursory reading of the District Court decisions which preceded Rodriguez suggests that the judges' views on the relation of educational expenditure to educational achievement were based on nothing more than common-sense everyday opinion. And this is the point. Common-sense everyday opinion no longer persuades. Everybody asks: who knows? If it is theoretically possible to know something—and there are few relationships about which it is not theoretically possible to know something—then until the research is done, no one is in a very good position to speak!

If we may adopt for a moment the lawyers' term "material," then we may say that the range of what is material in lawsuits is now greatly expanded—or will be as the courts submit to the logic, or perhaps it may be better to speak of the spirit, of the social sciences. Some years ago Kenneth Boulding spoke of the advent of the social sciences as an historical event comparable for society to the beginnings of consciousness in human beings. That we are only at the beginning of this era does not at all limit what we expect of it; it may be, and probably is, the case that we greatly exaggerate. But that changes nothing as yet. The Supreme Court in Rodriguez found there was no evidence to support the charges. Accordingly, the Texas school-financing system was found Not Guilty. (Or was it a Scottish verdict: Not Proven?)

Thus does social science rend the "web of subjectivity," the phrase which Bickel used to describe aspects of the Warren Court. His references were primarily to the Court's reading of the past. On more than a few occasions, he wrote, "the Warren Court has purported to discover in the history of the Fourteenth Amendment, and of the Thirteenth, and of other constitutional provisions, the crutch that wasn't there." Now this can be seen to be a traditional enough critique. Here the Court interprets the past, and it is altogether to be expected that legal scholars should occasionally criticize the Court (however gently, in Bickel's case) for its interpretation of the past. But where the Court essays to predict the future, which is the realm of social science, the idiosyncratic and the subjective are even more conspicuous, and more subject to criticism.

As litigation concerning educational matters has illustrated some earlier propositions, it may do so also with respect to this last, most important one. Commencing at least with the Brown decision, the Supreme Court has held that "education is perhaps the most important function of state and local governments." But a decade prior to Brown, the Court ruled in Everson v. Board of Education (1947) that the First Amendment requires that government assistance to
schools that are not in the public sector, strictly defined as not operated by government, must be severely restrained, and as near as possible nonexistent.

Here was a common enough situation for the courts. They were asked to determine what it is the Constitution decrees with respect to matters that clearly were remote from the thoughts of those who drafted the document, including its various amendments. Anyone who will trouble to read the debates concerning this part of the First Amendment—and this will not entail a great deal of trouble, for the question was debated for the equivalent of about a day in the House and a day in the Senate and the entire record in the *Annals of Congress* takes up only 119 lines—will find no mention of aid to education. Hence judges have had to interpret as best they could.

Now in the judgment of some, they have quite misinterpreted this history. In the manner that Bickel chides the Warren Court for discovering things in the history of the 13th and 14th Amendments that simply are not there, scholars such as Walter Berns, Michael Malbin, Antonin Scalia, and Philip Kurland find that, with respect to aid to nonpublic schools, the Court's interpretation of the establishment clause is non-historical. In his 1962 study, *Religion and the Law*, Philip Kurland writes: "Anyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other is either deluding or deluded."

In the interest, once more, of full disclosure, I must state that I quite agree with the critics of the Court in this matter. In my view, the only truly comparable situation is that long period when the Supreme Court repeatedly claimed to find in the 14th Amendment a whole series of restrictions on the power of legislatures to enact labor legislation. Thus in *Lochner v. New York* (1905), the Court—striking down a 60-hour-work-week law—said that it was not at all "a question of substituting the judgment of the Court for that of the legislature," but simply that there was "no reasonable ground for interfering with the liberty of person or the right of free contract." Now there was no real difficulty in 1905 in discovering the purposes for which the 14th Amendment had been adopted, and establishing that it was in no wise enacted to prevent the New York State legislature from regulating the hours of bakers. But such nonsense had been solemnly invoked by the Supreme Court in *Allgeyey v. Louisiana* (1897) in the closing years of the 19th century and was only overruled in the fourth decade of the 20th century. It is all forgotten now, save by historians, but it was once a burning issue of American politics—as it should have been.
In just this manner, the establishment clause has been held to prevent legislatures from providing various forms of assistance to church-related schools, albeit that the establishment clause has the plain and unambiguous meaning—reflecting the Founders' intention—that Congress will not establish a national religion.

There are those who are not happy with this state of affairs, but few, one would venture, who are actively angry. We go through these things every so often, and have done so for generations. One day a Justice will come along who will make the equivalent point that Holmes made in *Lochner* when he declared, "The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics.*" It will come to be seen that the Court's rulings on aid to private schools merely reflected a particular religious point of view—i.e., that there is no public interest in the promotion of religion—which reached its peak of intellectual respectability in the 1920's and 1930's, the period in which most of the judges who made the decisions were educated.

Having stressed the shaky reliability of social science, a certain kind of fairness suggests that the infallibility of judges might usefully be questioned also. The establishment-clause decisions are an intellectual scandal. Without intending to do so, the courts in the school-aid cases have been imposing on the country their own religious views. This point was well understood in 1841 by John C. Spencer, Toqueville's first American translator and New York's Secretary of State and Superintendent of Public Schools. To those who feared use of public funds for sectarian purposes, Spencer in an official report replied that all instruction is in some ways sectarian:

No books can be found, no reading lessons can be selected, which do not contain more or less of some principles of religious faith, either directly avowed, or indirectly assumed.

Even the moderate degree of religious instruction which the Public School Society imparts, must therefore be sectarian; that is, it must favor one set of opinions in opposition to another, or others; and it is believed that this always will be the result, in any course of education that the wit of man can devise.

On the contrary, it would be in itself sectarian; because it would be consonant to the views of a peculiar class, and opposed to the opinions of other classes.

All this will be borne with sufficient good will and even good humor. The greater problem is for the courts, and it is a problem much complicated by social science. For social science affects what the court can say. Thus the case of *Tilton v. Richardson* (1971), which is the controlling decision regarding Federal aid to church-
related schools. The Higher Education Facilities Act of 1963 provided Federal construction grants for college and university facilities. Tilton et al. sued, contending that grants to four church-related colleges and universities in Connecticut had the effect of promoting religion. The Court held that this was not so, even though it would never tolerate a Federal statute that provided construction grants to church-related high schools or suchlike institutions. Colleges and universities, the Court said, are different from elementary and secondary schools where religious matters are concerned, and college students are different from high school students.

**An unassailable argument**

Before grappling with the decision of the majority, it will help to touch upon the dissent of Mr. Justice Douglas, who thought such aid to church-related colleges to be unconstitutional. It was an impassioned dissent: in his own words, a despairing dissent. The respect, he said, "which through history has been accorded the First Amendment is this day lost." Before coming to this sad conclusion, he presented an argument which some may view as wrong, but which is also logically quite—or almost—unassailable. By contrast, the less idiosyncratic decision of the majority is nonetheless indefensible, and it is a weakness which the advent of social science has brought about.

There is one unimpeachable sentence in Justice Douglas's opinion. "The First Amendment," he writes, "bars establishment of a religion." Just so. There was to be no established religion such as the Church of England or the Church of Ireland of that period. The meaning and intent of the amendment was most clear in the version considered by the House of Representatives on August 15, 1789, which read "no national religion shall be established by law." Elbridge Gerry objected, as the word "national" was a matter of contention between Federalists and Anti-Federalists, and the final version emerged, accessible in meaning to anyone who can read English. No established religion. Surely this has nothing to do with construction grants made available to religious institutions of all denominations. Hence a judge who is going to contend that it does, had best give considerable thought to what kinds of available evidence will tend to prove or disprove his contention. On this score Douglas was unassailable. He advanced arguments that some will find curious, but which none can refute.

To begin with, he would brook no distinction between levels of
"parochial schools." They all looked alike to him. There is, he stated, a "dominant religious character" to all such schools. He then introduced in evidence the work of Loraine Boettner. A passage from Boettner's book, Roman Catholicism, is reproduced in a footnote. It should be clear, Boettner writes, "that a Roman Catholic parochial school is an integral part of that church." The title of ownership is vested in the bishop as an individual, a person "who is appointed by, who is under the direct control of, and who reports to the pope in Rome."

Now this "pope in Rome" is a person much on Mr. Boettner's mind. His book was published in Philadelphia in 1962, by the Presbyterian and Reformed Publishing Company, but it could as well have appeared in Edinburgh four centuries earlier. To him, very simply, the pope is an Antichrist; his church is an heretical church; its teachings utterly subversive of true religion. As for the followers of the pope, they are, in Boettner's view, to a greater or lesser degree, agents of papal subversion. On one page of his book, for example, he states that Roman Catholics ought not to be allowed to teach in public schools.

Boettner's full view of the matter, with respect to schools, is seen in another passage from this book which Douglas reproduces word for word in his concurring opinion in Lemon v. Kurtzman (1971):

In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.

Now here we are at the crux of the matter: Catholic schools do not "teach scripture truths." In Boettner's view Roman Catholic schools are heretical. In Douglas's view they are unconstitutional, i.e., they are not Presbyterian.

Now this is a venerable view, entertained over the years by many more Scotsmen than the Justice. Equally interesting is the passage that Douglas quotes in his dissent in Tilton from an article by Dr. Eugene Carson Blake which appeared in Christianity Today in 1959, the year after Blake completed his distinguished eight-year tenure as Stated Clerk of the General Assembly of the Presbyterian Church.
of the United States of America. (Douglas, to be quite fair, identifies him as "Dr. Eugene C. Blake of the Presbyterian Church.") Blake, who had studied in Edinburgh as a youth, had a lively imagination of the sort associated with that city. He had also, more rare, the gift of prophecy. It was his judgment that owing to the tax-exempt state of church properties "it is not unreasonable to prophesy that with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future." This alarmed him:

That the growing wealth and property of the churches was partially responsible for revolutionary expropriations of church property in England in the 16th century, in France in the 18th century, in Italy in the 19th century, and in Mexico, Russia, Czechoslovakia, and Hungary (to name a few examples) in the 20th century, seems self-evident.

Now this is a range of historical reference which Gibbon would have admired, and in our time perhaps only Toynbee might have essayed. It is also of course gibberish, much as Boettner is... well, if not harmless, surely not serious. But these arguments are all but irrefutable. Boettner thinks the pope is an Antichrist. Douglas cites Boettner. Who is to disprove them? Blake thinks rich monasteries cause peasant revolts. Douglas cites Blake. Who is to disprove them? Douglas chose his ground well. He asserted a range of particular values and ultimate truths which he claimed to find in the Constitution; and that was that.

By contrast, the majority of the Court chose the most exposed arguments on which to rest its decision. The Chief Justice, for the majority, stated that "there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial schools." Two particular differences are cited. First, that religiously-affiliated colleges and universities do not attempt to indoctrinate their students while religiously-affiliated elementary and secondary schools do. Second, that college students are different, that "college students are less impressionable and less susceptible to religious indoctrination," that the "skepticism of the college student is not an inconsiderable barrier to any attempt to subvert the Congressional objectives and limitations."

Enter social science. For these are researchable subjects. The facts are discoverable, if not easily. It is no longer possible to make such statements and expect to be taken seriously unless one has proof.

The Court in a sense acknowledges this. Proofs are provided. One is tempted to observe that, as in the evocation of the Dreyfus case in *Penguin Island*, this was fatal. For what the Justices offer with
respect to the assertion that “there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools” is a Harvard Law Review article by Paul A. Freund. And what does Professor Freund report? He reports that “institutions of higher learning present quite a different question, mainly because church support is less likely to involve indoctrination and conformity at that level of instruction.” The argument grows tautological. What is Freund’s evidence? What studies? What survey data? None. No evidence of any kind. Freund is among the most distinguished legal scholars of the age. But it is not for anyone to describe the pedagogical practices of a group of colleges and universities without having inquired into the matter, preferably in accordance with reasonably well-established methodological rules. “Less likely,” will not do. A modern bench requires harder data than that. Social science establishes new standards for what it is that can be taken as “self-evident,” what, to use the words of the Court, “common observation would seem to support.” This of course is a special problem for the Supreme Court. One cannot imagine that the bloopers of Tilton would have survived review—but with the Supreme Court there is no review.

Consider the second assertion, that “there is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.” The Court again offers in evidence a Harvard Law Review article, this by Professor Donald A. Giannella. Again the tautology: Church-related colleges, Giannella writes, do not “attempt to form the religious character of the student by maintaining a highly controlled regime... to attempt such control of the college students is highly inappropriate, and would probably prove self-defeating.” Again, no evidence, no data.

This kind of assertion by the Court is bound to be challenged. Anyone with any experience of a liberal-arts faculty would immediately suspect that psychologists would not have any reliable findings on a subject so vast as “impressionability to religious indoctrination.” This almost surely would come under the heading of things researchable but not researched. The methodological problems, especially of definition, are clearly formidable.

And, indeed, in response to an enquiry which I sent, the 1978 President of the American Psychological Association, Professor M. Brewster Smith of the University of California, replied:

There is no comparable comprehensive treatment of religious change over the high school years that I know of, and while surely a close
search might turn up scattered studies, I think it is fair to say, in an-
swer to your question, that solid evidence regarding the high school
vs. college comparison in which you are interested does not exist (his italics).

Inasmuch as I have called the Tilton case into question in the
course of Senate debate, allow me to be particularly explicit as to
what I judge the Court to have done in this case. The Court's con-
fidence in what some might call its "secularist" position on the es-
tablishment clause has declined steadily since it first pronounced on
the matter in Everson in 1947. In Tilton it was trying to find grounds
for allowing a clear intent of Congress to be carried out, and did so
by distinguishing between higher-education facilities, which are the
only ones affected by the law, and other facilities. But the point I
would wish to make, for purposes of this essay, is that the Court, in
an effort to base its decision on contemporary modes of argument,
was rigorous but not rigorous enough. On examination, there is no
evidence with which to support its finding. Justice Douglas, arguing
in a prescientific mode, made no such mistake.

A great wisdom

Is this distressing? Not, I think, unless one is distressed by the
modern age. Primitive man, presumably, had an explanation for
everything. There is a sense, of course, in which science has made
ignoramuses of us all. So much is not known. But modern man still
does know more than his ancestors, even immediate ones, and we
would do well to recall the saying of 19th-century Americans that
"it's not ignorance that hurts, it's knowin' all those things that ain't
so." Courts will learn to adapt to the changed conditions of evidence
which social science imposes on contemporary argument. One would
not be surprised, for example, to see the emergence of a group of
lawyers trained in both disciplines, much as there are now special-
ists trained both as lawyers and as medical doctors. Indeed, lawyers
with no more than a good undergraduate grounding in social-science
methodology could have quite an impact in this area simply by es-
ablishing standards of cross-examination which are infrequently
attained today.

This would be no small thing. To take yet another, and now con-
cluding example from the field of education: Consider the contro-
versy which broke out in the late 1970's over reinterpretations of the
Equal Educational Opportunity Report, commonly known as the
Coleman Report after its principal author, Professor James S. Cole-
man. In the late 1960's Coleman's data on pupil achievement were the basis for a number of major court decisions calling for school busing. Subsequently—in the familiar pattern—his initial interpretations were challenged. Much confusion and some bitterness followed. It is at least arguable that much of this might have been avoided had it been made clear to the courts, in the first place, either through exposition by plaintiffs or cross-examination by defendants, that Coleman had not found any race effect as such in his analysis of student-body characteristics and educational achievement. He had found a social-class effect.

Judges in the future should be able to look for such cross-examination. This will help them protect the special space that we give to the courts, for if there is one thing they don't need, it is another group of critics, claiming to know their tasks better than they.

One hopes it does not transgress any boundaries to suggest that these developments might also encourage in the courts a somewhat more easeful acceptance that, in the end, law is after all only long-established preference, codified opinion. When Pound and Cardozo and Holmes began talking of the "science of law," perhaps they, too, were mostly trying to impose a different set of opinions from those then prevailing. But at least they were doing so in an effort to get the bench back to the business of interpreting opinion as embodied in legislation, rather than as embodied in the education and social-class preferences of a particular body of judges. This was great wisdom, and this is precisely the import of Chief Justice Burger's decision in Tennessee Valley Authority v. Hill (1978) in which it was held that, inasmuch as the Tellico Dam would endanger the snail darter, it was prohibited by the Endangered Species Act.

In civil but firm tones the Congress was informed that it must expect that, when called upon, the Court will enforce such laws as Congress enacts regardless of any individual appraisal of the wisdom or un-wisdom of a particular course. Whether that was to be considered a warning or not will depend on one's judgment as to the balance of wisdom against un-wisdom in recent Congressional enactments. But that it is the policy of the present Court, none need doubt. We may all take pleasure in the nice touch of the Chief Justice who closed his opinion not with a citation of social science, nor yet of any "science of law," but rather lines ascribed to Sir Thomas More by the contemporary playwright Robert Bolt: "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal... I'm not God."