CIVIL JUSTICE RESEARCH AND CIVIL JUSTICE REFORM*

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I. OVERVIEW

If the law's traditional road to reform were the only path available, we would still be trying to improve the administration of justice by theorizing and "reasoning" our way to betterment. That is no longer the only way. Recent decades have seen a rise in the use of systematically gathered data to identify problems and devise responses to aid the justice system. This new path takes the investigator into the field rather than into the library, relying on the skills of the social scientist and statistician as well as those of the legal thinker.

For their part, the social scientists have found a considerable fascination in investigating law in action. They have been particularly intrigued by the operation of the criminal justice system. In the glory days of the Law Enforcement Assistance Administration[1] the opportunities and rewards in the criminal justice field were abundant. But even without comparably generous support, the area of civil justice administration has lately begun to attract investigators. Empirical research in civil justice today is in the most active state it has ever achieved. Several factors account for this.

First, the litigation explosion has sent great waves of cases crashing into the courts. The result has been a sense of higher urgency to learn, as the Civil Litigation Research Project is trying to do, what breeds litigation, what curbs it, and why

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* Since this article was drafted in January, 1981, the Office for Improvements in the Administration of Justice has been merged into a new unit in the Department of Justice, the Office for Legal Policy. Responsibility for the CLRP project was transferred to the National Institute of Justice.

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[1] Created by the 1968 Omnibus Crime Control and Safe Streets Act and curtailed by the 1979 Justice System Improvement Act (PL 96-157).

LAW & SOCIETY REVIEW, Volume 15, Number 3-4 (1980-81)

costs go out of control. Second, the development of computer technology allows collection and retrieval of detailed information about the nature of the incoming lawsuits, the factors associated with their rapid or sluggish movement through the courts, and many other case characteristics of potential significance to law reformers. Third, with the rise of poverty law and public interest advocacy and the continued expansion of civil rights and civil liability litigation, the noncriminal fields of law now compete for social scientists' attention more successfully than in days when the drama-laden problems of criminal justice all but monopolized law-related empirical research.

Deeper investigations into how the civil justice system works have begun to produce a trickle of explanatory theories. These are far from being hard and fast diagnoses; they undergo continual revision as more information accumulates. Still, they are much better than naked intuition. Government officials appreciate this and increasingly turn to social scientists for empirical data to guide important practical decisions. In many legislative bodies it has become standard practice to look before legislating—to collect empirical evidence in order to assess the dimensions of perceived societal problems. A more recent interest of legislatures is in looking after they legislate—at the impact of rules or programs they have adopted (see Scarr, 1979). Even in the courts the judges have learned that their own personal experiences and intuitions are not a good substitute for systematically gathered data about the law in action (Rosenblum, 1977).

The community of interest between the lawmakers and the social scientists is apparent in regard to such endemic problems of civil justice as excessive delay and costs (Church, 1978; Flanders, 1980). It is widely accepted that empirical research and testing are essential in formulating measures to overcome those pathologies.

The growing use of empirical research for law reform has serious implications for the future work of legal scholars and for the institutional settings in which they function. First, empirical research differs from classical legal research both in its methods and in its intellectual stance. Instead of studying case decisions, statutes, commentary, and other existing documentary sources of law and then applying to them the chiefly cerebral and internal skills that go with thinking like a lawyer, social research heavily depends on creating new information by observing phenomena outside the formal legal

system in a systematic way. It then applies to the materials gathered a set of rigorous analytical methods. The emphasis on disciplined observation, methodological precision, and quantification involves a sharp break with the law scholar's traditional mind set.

Second, obtaining systematic data about law in action calls for vastly different personnel and material resources. Classical legal research is done in the library by essentially individual efforts and without elaborate logistical support. Imagination, intelligence, and persistence, but no intricate apparatus are required. By contrast, empirical research typically requires teams of investigators working in close coordination according to tightly engineered plans, with varied disciplines participating and much paraphernalia in evidence. Combining the points of view and skills of various disciplines means that the exclusive dominion of law-trained personnel must at times give way before superior knowledge or methods at the disposal of nonlawyers. The result is an end to the monopoly long enjoyed by classical, individual scholarship in conducting research for law reform.

The remainder of this paper will explore further the reasons empirical research is vital to soundly conceived reform of civil justice, offer examples of its use, and examine in some detail the new imperatives for effective research on the administration of civil justice. As a prelude to the discussion, it will be useful to disclose the particular meaning and focus we ascribe to the term "civil justice," which otherwise might be understood to take in the entire legal system except for the criminal law. That would be too broad a frame of reference. In this article, the focus is on the administration of justice through case-by-case adjudication in noncriminal matters. This includes dispute resolution by alternatives to courts as well as by the judicial process.

In concentrating on courts and their alternatives, we have deliberately excluded many activities that, although properly part of the administration of civil justice, are in the form of legislation that changes the citizen's substantive rights and obligations. This is in no sense a judgment that wholesale substantive law reforms are less effective in achieving fairness and efficiency in civil justice than resolving civil disputes on a one-by-one basis. To the contrary, changing legal rights by legislative action is often the surest way to overcome frictions and misfires in the dispute-resolving arsenal. When legislatures make reforms on a wholesale basis by redefining

rights, they frequently employ large-scale empirical research efforts. Were there enough time and space to explore those activities in this essay, we would not be limiting this discussion to research that is directed to improving the adjudication process.

II. LAW AND THE EMPIRICAL METHOD

The social scientist's approach to investigating law-related problems and the impact of law upon social phenomena represents a new level of understanding of the need to systematize the law's contact with reality in order to improve law. In 1967, the President's Commission on Law Enforcement and the Administration of Justice helped to make clear the limitations of proceeding only intuitively and speculatively. It said: "The Commission has found and discussed throughout this report many needs of law enforcement and the administration of criminal justice. But what it has found to be the greatest need is the need to know" (President's Commission on Law Enforcement and Administration of Justice, 1967a: 273).

Since 1967, the federal government has shown by many actions that it recognizes empirical research as essential to soundly administered laws. The creation in that year of the Federal Judicial Center (PL 90-219) and the establishment the next year of the Law Enforcement Assistance Administration are clear signposts. Recent milestones along the same road are the start-up of the National Center for State Courts, the National Institute of Justice, and the Bureau of Justice Statistics. Until its recent dissolution, the Office for Improvements in the Administration of Justice constituted another important example.

Today the agenda for research on civil justice is as rich as we could want. Testable hypotheses range from theories about how disputes are born, mature, and are resolved to why trial delay exists in some courts and not in others. There are theories about how juries function, about which demographic and personality factors in jurors predispose them to particular verdicts, and how well or poorly juries understand the law. There are theories about the effectiveness of such procedures as discovery or the pretrial conference, and about the considerations that lead litigants to settle or insist on trial and to appeal or not appeal.

Social research on problems of civil justice has brought the scientific mode of inquiry directly into the lawmaking process.

Those who propose programs have formed a loose partnership with those who propound hypotheses, thus bringing together the intellectual pursuits involved in investigating social phenomena with those involved in conceiving and developing legal programs. This merger was long overdue. In no other way can the flaws in the civil justice system be successfully diagnosed. There is not much use in recognizing that a social problem exists unless one can assess its nature and dimensions. Effective assessment requires research efforts that are informed by a knowledge of probability theory, sampling methods, and statistical science.

A similar need arises when a legal antidote has been compounded for a social ill, and the questions are whether the remedy works and in what manner. The impact must be tested as rigorously and precisely as possible. Again, social science methods and knowledge must be employed in the research.

In the procedural area it is particularly difficult to get a warm reception for empirical research, because civil procedure is so heavily law-oriented. Here the lawyer's ancient instincts have long prevailed: look to the past; follow precedent; and thus foster stability, continuity, and orderliness. These instincts have produced a standard approach to law reform: discern a social evil; legislate a supposed remedy; go on to the next perceived evil. So long as the jurisprudential intuitions of lawmakers were satisfied by the remedial measure, there was no need to test it in the real world. When Holmes said that the life of the law is "experience" (Holmes, 1963: 5), he was referring to the intuitively derived individual experience of lawmakers—not to the empirical and systematically observed conditions of society or impacts of law. Until relatively recently, the dominance of this philosophy made law a closed system of thought. It is this classical perception that the methods and findings of social science have been altering.

The work of the Civil Litigation Research Project, operating under a major award of the recently dissolved Office for Improvements in the Administration of Justice, is an important example of the new approach. It holds the promise of greatly enlarging our understanding of the genesis, maturing, and processing of civil disputes. This major effort to produce basic information about the dynamics of disputes and the processing capabilities of various dispute-resolving institutions was a key element in the research agenda of OIAJ and its Federal Justice Program.

III. DILEMMAS AND TRADE-OFFS IN CIVIL JUSTICE

Two important values animate many current efforts in the field of civil justice. The first is to improve access to court-delivered justice; the second, to elevate public confidence in the courts. Several intermediate goals are instrumental to those values—among them the enhancing of affordability, dispatch, and accuracy in the dispute resolving process. In theory these objectives are entirely compatible, but in practice they at times collide with one another, raising dilemmas and tensions. For example, speed in resolving a dispute may be at odds with correctness; or holding down costs may require eliminating methods of obtaining information to an extent that jeopardizes accuracy.

Systematic information about these matters may help us estimate the relative strength of competing values and may point the way to reasonable solutions. At times the data may suggest the desirability of nonjudicial mechanisms for resolving disputes of various kinds. Thus, an inquiry into the affordability of litigation as a factor in access to justice may produce evidence that an extra-judicial method is less expensive and at least equally desirable on other grounds. Some of the possibilities can be readily illustrated after noting a few basic statistics.

Alternative Modes of Dispute Resolution

The growth in court caseload at both the trial and appellate level has raised concerns about the capability of courts to handle all the disputes people see fit to press. The quantitative data carry sobering qualitative messages for policy makers.

(1) Compared with 1960, the 187,000 cases filed in federal district courts in FY 1979 represented an increase of 118 percent (Administrative Office of the Courts, 1979: 4, 7).

(2) In the same twenty years, the number of appeals docketed in the eleven regional courts of appeals increased almost 419 percent over 1960, rising above 20,000 (Administrative Office of the Court, 1979: 3).

(3) The best available data show that state courts far outdistance the federal courts in filings: for 1975, it is estimated the states had at least 11,725,362 trial court filings and 126,922 appeals (National Court Statistics Project, 1980: 25).[2]

[2] This is an estimate for 49 states using an upper limit of 95 percent of the confidence interval.

(4) In 1900, for every 100,000 persons in the country, approximately 19 cases were filed in the federal district courts; by the start of the 1970's, there were 45 per 100,000 population (Grossman and Sarat, 1975).

These figures are, of course, the visible top of the dispute volcano; what seethes below will be reported by the CLRP investigators when they have fully analyzed the data they have collected. A high volume of disputes need not necessarily be seen as a natural disaster, however frequently judges may wish for federal disaster relief when facing Alpine caseloads. Of course, it makes a big difference who is viewing the situation. Business groups tend to view the spread of litigation as an increasingly burdensome tax on the cost of doing business. Consumers, in contrast, tend to see uninhibited litigation as a necessary check on the practices business would adopt if not challenged in court. Some judges, practicing lawyers, and academics see greatly increasing caseloads as a possible source of erosion of the courts' unique status and fragile capacity (Department of Justice Committee on Revision of the Federal System, 1977; Rifkind, 1976).

A possible partial adjustment of these interests and perspectives lies in fostering mechanisms outside the courts to adjudicate routine disputes that occur in large volume. We need to know a number of facts about the disputes and the disputants before making efforts to channel them away from the courts and risking cries of "second-class justice" (see National Center for State Courts, 1978b: 119). For instance, there is suggestive evidence that some types of disputes alleged not to be suitable for alternative dispute-resolving mechanisms, such as disputes over major purchases, are not now being pressed widely in court (Miller and Sarat, 1981: 525). Creation of better backing for consumer complaint bureaus with authority to enforce dispute resolutions would create new adjudicative capacity and might benefit businesses by reducing consumer dissatisfaction and lowering litigation costs. Another alternative is mandatory court-annexed arbitration as a prerequisite to court trial. Court-annexed arbitration has been receiving increased scrutiny in both state and federal courts (State of New York Office of Court Administration, 1978: Appendix; Rosenberg and Schubin, 1961; Lind and Shapard, 1979).

If we fail to set up new extra-judicial mechanisms, we may be inviting problems of two kinds: a continued influx into the courts of an unmanageably large caseload and a continuing

inability on the part of citizens to voice legal grievances effectively and inexpensively. Without sufficient data on costs, benefits, usage, effectiveness, and satisfaction regarding the alternative fora, we cannot know how to strike a sensible balance between court and noncourt mechanisms. Collecting precisely that kind of information was the aim of the Dispute Resolution Program that became law in February, 1980, but which is unlikely to be funded in the foreseeable future. By surveys, experiments, and pilot efforts the new Program would have helped us determine which types of dispute resolving processes are most effective for various kinds of disputes. It would have enabled the states and cities to act more sensitively in providing fora and processes appropriate to the needs of citizens who find themselves in legal disputes with neighbors, family members, landlords, merchants, customers, and other persons with whom they have continuing relations.

Designing Effective Procedural Rules

Inside the courts there are countless procedural choices that may maximize one value at the expense of another. A measure that reduces the time permitted for one stage of litigation—discovery, for example—may reduce the information available to lawyers and courts. Several years ago, after a study of procedures being used in various appellate courts to make their processes more efficient, colleagues and I concluded that some of those time-saving measures compromised the quality of appellate justice by stripping away features that gave the process a more humane and personal touch (Carrington *et al.*, 1976). We urged that the tension between the efficiency values of expedited disposition of appeals and the quality values of retaining the judges' deliberative role be resolved in favor of the latter. We thought it essential that the courts demonstrate their commitment to collegial consideration of points at issue.

Our judgment on this is certainly appealable. Little is known of the effect of appellate review on confidence in the trial courts (Schwartz, 1980). Very possibly some categories of cases would benefit more from an abbreviated appellate review than from the full-scale traditional process. The Council on the Role of Courts[3] has been investigating whether and how

[3] The Council on the Role of Courts is a self-constituted group that has functioned with financial and staff support from the Office for Improvements in the Administration of Justice. It began meeting in July, 1978, to analyze and evaluate the role of courts in the United States, with the aim of producing

appellate review plays a role in building institutional confidence. Empirical data on the matter are in short supply even though they would bear vitally on the problem of how to reduce the time demands of appellate process while preserving the appellate role.

In trial courts, there has been for several years an effort to balance the benefits of liberal discovery rules against the desire for efficiencies in time and expense that would come from limiting discovery (see Cohen, 1979). Also involved here is the conflict between active judicial control of cases and adversarial initiative and participation. There is evidence that active judicial control over discovery, such as by setting a discovery cutoff, is associated with faster case processing (Flanders and Sager, 1977: 234). On the other side, the lawyers resist dilution of their privilege of pursuing every avenue that may yield advantage or provide protection in a lawsuit. The ideals of a day in court and effective participation provide ammunition for this position, much as they do with regard to the related issue of lawyer-directed versus judge-conducted *voir dire*. The ideals of low public cost, expeditious case processing, and responsible use of process argue for an increased judicial role in case management. To tailor the new judicial role fittingly, we need more information on the costs and benefits of alternative methods of regulating discovery. What seemed true in 1977 seems true today:

> The number of units of lawyer's time that must be invested in preparing a case for trial has . . . been rising at a dramatic pace, by all reports. The explanation commonly offered is that excessive use of pretrial discovery accounts for a large part of the investment in trial preparation and in the overall costs of litigating. Without extensive up-to-date figures we simply cannot know whether this is true (Rosenberg, 1977: 169).

Until the data are collected, the closed-system tendencies of the law will produce continuing attempts to solve the problem through reason and intuition informed mainly by anecdote.

IV. COST OF LITIGATION AS A CRITICAL ISSUE

A dominant concern in the administration of civil justice is the matter of cost. In recent years, the outcries against the escalation in lawyers' fees and related charges have reached a crescendo. Many responsible observers insist that court-administered civil justice is being priced out of the market for large numbers of Americans.

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findings and recommendations that will inform legislators who must decide on channeling disputes to courts or providing alternative mechanisms.

Litigation costs are a compound of the public expense of maintaining and operating the courts and, at times, providing legal services to indigent litigants; and of the private charges the litigating parties bear.

The public expense is often neglected in discussions of the cost of justice, but it should not be overlooked. In the large run of cases, where the only issue is money, costs to the society of providing the arena for the legal conflict may be an immensely important factor in evaluating the soundness of the law's approach to the problem of providing a mechanism for resolving the dispute. This is not to say that the fact that a case involves little money means that it necessarily belongs in a lesser court or other low-level tribunal. In some circumstances it may not be sound to allocate the $500 case to a lower-level tribunal and the $500,000 case to a federal district court. Rather than look at size alone, we might want to ask such questions as: can the court do anything constructive to aid resolution of the $500,000 case that could not be done by some other mechanism or agency of dispute resolution? Are the facts so complicated and is the law so unclear that a court adjudication is needed? Besides the question of need, a second question is whether the principle of proportionality is offended by devoting more in public resources to settle the dispute than is involved in the controversy.

These questions cannot be settled by empirical research alone. However, a systematic body of relevant data will certainly illuminate some of the choices and considerations that will enter into the decision. If it develops that the costs of legal services make it uneconomical to hire a lawyer or go to court, an attractive alternative may be to compensate the injured party on a no-fault basis, thereby avoiding most or all the legal expenses. Disputes that involve sums too small to warrant legal fees may reveal characteristics that make them amenable to settlement through administrative processes that are simple and manageable without the help of lawyers.

To decide whether noncourt options are called for requires examining a number of factual issues that only empirical inquiries can adequately address. For instance, when we examine the disputes that actually arise, is there a clear point below which the dollar value of the claim is too small to justify the costs of the judicial process? Are such claims significant in volume, and are they a substantial proportion of all legal disputes? If some classes of claims are unduly excluded from

the civil justice system, is it because large numbers of clients are unaware of feasible alternatives to lawyers?

Another cost problem is the recurrent complaint that for the winning litigant the taste of victory is often soured by the need to pay the heavy lawyers' fees that litigating exacts. We have found that there are unexpected complications in attempting to legislate a "loser pays winner's attorney" rule for civil litigation. In tailoring a sensitive and reasonable rule, knowledge of empirical data about the relationship between stakes and legal expenses becomes critical.

IV. CONCLUSION

This paper has discussed a sampling of the many empirical questions about civil justice topics that await illumination by systematic inquiry. They illustrate the importance for law reform of the multidisciplinary approach and of providing capabilities in addition to the lawyer's traditional talents for working with books and documents. The nature and scale of the problems calling for investigation suggest the need for mechanisms able to handle research ventures of a size that no solo legal scholar or small team of legal scholars would dare to attempt.

Law schools have not been quick to respond to the need—either by assuring that law students are educated in the concepts, theories and methods of scientific observation or by creating institutional frameworks for large research ventures. Yet I continue to be optimistic. When law teachers see that improving civil justice requires knowledge that even the law reviews do not command, the law school curricula will bloom with offerings in the concepts and methods of social research.

For references cited in this article, see p. 883.