SURVEYS AND JUDICIARIES, OR WHO'S AFRAID OF THE PURPLE CURTAIN?

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As any science, natural or social, goes through various stages of development, practitioners find that past conceptualizations and tools need revamping or new applications. This is in the scheme of scientific things; it is essential for progress in science. It is necessary for developing that body of knowledge and those observations and measurement techniques comprising the sum and substance of the sciences. But one question remains: when will this occur – sooner or later?

Sometimes a technique or tool or approach is not used because an existent tool is believed to be inapplicable, inappropriate, or unfeasible. Then one or two or several try with "surprising" success. This is reported quickly – by itself; or it can be reported in the course of the presentation of findings and analysis of a research study. In this instance, I am selecting the former course since I fear that the scientific study of the judicial process is one of the least developed areas in all of political science and sociology. I hope that reporting successful and effective uses of a particular social scientific technique in the study of the judicial process might serve as stimulation for similar work more quickly than might be the case in the normal run of research events. And, of course, in my view, that would be all to the better.

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It is now well known that the United States judiciary has become one of the most popular focal points of political behavioral interest. Great cascades of material tumble forth yearly about this process – the figures and equations bubble up at an awesome rate. Despite all this interest in the rigorous and systematic study of the law and courts, however, there is still much talk and belief about the relative inaccessibility of much of this phenomenon to the behavioral scientist. In the era of the Iron Curtain and the Bamboo Curtain, the metaphor of The Purple Curtain seems as appropriate as any to designate the boundaries of the specific, putatively "closed system" under discussion. Indeed, as so many political science researchers seem to believe, the Purple Curtain has long since been lowered to conceal one of the leading governmental mysteries of modern times.

Judges, they explain, must be quite anxious lest their "racket"[1] be exposed. And thus, they claim, the behavioral scientist must work in indirect (if not devious) ways to uncover "Truth" about their object of interest. S. Sidney Ulmer, an empirical researcher in this area, has stated:

> One who would study leadership on a collegial court faces, at the outset, what are clearly substantial obstacles. The "purple curtain" that hides much of the doings of courts of law is no accident. By design, great care is taken to safeguard deliberations leading to decision, and the conference room of the collegial court especially is considered inviolate. Such practices are neither arbitrary nor superfluous, since an important function of obscuring decisional processes is to sustain the myth of judicial objectivity which permeates the American judicial system.[2]

In other words, there would seem to be no direct way to observe the court's decision-making process to determine judicial leadership, objectivity, and the like.

Of course it is hardly likely that the judges of any court in the American system (or in any system) would be willing to open their conferences to anyone, much less

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1. The coinage of this word to refer to the judicial practice of law is not mine, nor that of a political scientist. It was adopted by, of all people, a law professor at Yale. See F. RODELL, WOE UNTO YOU LAWYERS (2d ed. 1957).

2. S. Ulmer, *Leadership in the Michigan Supreme Court,* in JUDICIAL DECISION MAKING 3, 14 (G. Schubert ed. 1963). It is often argued that courts achieve legitimacy by perpetuating such myths and enveloping their decision-making in a cloud of secrecy. *Cf* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

3. Though Glendon Schubert's newest book bears that phrase as a title, it would appear to me to be a misnomer as he operationally defines it. See G. SCHUBERT, THE JUDICIAL MIND (1965).

4. S. Nagel, *Off-the Bench Judicial Attitudes,* in JUDICIAL DECISION MAKING 29 (G. Schubert ed. 1963).

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to observers recording detailed interactions among participants. Also, I doubt the possibility of getting judges to confer in a room subject to observation through a one-way screen. On the other hand, there are other reasonably reliable and rigorous methods available which might assist in gaining a deeper insight into the mechanism called (upon occasion) "the judicial mind."[3] A contribution by Stuart Nagel comes immediately to mind.[4]

Nagel wanted to test the correlation between various general attitudes held by the American appellate judiciary and their decisional patterns in several categories of cases. Up to that stage in the development of the political science behavioral study of the judiciary, the isolation and measurement of attitudes of judges had been done solely through inferences made from various statistical tests applied to Supreme Court decisions. Schubert led in this work. But, as I have argued elsewhere,[5] these devices (e.g., bloc analyses of judges' votes on collegial courts) seem utterly incapable of producing that which could meaningfully be considered to be the attitudes of judges. Nagel, however, through the act of having judges make plusses, double plusses, minuses, etc., indeed isolated some distinct, discrete variables with which to test for relationship with decisions. The bloc analysis school clearly does little more than find correlations between two sides of one coin. On the other hand, the Nagel study pointed out only too clearly some problems in the use of the questionnaire technique when one wants to learn something about the nature of the judicial process. And unfortunately, a side-effect brought about by his study was a reinforcement of the commonly believed adage about judicial inaccessibility.

Because the Nagel study was distributed to the judicial population through the mails, apparently with little thought to maximizing response, it is vulnerable to serious criticism. Out of the 313 state and federal supreme court judges solicited, only 119 replied. This is only a trifle above one-third. Beverly Cook's recent mail-questionnaire study of the California judiciary yielded only a 45% response.[6] The substantial bias that this creates all but invalidates a study, for it is almost axiomatic in the social sciences that "a low response (in mailed questionnaires) is almost always indicative of a biased sample."[7] And, much worse, when such a substantial bloc of the judiciary fail to reply, it would be only the most clairvoyant analyst who,

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5. T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE (1965).

6. B. Cook, *Boundary Interchange Between Teaching and Research in Judicial Process and Research in Judicial Process* 11 (paper presented at Western Political Science Association Convention, Reno, Nevada, March 1966).

7. W. GOOD & P. HATT, METHODS IN SOCIAL RESEARCH 180 (1952).

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in the absence of additional data, could determine the direction of the bias. Unfortunately this lesson seems to be lost on other political scientists as well.[8]

However, there is no consensus among those who study courts that judges *totally* immunize themselves to the probes of questionnaires. Some of the work done by behavioral scientists in studying juries, for instance, has required cooperation from judicial personnel. *But* there are still distinctions which must be made clear.

James G. Holbrook, for example, has reported a good deal of success in his dealings with judges in a study he conducted on the selection of jurors.[9] Those judges whom he approached were apparently most responsive. The main distinction is that they were willing to stand up to the cold glare of a questionnaire which solicited their opinions about *others*. They also felt free to answer questions on certain issues concerning procedural reform about which judges are often rather vocal. Thus, the limited scope of their cooperation was insufficient to dispel the established lore about judcial inaccessibility. Furthermore, the highly publicized difficulties that Fred Strodtbeck and the Chicago Jury Project met when they attempted to look into (or hear into, as it were) the jury room is more relevant to our concerns, having served as further "evidence" for the Purple Curtain idea.[10]

One of the principal reasons for the vitality of the notion of judicial hostility to the study of the judicial process is probably that so much attenton has been paid to the Supreme Court of the United States. This institution is perhaps the most sensitive to scrutiny, as is indicated by my personal experience with Justice Tom Clark. Last year, I happened across Justice Clark in an informal vacation situation, and he submitted himself to a reasonably thorough probing of his view of the judicial decision-making process. But he frankly admitted that had I approached him through the mail or in full-professor-attire in Washington, he never would have acquiesced as readily (if at all) as in the warm pacifying Hawaiian sun. (He suggested that I take up tennis to get at Justice Brennan.)

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8. See J. GROSSMAN, LAWYERS AND JUDGES 164 (1965). Though Grossman only received a 40% return of a questionnaire sent to the 100 U.S. Senators, no mention is made of the validity problem. Indeed, Grossman even tells us that he received 40 "valid responses" – whatever that might mean.

9. J. Holbrook, *Role of Juries in Judicial Administration*, in CIVIL JUSTICE AND THE JURY 195 (C. Joiner ed. 1962).

10. A brief account of this is presented in F. Strodtbeck, *Social Process, the Law, and Jury Functioning*, in LAW AND SOCIOLOGY 151 n.8 (W. Evans ed. 1962).

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To test Justice Clark's hypothesis that the remainder of the Court would be equally inaccessible despite my publicized (to them) acquisition of the Clark interview-scalp, I sent a letter requesting interviews to the remaining eight members of the Court. One by one the replies came in. The first was from Justice Douglas. It was in the affirmative. I immediately began preparing applications for a research grant. But these came to a quick end as the next seven justices (in rapid succession) gatling-gunned me into an Ulmer-like cynicism. But for some reason or other (call it blind faith) I still felt that all judges could not be so reluctant to submit themselves to objective, rigorous academic scrutiny.

For certain questions nagged at me. For instance, can it be doubted that the vast majority of American judges have long abandoned the view that they "discover" the law? It was difficult for me to believe that any judges really think that the bar or the public believe this myth. Moreover, it seemed somewhat inconceivable to me that judges believe that they *should* delude the public about the nature of the judicial process. Jerome Frank said some time ago that:

> It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions. The public, I think, can "take it" . . . It is the essence of democracy that the citizens are entitled to know what all their public servants, judges included, are doing, and how well they are doing it. The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts.[11]

I am not aware that the bench considers Frank's theme traitorous or in contempt of court. Nor does this seem to be the view of many lawyers and legal scholars.[12] Thus there seemed to be compelling reasons to expect judicial cooperation for a behavioral science project concerning the judicial process itself. But how could this best be done?

It seemed to me that a simple mailed questionnaire almost certainly faced a dismal response when sent to professional people. Such a procedure is impersonal and remote, and such respondents place a high value upon their time. This would

11. J. Frank, *op. cit. supra* note 2, at 2-3.

12. Frank is frequently cited by legal scholars seeking authority for their own debunking of various "myths" which cloak judicial activities. See, for instance, the recent article H. Jones, *The Trial Judges — Role Analysis and Profile*, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 130 (H. Jones ed. 1965).

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seem to hold particularly true for judges – who almost universally bemoan their lack of that commodity.[13]

THE STRATEGY OF CARE

However, a recent study by Henderson and Sinclair offers us much hope of success in approaching judges.[14] Their technique was to employ a questionnaire and their object of interest was that of a judiciary: the state and federal courts in the State of Texas. The type of information sought involved various aspects of what might best be termed "judicial role." Essentially, Henderson and Sinclair were attempting to test various hypotheses on the relationship between the selection process and variations in the role perceptions of different judges. A typical question was as follows:

> If you were in a position to select (a trial judge) (an appellate judge) which of the following factors would be most important? Rate them in importance from 1, most important, to 6.

Trial experience	Knows about people ....
Continuing scholarship	Sound legal education ....
Objectivity	Previous trial court
Residing in district	experience ....

The questionnaire was complex and lengthy (5 pages). However, even though these questionnaires were distributed by mail, an impressive 78.3% of the judges of the state responded (174 out of 222).[15] A technique capable of securing such a return obviously deserves description.

The main difference between the Henderson-Sinclair study and the Nagel and Cook studies is the palpable personal care taken to persuade and to invite the judges' interest and participation in the project. This is the key, it seems to me, to successful invocation of judicial help in getting at the innards of the judicial process. In the Henderson-Sinclair study we learn the following:

To encourage maximum response the following devices were used:

(a) Biographical data including age, law school, public career, and the date when the judge assumed his present position was collected and recorded

13. "Among eminent judges and bar leaders the conviction grew that unless quick action were taken many courts would capsize in the flood of their work." M. Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies* in *id.* at 31.

14. B. HENDERSON & T. SINCLAIR, THE SELECTION OF JUDGES IN TEXAS (1965).

15. *Id.* at 121.

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on the questionnaire before it was sent, on the assumption that if the judge realized the level of our interest in him and our information regarding him, he might be more willing to respond.

(b) A covering letter promised confidentiality and cited endorsements of the study by three leading judges in the group.

(c) After a time lapse, brief hand-written follow-up letters were sent to non-respondents along with additional copies of the questionnaires and additional stamped addressed envelopes.[16]

Rosenberg conducted another recent study which was highly successful in eliciting responses from a state judiciary to a mailed questionnaire.[17] This was achieved in the execution of a project designed to see what effect, if any, the judges and lawyers of Arkansas believed a new comparative negligence statute had on trial verdicts, e.g., the size of the verdicts; the proportion of verdicts won by plaintiffs; etc. Out of 23 judges solicited, 19 returned substantially completed forms. This is a response of 82.6%. The extra care taken in this study was:

> A covering letter of the Arkansas Bar Association and an explanatory memorandum prepared by the Project accompanied each questionnaire . . . [and there were] two follow-up communications. . . .[18]

It thus appeared that judicial non-response to questionnaires can be partially mitigated by certain questionnaire construction and administration techniques. Furthermore, the effects of bias can often be minimized by comparing respondents with non-respondents on certain objective characteristics. If they are equal it can often be assumed that the attitudes, values, and/or personality attributes which might have underlied the non-responses are not significantly related to the attitudes and/or behavior under study. As the level of non-response increases, however, this assumption becomes less and less tenable.

The questionnaire I employed on judges was also somewhat complex. It was presented to the judge in two separate sections. The first section consisted of two parts. The first part of the first section was a lengthy attitude questionnaire (some-

16. *Id.* at 3.

17. M. Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 36 N.Y.S.B.J. 457 (1964).

18. *Id.* at 464.

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where between the open-ended and closed-ended varieties)[19] concerning the liability of hospitals (charities) for the negligence of its employees committed during the course of their employment. The judge was supposed to answer six questions by writing out his view in longhand. It was stressed that his "*personal*" opinion was desired. Also, he was expected to check one of four "intensity of feeling" boxes.

The next part of the first section consisted of many personal questions about the judge's career, including, for example, one about his final numerical place in his law school class. Also, there were several questions concerning his views about the importance of various legal volumes, e.g., law encyclopedias, West's National Digest System, etc. The last part of the first section was a series of items (elements) theorized to comprise the judicial role, e.g., "my concept of justice," "common sense," "precedent, when clear and directly relevant." Each of these items had numbers from 4 to 0 next to it. The judge was instructed that the numbers represented degrees of importance that each factor might have in his decisions. He was told that he should circle the higher numbers if he believed that the corresponding factor had great influence upon him. He was told to circle the zero if he believed a factor exercised no influence upon him as he made his decisions.

After the judge turned in this section to the interviewer he was handed the second section. It consisted of a hypothetical case dealing with an action against a hospital by a woman whose husband was killed because of negligent action of a nurse acting within the scope of her employment. The judge was asked to assume the role of a supreme court justice, deciding the case and writing down the reasons for his decision. I assumed that almost every judge would *personally* believe (since we can assume that they internalize the general, "enlightened" American juridical position)[20] that hospitals ought to be held liable like any other institution. This hypothetical case, however, had extremely clear precedent (so rated by a panel of 4 law professors) to the contrary. In other words, the case was slanted so that the precedent clearly directed the judge to decide against what I expected would be his personal proclivity. This was intended to be the major phase of the study. For the most important hypotheses being tested involved the *objectivity*

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19. Closed-ended questions require the respondent to choose from a limited set of responses, which have been created by the researcher; open-ended questions allow the respondent to reply in whatever way he chooses.

20. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 1024 (3d ed. 1964): "In short, the immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of the next two decades will see its virtual disappearance from American law."

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and *impartiality* of judges at different court levels and in comparison with lawyers, law students and laymen. So much for the questionnaire.

Undergraduates were used as interviewers, a practice opposed by many social scientists. Backstrom and Hursh, for instance, advance several reasons for opposing the practice including the assertion that appearance and ostensible lack of seriousness of undergraduates will cause many respondents either to refuse to grant an audience or to answer the questions half-heartedly.[21] However, these cautions did not seem to be applicable in research contemplated on the judiciary.

Backstrom and Hursh's comments relate to population-wide representative samples or to large groups of lay respondents. In planning a survey of the judiciary, however, one has every reason to commence with the assumption that the respondents will be either hostile, hurried and/or indifferent. Thus, it seemed to me, some of the strong points in employing students should be weighted more heavily. Among these, interviewer motivation is an especially important consideration. Backstrom and Hursh may well be correct in stating:

> Yet, when all of this is accounted for, students can be good interviewers. . . . Properly engendered, student motivation will be high — much higher than among professionals working for money.[22]

Also, students who volunteer for this type of work will probably combine the better parts of enthusiasm, sincerity and interest in the subject matter. Finally, since the main objective in the immediate research project was to *place* the questionnaire, the negative aspects of using students seemed to be of minimal significance.

I decided to use top undergraduate students in my Courts and Politics class. Several volunteered and after some brief instructions went out armed with their two sets of questionnaires. The results were as follows:

Court	Total number of judges	Number of judges solicited	Number of judges responding	Percent of those solicited
Superior Court of Hawaii	5	4	3	75
Circuit Courts of Hawaii	14	12	9	75
District Courts of Hawaii	24	15	15	100
Totals	43	31	27	87[23]

21. C. BACKSTOM & G. HURSH, SURVEY RESEARCH (1963).

22. *Id.* at 12.

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The results of this study suggested that the higher courts in a hierarchy are less likely to respond to this particular questionnaire approach technique than the first, trial level.

The Henderson-Sinclair breakdown of data, however, presented material that confounds any hypothesis which would generalize the above hypothesis past the particular approach technique which I employed. In other words, using their specific technique, the exact reverse hierarchical response resulted: the Supreme Court of Texas replied at over 90 per cent (8 out of 9); the middle levels replied at 86 per cent; and the lower courts replied at 76 per cent (135 out of 177).[24]

Why is this so? It is really difficult to say. Perhaps it is a function of the differences in the procedures used to enlist the support of the judiciary. A study of four state supreme courts (Massachusetts, New Jersey, Pennsylvania and Louisiana) currently under way by Kenneth Vines lends support to this idea. Each justice received a letter asking for a personal interview in which an extensive questionnaire was to be administered. Included in this letter, however, was a "strong" letter of introduction from a judge of the Third District Court of Appeals of Louisiana. Vines notes that as of July, 1966, 81 per cent of the judges solicited reported affirmatively and in Massachusetts and New Jersey, the rate was 93 per cent (13 out of 14).[25] Thus, perhaps lower court judges are more receptive to student presented questionnaires while supreme court judges are more receptive to formally introduced mail with a personal touch and a bar-bench endorsement.

One interesting possibility that my response/non-response data reveals is that the only 4 judges to refuse to answer were not only middle- or upper-level judges, but were also all urban-based in their office, practice and courtroom. Of the 17 judges contacted who were outside the city of Honolulu proper, all replied. Thus, we might hypothesize that this factor is a significant one to consider in developing

23. There is little reason to suspect that the obvious disparity in the percentage of District Court judges solicited as compared to the Circuit Courts and Supreme Court is related to the percentage of judges who responded. First, several were "solicited" (telephoned) and agreed to answer, but no funds were available for plane fare to the islands when they were sitting. Secondly (but keeping the limited N in mind) the "urban" judges were the only judges who refused to co-operate. All "rural" District Court judges on Oahu (N-5) co-operated. The remaining nine District Court judges were "rural" — coming from Kauai, Maui and the island of Hawaii.

24. B. Henderson & T. Sinclair, *op. cit. supra* note 14, at 121.

25. This data is contained in a personal letter to me from Professor Vines dated July 7, 1966.

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further survey plans for studies of judiciaries. And there are surely other possibilities. For instance, as Vines points out:

> Our experience thus far indicates that extensive personal interviews are possible on a very high judicial level. The first indications are that judges in appointive states are more open than are elective judges to interviewers. We suspect that judges in elective states, particularly those who are politically active, may experience a variety of role conflict which leads them into reactive behavior against social science study.[26]

Nonetheless, it is still clear that many other studies need be conducted before we can assert with confidence *any* formulae for approaching judiciaries which would yield near-perfect response. But there is good cause for optimism.

CONCLUSION

There is a veritable encyclopedia of folklore which has and does serve as raw material for obstructionism in the way of social science. The impediments take many forms and block us from many areas of interest and concern. Yet, it seems to me foolish for social scientists to accept any of these tales as they stand, without challenge.

It is a fact that the judicial process has been heavily cloaked in mystique in the past. But there is no alternative for the social scientist other than to move boldly forward in the face of this. Some who are in the process now have found the current obstacles to be no more formidable than a few cobwebs framing a threshold. There are many modes by which social science can study the institution of the judiciary, American and otherwise, but there is hardly a need to spend oceans of time away from that process. After all, what better way for man to learn about man than by studying him directly.[27] We need not resort exclusively or primarily to the law books and letters of judges of yore. With only a minimum of effort, the object of the inquiry is quite amenable to being observed . . . and even to help that process along.

Judges are reasonable, well-meaning men. The Inquiry is reasonable and well-meant. These great assets should be exploited in research on the judicial process.

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26. *Ibid.*

27. The psychologist Gordon Allport expressed this point succinctly "If we want to know how people feel: what they experience and what they remember, what their emotions and motives are like, and the reasons for acting as they do – why not ask them?" C. SELLTIZ, M. JAHODA, M. DEUTSCH and S. COOK, RESEARCH METHODS IN SOCIAL RELATIONS 236 (1963.)

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