

Legal Research — Institutional Responsibilities*

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Mr. Chairman, this morning one of the brethren raised an embarrassing question. He asked, "Why in the world did they invite a dean to talk about research?" I tried to laugh it off, but to make sure that I got the point, he continued, "Don't you know that everything you say will be incompetent under the hearsay rule?" Finally, taking no chances, he asked, "Is it vicarious scholarship you are going to talk about?"

But however vulnerable I may be to these thrusts, I am glad of an opportunity to express a few ideas on legal research and the responsibilities of universities and other institutions. I think that the current situation as to legal research is highly unsatisfactory.

We are all deeply impressed with the achievements of research in physical and biological sciences. And we have heard much about how our knowledge in these fields has outstripped our knowledge of human relations and social institutions. Much has been said of the necessity of stimulating research in these latter fields. Foundation reports have indicated a keen awareness of the need of research in the social sciences. At Chicago Mr. Hutchins has reason to fear that he will go down in the history of the university as the president under whom the development of research in physical and biological sciences far outstripped the development in the humanities and social sciences.

One would expect that a period in which we are conscious of these lags would see an increase in the funds available for legal research, as well as research in psychology, economics, and other social disciplines. But this is not the situation which we face. Foundation grants are difficult to secure for legal research or for projects combining law and other social disciplines. At the University of Chicago teaching and research in medicine are supported by appropriations over ten times those made available for law. I do not forget the high cost of laboratories, but a ratio of over ten to one needs some explaining.

I have a theory as to how this situation has come about. I think it results partly from the fact that we have been somewhat confused as to what legal research is and what its methods are.

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Being thus confused, we have been diffident about the results which can be expected and we have been timid in pressing the claims of legal research upon the budgeteers with whom we deal.

One source of the confusion as to the nature and methods of legal research is, I think, a worship of the methods of the natural sciences, an attitude which we lawyers often share with other social scientists. Now I do not belittle the exact research in the natural sciences or the general ideal of scientific research which such investigations set before researchers in any field. My point is that perfectionist attitudes and efforts have tended to discredit and handicap other useful types of research in law.

For example, I suppose that many of you are familiar with Underhill Moore's inquiries into the effectiveness of legal regulation. He attempted to secure precise information as to the relation between law and behavior, correlations between changes in regulations and changes in behavior. To obtain conditions appropriate for the use of techniques of empirical science, he chose a relatively simple field, that of parking regulations in certain areas of New Haven. Arrangements were made with the city authorities for experimental changes in the regulations, and "before and after" tabulations of the behavior of motorists were made in great detail. On the basis of these observations, Moore developed algebraic formulae expressing the relations between the variables studied. True to the traditions of science, he cautioned against assuming that the generalizations would be valid for parking regulations in other cities, or in other parts of New Haven, or for laws or regulations of other kinds. He claimed only to illustrate a method of study by which in some areas of law accurate knowledge might be obtained.

It is apparent, I think, that such a method could be used in relatively few fields of law and it is my hunch, furthermore, that the generalizations which might thus be secured would be relatively unimportant. My principal objection, however, is to Moore's negative pronouncements. For example, after describing his objective of precise knowledge of specific effects of law on behavior, he added that "until such knowledge is available, any discussion of the relative desirability of alternative social ends which may be achieved by law is largely day dreaming, and any discussion of the engineering method by which law may be used to achieve those ends is largely futile." I suppose that few of us actually agree with such statements but we often speak apologetically of research which falls short of such standards or which does not at least utilize statistical methods.

If we are guilty of day dreaming, I think that some of our fantasies deal with scientific research in law, and the Johns Hopkins Institute of Law has had perhaps its most far reaching in-

fluence in keeping alive these fantasies. The Institute was martyred by the depression, cut off before the utility of its elaborate statistical procedures could fairly be tested.

Particularly here in Ohio, in cooperation with the Judicial Council and the State Bar Association, the Institute conducted extensive studies as to the conduct of litigation and other aspects of judicial administration. I am of course not in a position to criticize these studies, though I should like to hear from some of you Ohioans as to what use has been made of these researches and as to the soundness of the methods used.

What I can say — and what I want to say without apology and with enthusiasm — is that there is much useful and scholarly work to be done that does not use statistical techniques and which falls far short of the standards of research in the natural sciences — work which we can appropriately include in the category of research. Let me give just a few examples of studies which I think are of great importance, wide usefulness and high quality, yet in none of which were strictly scientific techniques used. Take Bonbright's Valuation of Property, the product of a ten-year cooperative study at Columbia covering valuation for various legal purposes. Then there is the Frankfurter and Landis study of the Business of the Supreme Court and Henderson's Position of Foreign Corporations in American Constitutional Law and Sharfman's treatise on the I.C.C.

I have chosen varied examples, none of them traditional legal treatises, all of them of great value and originality and certainly the product of research.

From what sources are we to expect the principal support for legal research in the future? In the last decades, much excellent work has come from staffs of government agencies, like the SEC study of protective committees and corporate reorganization. Some of the monographs commissioned for the TNEC belong in the same category. Even the best of these, however, suggest the need for research under private auspices.

One might expect that university law schools would be centers of such work just as medical schools are centers of advance of medical knowledge. The cold fact is that there are few law schools with budgets which make possible more than a token program of legal research. We talk of establishing law centers and imply that a law school should be a center of constructive criticism of the law, but the law center may turn out to be merely a new building for the law school — with no increase of support for legal research.

If high quality research is to come out of law schools we need larger faculties, with reduction of teaching load for men engaged in research. We need close relations, of course, with research per-

sonnel in Economics and other related fields. At Chicago, for example, we have on the law school faculty three economists whose principal responsibilities are in the research field.

It is vital, furthermore, that a research program should not be regarded as a luxury item, the first to be cut or eliminated when budget revenues decrease. This is a point which I emphasize with peculiar pain.

I have spoken thus far without mention of our law reviews. The field of law is unique in the number of outlets for publishing in article form the results of research. There are almost fifty law journals published in this country. I need not dwell on the value of these journals; there is more need that we be reminded of the problem created by their large number. My boss, President Colwell, has indicated the problem in an address to directors of university presses:

When it becomes mandatory for any professional school or major department in any university to publish a learned journal, social irresponsibility and academic humbug can go no further. I realize that any example is invidious; so I choose one well qualified in the arts of self-defense. There are forty-four journals published by law schools with university standing or connections in this country. There is not enough legal scholarship in the country to fill these journals. The same thing would be true in other fields. These are not learned journals, but house organs. Their number and pattern are a threat rather than a help to the interests of scholarship.

These blunt words may reveal an unfamiliarity with the value of various types of law review articles to the practising attorney — including articles dealing with problems in a single state. But what law review editor can plead entire innocence of resorting to inferior material to meet dead-line emergencies? And has not the easy availability of publication sometimes encouraged hasty and superficial work? Then, too, I must admit that President Colwell's blast has set me thinking about the appropriate division of the burden of publication costs between the universities and the profession, whether through subscription prices or bar association or other professional subsidies. I am not at all sure that our present practices in this respect represent the ultimate wisdom on the subject. Of one thing I am sure — that in soliciting financial support for programs of legal research we will be called upon to account of our stewardship with respect to law reviews.