# LEGAL RESEARCH : A VARIATION ON AN OLD LAMENT*

"I do not see how any one can possibly understand the law or know anything of it, except memoriter, without getting a clear idea of how it is in fact generated in society and adapted from age to age to its immediate needs and uses." — *Woodrow Wilson*, 1894.

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## I

THE LEGAL scholars write and write, the law journals publish and publish, and what do we have? Precious little. There is probably no field of intellectual activity where there is so much of the blind wandering around with the blind. Even the philosophers, who are said to bake no bread, purport to rely on the disciplines whose stock in trade is the broadening of knowledge through empirical study. As the frontiers of physics, astronomy, chemistry, and psychology are pushed back, the philosopher reviews his theories and builds his speculations on a new base. Not so the legal scholar, With a few notable exceptions, the legal scholar simply spins out words, using as his base other words spun out by other scholars. As time passes, the spinning becomes increasingly intricate. Whether it gets closer to or farther from reality is a question few should feel prepared to answer.

If a man sits down and says to himself, "I shall be a legal scholar and I shall write something important," what can he do? One of five things:

1. Write a historical essay showing the development of a field of law or a particular doctrine.

2. Analyze a doctrine, which is to match judicial statements with each other, pointing out the ones that do not square with most of the

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others, and propounding a new set of words designed to square everything with everything else.

3. Do a reporter's job, which is simply to run through a lot of recent decisions, summarizing the most important and perhaps making a wild (or shrewd) guess as to what the courts are going to say next year.

4. Write about "What I believe in." This is usually a matter of deploring a trend.

5. Write about the relationship between the "law" and the "world".

For any of the first three, one needs only a law library. For the fourth one does not even need that. But the last requires field research, lots of it. And at that point the legal scholar usually gives up, for field research requires money and the legal scholar knows that those who have money for research do not give out much of it for legal projects.

But isn't field research the only really profitable area for the legal scholar? True, there is value in historical legal research just as there is value in historical research generally. But if all the legal scholars in America turned to historical research and did a bang-up job, we would not be able to say that much light had been shed on the impact of the law on contemporary America. There is also value in analytical articles, for if logic-chopping is to be done, as it must, it ought to be good logic that is chopped. But even when that is done, we cannot be sure that it is the logic that solves contemporary problems. Likewise, there is a place for the reportorial job, for there are many who want and need the short-cut to legal learning, though this does not greatly advance our knowledge of the law. Finally, it is always interesting to read what somebody believes in. But can we be sure that if that person translates his beliefs into legal rules, the results will be consistent with his beliefs?

No, the legal research that is needed, that would be most useful today, is the study of the relationship between the world of the law and the world that the law purports to govern. It may very well be that in some mysterious way the law and the real world are in close harmony. I doubt it. By its very nature the law tends to freeze things from the past, and it seems only natural that this process should result in unrealistic relationships. We know that a society's verbal statements of its own behavior are not always consistent with actual behaviour. The law is a more or less systematic statement or the *appropriate* behaviour of the society. But the legal statement is built on the verbal statements, and in the process the real world becomes more and more remote.

## II

To make this discussion a bit more concrete, I should like to talk about that area of the law with which I am most familiar—the work of the Supreme Court. I used to give a seminar devoted to the highly

speculative question "What ought to be the Supreme Court's function in our society?" One of the questions which I threw out early in the game was, "Does it make any difference what the Supreme Court does?" This question is not so foolish as it sounds. The history of America shows that the Supreme court has been an important institution; but do we know whether on past occasions the Court was an effective agent or was simply a mirror reflecting the struggles of the time? I think the Court has in the past exercised real power and that it does make a difference what the Court does. On the other hand, I doubt that the Court is as influential as we sometimes think.

In that seminar we agreed that the Supreme Court's decisions did have some effect but then I raised the question, "How?" Is the Supreme Court's influence exerted primarily through the judicial hierarchy?[1] Or is its influence primarily exerted through the use made of its opinions by other institutions? There are certainly indications that some members of the Court write their opinions with an eye to quotability. It may be that editorial approval or disapproval of a given decision is an important factor in the acceptability of the implications of the Court's decision. If so, does this mean that the Court should write its opinions of general quotation rather than for the legal technicians?

The point is that we really do not know how effective a Supreme Court decision is, or in what manner its effect is transmitted. I feel strongly that the Court does not play the role that lawyers ascribe to it. Lawyers and law teachers tend to look upon the Court as the most important judicial body in the country, an institution wielding great power, whose pronouncements, especially in the field of public law, are of profound importance. But it may well be that by the time the Court's pronouncements percolate down through the institutional layers of our society, their effect is much less powerful than appears to the lawyer and law teacher reading away in their legal towers.[2]

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1. Walton Hamilton tells the story of the effectiveness of *Tumey* v. *Ohio*, 273 US 510, 47 Sup. Ct. 437, 71 LED 749, 50 A.L.R. 1243 (1927). When he was caught in some "speed trap" in Pennsylvania and taken before a justice of the peace, he asked the J.P. how much of the fine the J.P. got. When the reply "five dollars" was forthcoming, Mr. Hamilton mentioned that this was unconstitutional,. "Who said that?" he was asked. Upon learning that it was the United States Supreme Court, the J.P. shrugged and said, "Oh well, I didn't think it was any Pennsylvania court".

Recently, a lawyer I know was arguing a case before an Indiana circuit judge and asserted that there were authorities supporting a particular proposition relating to procedural due process before an administrative tribunal. The learned judge asked, "What court"? The attorney said, "United States Supreme Court". The judge said he would consider the argument if some Indiana Supreme court authorities were presented.

2. "The decisions of the Supreme Court may fall like thunderbolts from Almighty Jove. There is a blinding flash, perhaps some spectacular damage to a restricted area. Temporarily there is terror and repentance. But soon calm is resumed and with it

An example of this problem of the significance of the Court's work is in the field of taxes on interstate commerce. For years now the Court has turned out opinion after opinion designed to police the burdens borne by interstate commerce in paying state and local taxes. I am confident that almost without exception teachers of Constitutional Law will concede that the law in this field is chaotic and that each new decision only adds to the confusion. Why is this? I think it is that nobody, and particularly the Court,[3] knows the real story of the interstate tax burden. Obviously, the only thing to do is to organize a comprehensive research team consisting of constitutional lawyers, tax lawyers, economists, political scientists, and accountants—lots of accountants—plus a good staff of field workers to find out just what goes on. My hunch is that such an investigation would show (*a*) that nothing the Court has done or can do in this field is very significant; (b) that if anything, the Court's doctrinal chaos increases the ultimate burden on interstate industry; and (c) that only comprehensive legislation by Congress can bring order into the field. The hunch may be wrong, but only such a study will demonstrate it conclusively. No amount of doctrinal manipulation will ever be convincing.

Scholars in other fields of law must have many examples of legal doctrines whose practical operation and effectiveness are unknown quantities. Occasional studies have, of course, been made from time to time, but by and large they have been isolated projects whose principal significance has been to whet the appetite, to make one realize how valuable many more such studies would be.[4] Rarely if ever has a project been large enough to provide a base for significant conclusions.[5]

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confidence that, granted a proper observance of prescribed rituals and occasional adaptation of their form to the whims of an angry god, there is likely to be very little interference with the actual plans of those who walk the earth below." Foster, "Conflicting Ideals for Reorganization", 44 *Yale L.J.* 923, 928 (1935).

3. With the possible exception of Justice Black, who long ago gave up and proposed that the Court wash its hands of the whole business and leave substantially everything up to Congress.

4. The latest that I have seen the Schultz's study of a contract problem, "The Firm Offer Puzzle : A Study of Business Practice in the Construction Industry", 19 *U. of Chi. L. Rev.* 237 (1952); James and Law's follow up on the great Columbia study of compensation for automobile accidents. "Compensation for Auto Accident Victims : A Story of Too Little and Too Late," 26 *Conn. Bar J.* 70 (1952); and Speck's, "The use of Discovery in United States District Courts", 60 *Yale L.J.* 1132 (1951). For comments on earlier projects, see Nussbaum, "Fact Research in Law", 40 *Col. L. Rev.* 189 (1940).

5. There is, of course, the monumental labor of Underhill Moore. Many people may assert that his studies demonstrate the futility of the very thing that I am arguing for here. His great parking study [See Moore and Callahan, "Law and Learning Theory : A Study in Legal Control", 53 *Yale L.J.* 1 (1943)] cost a lot of money and involved a lot of work, and on the surface, its conclusions do not seem startling. But it must

Men in substantially all of the other social disciplines have long since gone out to gather the necessary raw basic data upon which to base any significant conclusions. But if any such conclusion calls for governmental action some sort of law is necessary, and nobody knows for sure how the law works in general and probably nobody can be positive that the results called for by any particular law will in fact be forthcoming.

The economists, political scientists, sociologists, and the rest ought to recognize that the legal scholars must be pulled out into the garden to grub with them. Otherwise, they will some day discover that they know the facts, know what is to be done, but are unable to get it done because the lawyers are not sure how to change the law to produce the desired result. At that point, the social disciplines might just leave the lawyers behind and take over the job themselves.

## III

There are those, of course, who would disagree with this contention that lawyers and legal scholars are operating in a word jungle remote from reality. Theirs is the argument that the law must be an accurate reflection of the world we live in or else "something would have been done about it". A short answer to this is that most of the other social disciplines have found that their body of doctrine is not an accurate representation of the world, and it is not unreasonable to assume that the law is no different. The economists, for example, kept refining their theories of classical and neo-classical economics long after the economic world had ceased to operate in any such fashion.[6] Political theorists are now giving serious consideration to the finding of their confreres, the practical political scientists, who have been scurrying around studying behaviour. The theorists recognize that they cannot rest on intuition alone.[7]

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be remembered that he was attempting to take the theory that law derives from social phenomena and put it to an empirical test in a rigorously controlled experimental situation. See Northrop, "Underhill Moor's Legal Science : Its Nature and Significance", 59 *Yale L.J.* 196 (1950). Although, as Northrop point out, much more basic research along the Moore lines is called for, it is not necessary to defer all research until the basic problems are solved. Unless one insists that "a little knowledge is a dangerous thing" we could do with a lot more "superficial" knowledge of the relationship between behaviour and law. On the other hand, the More approach ought to be carried forward with a great deal more basic research. See Northrop, *supra*, and Northrop, "Contemporary Jurisprudence and International Law", 61 *Yale L.J.* 623 (1952).

6. See Galbraith, *American Capitalism : The Concept of Countervailing Power* (1952).

7. See Pennock, "Political Science and Political Philosophy", 45 *Am Pol. Sci. Rev.* 1081 (1951).

It is especially dangerous to rest on the *a priori* assumption that the law works the way we think it works. Such an attitude opens the door to devastating attack. If the law automatically reflects the world of human behaviour, then people can argue that the law is just a lot of language embodying common sense adjustments of disputes in our society and then go on to argue that the law takes a simple problem and clothes it with enough mumbo-jumbo to make it look as if something more is required than common sense. The fact is that the law serves a purpose. Our society is too complex to be governed by simple "common sense"; the law is a necessary agent for controlling behaviour. But the legal universe is capable of developing internally and thus of running away from reality. Only by a study of how the law works in fact today can we know how closely it reflects society's "common sense".

In fact, if an *a priori* assumption is to be made it is that the law is incapable of rapid self-adjustment to changing conditions because the law is primarily based on the past, and the agents of the law, lawyers and judges, look primarily to the past.[8] In times of slight change this is probably relatively harmless; in times of rapid change it seems dangerous to rely principally on the past. One gets the impression that the physical scientists scan the professional journals every day looking for a new idea, a new fact, a new discovery to further their knowledge. One gets the impression that the lawyers and sometimes even the legal scholars look for a new idea only when they cannot find an old idea that will do.

There are, to be sure, two answers to this argument, but they seem hardly sufficient. It is true that the lawyer and legal scholar form a link between past and future and that the process of fitting new situations into old concepts is a stabilizing process. The trouble is that without accurate knowledge of the basic data of actual institutional behavior no one can be sure that it is a stabilizing process. The lawyers may wake up some day and find that they have stabilized something by retarding it so much that the world has gone off and left them. This has happened before, as in the case of the substitution of workmen's compensation for the law of negligence, and it will happen again. The other answer is that alteration of the law is task of legislatures and that they may and should rely on fact gatherers other than lawyers and legal scholars. Leaving aside the question of the lawyer's influence on legislatures and the question of the significance of treating all legislation as in derogation of something or other, it is sufficient to note that the legislatures ought to know more than they now do about how behaviour is related to positive laws. Lawyers will draft any statutes that are forthcoming. Do we know whether one form of words is better than another?

8. Perhaphs the chief justification of the jury system is that thereby the law can to some extent be prevented from being "wrong". By their verdicts jurors can "modernize" the law.

The legal profession generally is exercised about the low repute in which it is held. There are many reasons for this, most of which are unrelated to what I have been talking about, but one of which is that the public probably visualizes the legal profession as a group of bookworms burrowing into the past, learning more and more about older and older things. Undoubtedly the profession would be helped if the public visualized it as a group of people interested in what goes on and out gathering the facts in order to bring the law right up to date. If anything would give the legal profession a shot in the arm it would be a new outlook on life. Lawyers should begin looking at life instead of at the law.

## IV

This is all perhaps *vieux jeu* to a lot of people. And many will undoubtedly say, "Of course, but those who have the money won't dole it out for legal research." This has certainly been true in the past. If the future is to be different, legal scholars must present their case in a new light. Here I think there are three things to be done.

First, the scholars, with the aid of the legal profession if possible, must announce that their needs for legal research arise from a determination to do something new — to look at the world with unbiased eyes, to try to find out how and why the law ticks, to see whether the law is in fact serving the needs of society today. Few people will be sympathetic to the lawyers if request for research money are accompanied by assertions that the law is good and that the money is simply to produce perfection in an almost perfect world. The touchstone of the researcher is the open, inquiring mind. There must be hypotheses, to be sure, but only tentative ones. Legal research will get somewhere only if legal scholars abandon any thought that there is something sacred about the law as it is. Even if we accept certain values in our society as sacred, this does not make any particular legal proposition sacred. The legal scholar who wants financial assistance in research must admit what is true—that he is ignorant and that he is open-minded.

Second, legal scholars must join forces with the other social scientists. Economists, political scientists, sociologists, and others are all approaching their problems today by concentrating on behaviour. They have left the ivory tower and are out on the streets talking to people, gathering statistics and other facts. Legal scholars can be of help when it comes time to translate finding into law, but only if the legal scholars know something about the facts too. This union of social scientists and legal

9. It is probable that an association with the social scientists in research would lead to the revision of the law school curriculum that has been talked about for so long. See Currie, "The Materials of Law Study", 3. *J Legal Ed.* 331 (1951).

scholars will succeed, however, only if the social scientists are convinced that legal scholars have adopted and believe in the true empirical approach.[9]

Third, legal scholars must band together and propose a tremendous program of research. Only in this way will anyone be convinced that legal scholarship has changed from bookish introspection to empirical study. Without doubt a long range program costing as much as $10,000,000, premised on an open-minded inquiry into the actual operation of the legal system, will capture the imagination. Whether it will capture the ten million is another question. But it is worth trying. If there is any field of intellectual activity that is virgin territory for research, it is the law. This is the time to be bold. A proposed gigantic program may or may not fail; a continuation of the present piddling approach to research is bound to fail. It is time for legal scholars to arise; we have nothing to lose but our ignorance.