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NON-TRADITIONAL LAW-RELATED STUDIES AND LEGAL EDUCATON

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Traditional legal research and traditional law teaching have long been recognized not only as compatible but also as mutually reinforcing. Indeed, the resulting symbiosis has led to a justifiable concern lest law faculty research concentrate so intently on questions lending themselves to classroom discussion as to leave wide problem areas free from academic scrutiny. Moreover, the narrowing of the researcher's focus has exacted a price in terms of a diminishing sense of discovery. The returns yielded by doctrinal research are no longer as high as they were in the days of Wigmore and Williston, and the law teacher who has published his first two or three law review articles may grow restive as he views the prospect of confining his contributions to learning to that medium.

Unfortunately for him, non-traditional legal research and traditional law teaching tend to be antagonistic. They make demands on the teacher that often conflict. Moreover, even though non-traditional research may enlarge the law teacher's grasp of the legal processes with which he deals in the classroom, the specific subjects of his studies may have so little relation to his courses' content that he cannot add their products to his course assignments.

Non-traditional research, one must conclude, is likely either to accompany or to support non-traditional law teaching, or, perhaps more frequently, to have no relation to the researcher's instructional responsibilities. Such a condition may be a commonplace in the Arts and Sciences but can still render law school deans uncomfortable.

Before I attempt to comment further on these relationships between law teaching and research, I ought to confess to a terminological problem. It is most sharply exemplified by research in legal history. In this context, is such research to be viewed as "traditional" or as "non-traditional"? Each classification would, I am sure, have its champions.

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My own view is that the proper classification will depend largely on the objectives of each legal historian. One historian may be concerned primarily about carrying the study of a line of cases or statutes back toward their origins and setting the early cases or statutes in their legal contexts. I believe such a study can be properly labeled as traditional; legal scholars have been devoting volumes to this pursuit since the memory of man runneth not to the contrary. However, a legal scholar may range more widely and endeavor to trace the interaction over time of legal and other social processes and institutions, seeking to cast light on the development not only of law but of society. At some point in this process, I begin to think of the study as non-traditional and to suspect that its direct impact in the traditional law course will be limited, though perhaps important. Fortunately, however, even this order of research is not likely to disrupt the pattern of the legal historian's law teaching activities.

The problem of drawing a line between traditional research in, and non-traditional research about, law is not restricted to legal history. The application of economic analysis to legal materials, especially when accompanied by economic data, produces a hybrid that is not easy to categorize. Obviously, the interlarding of economic theory and materials in an article discussing antitrust cases may be so slight that one would have no difficulty in preserving its traditional classification. However, increasingly today we are observing the analysis of legal doctrines in terms that are more familiar to the economist than to the legal scholar.[1] We are also beginning to witness the construction of abstract models employing techniques that threaten to debar from access the nonmathematical majority among lawyers. Yet, as long as the analyst is content to keep his models abstract and so is spared the necessity of producing the data needed for their application to concrete reality, his teachings are not likely to be interrupted by the demands of his research. (I suppose abstract model building can be viewed as "research," at least for the purposes of articles such as this and for deans' reports.)

The use by law teachers of concepts and theories from social science sources is not, of course, confined to economics. Indeed, we law teachers display a striking degree of eclecticism, especi-

[1]For a recent example of the new approach, more general in its reach than most, see Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797 (1973). At pages 801-02, Professor Heymann cites a number of noteworthy writings reflecting this approach.

ally in the annotations to essentially legal articles and casebooks. The excursions into the learning of other disciplines that are involved in the collection and occasional use of assorted "other materials" seem consistent with traditional legal scholarship and a practice that is not likely to divert its practitioners' law teaching far from the traditional pattern.

There are some law teachers who have devoted themselves over the years to studies related to law in one or more of the social sciences and have been able to overcome the rejection phenomenon that commonly follows any extensive introduction of nonlegal materials into law courses. To name but two conspicuous examples of such teachers, I cite Alan Dershowitz of Harvard and Joseph Goldstein of Yale, both of whom have pursued nontraditional but law-related studies over a period of years. Their work, though having a common point of beginning, has diverged in terms of the subjects with which they have been concerned: Dershowitz with problems in the prevention of potentially harmful conduct and the use of prediction in aid of preventive measures; Goldstein with the contributions of psychoanalysis to the understanding of man as evidenced in the fields of family and criminal law.[2] Though each has engaged in some original studies, their principal objective appears to have been to bring together, analyze, and evaluate the relevant theories, insights, and data yielded by the research and clinical experience of nonlawyers who are experts in their respective areas of concern. The result has been the emergence of non-traditional law courses. However, insofar as the teachers who adopt this method of broadening the range of legal education are content to pursue empirical studies vicariously, they escape the conflicts that extensive involvement in field research of their own is likely to entail.[3]

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[2]The principal products of their endeavors are a series of distinctive volumes of teaching materials: R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, CRIMINAL LAW (1962) (a second edition edited by J. Goldstein and A. Dershowitz is in preparation); J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW (1965); and J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW (1967). (Their collaborator, Jay Katz, is a psychiatrist and psychoanalyst holding chairs in both the Yale Law School and the Yale Medical School.)

Professor Goldstein, with the collaboration of Dr. Anna Freud, is at work on a volume to be entitled *Beyond the Best Interest of the Child*. Professor Dershowitz has in progress a book to be entitled *Predictive Justice: Toward a Jurisprudence of Crime Prevention*, several aspects of which have been treated in articles published over the last few years.

[3]A byproduct of law teaching with such an objective is the stimulation of research by law students and sometimes by law graduates whose minds have been opened to the nature and significance of the problems encountered in the classroom and to the need for more systematic knowledge concerning them.

It is the law teacher's own field research that most often gives rise to institutional problems, whether he himself is venturing into the field or he is organizing and directing a team of researchers. There are two impediments to successful studies of law in action other than the intrinsic difficulty of conceiving and designing a useful study. One of these obstacles is lack of time; the other is lack of money with which to buy time.[4] The problem of time, moreover, is not simply a question of how many hours the teacher can devote to research. Class schedules and committee meetings frequently prevent him from freeing the blocks of hours he needs to accomplish his research objectives.Moreover, when he depends on law student assistance, he finds much the same difficulty embarrassing student participation. Typically, a law school curriculum provides a checkerboard of class hours that results in, say, a 15-hour class schedule capable of tying a student down for nearly all of a 35-hour work week.

If, moreover, the law teacher's own teaching schedule is comprised of traditional courses, he can seldom employ the product of his field research for many hours in his instruction, whereas his library research may sustain class discussion over one or more sections of a casebook. As a result, the burden added by field research may be more than the teacher believes he can carry—or would be wise to assume—and so the research is put over until the next summer or until a grant makes a research leave financially feasible.[5] Often, moreover, the consequence of dependence on financing means that the teacher must substitute a research project commissioned by some public or public-interest body for the subject he would have preferred to pursue.[6]

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[4]In a survey of non-traditional research by law teachers, 220 researchers reported that they had secured support for research time. They noted compensation for summer research on 174 occasions. The survey's findings with respect to economic support for research are summarized in Cavers, *Non-Traditional Research by Law Teachers*, 24 J. LEGAL ED. 534, 554-61 (1972).

[5]*See* note 4 *supra*.

[6]In the survey cited *supra* note 4, at 553, the respondents indicated that, of the aggregate of 533 publications they reported, 97 represented "all or a part of a report to a commissioning body." The fact that a scholar undertakes a study requested by some public or private body that has need for the knowledge that hopefully the study can provide does not render him an object of sympathy or condescension even though the study's subject is not the one he would have chosen if he were financially independent. The fact that studies had been commissioned may, as I have suggested in my report, mean that they were "assured of some very attentive and responsible readers and may well have had an impact on the decisions of the commissioning bodies." *Id.* Of course, such bodies sometimes intrude improperly in the study process, an intrusion the researcher should be prepared to resist.

These gloomy observations are not novel, but is there reason to believe that the conditions observed are likely to change? I believe so, though I doubt that the rate of change will be rapid. I think we shall see a gradual multiplication of non-traditional law courses in which both instructors and students find themselves embarking on non-traditional law-related research. This has been foreshadowed in various law schools by experimental courses and seminars in which the students are expected to collect and present data bearing on the seminar subjects. Professor Reed Dickerson of Indiana for years conducted seminars in which each year some problem area of modest dimensions—*e.g.*, private swimming pools or trailer parks—was studied intensively with a view to proposing legislation designed to protect against problems that the studies had identified. A book presenting the seminar findings and proposals has at least on one occasion been the result.[7]

In response to the tendency of the last few years to loosen and diversify the law curriculum, especially in the second and third years, courses and seminars may be expected in which allowance is made for a block of time—a day or even two days in the week—in which field research may be pursued.[8] Needless to say, some cut in regular class hours is a necessary concomitant of such an arrangement. However, now that we have reached a point in our discussion of curricular change where a cutback in the entire law course from three to two academic years can be viewed as thinkable, the possibility of a time allotment of six, eight, or twelve hours of field research in lieu of, say, four or six hours of classroom instruction cannot be considered startling.

The offerings in clinical legal education present breaking ground for such an innovation. The checkerboard course schedule is probably an even more serious impediment to effective clinical instruction than it is to student field research. However, because the need is obvious and because clinical instruction has achieved academic acceptance to an impressive degree, adjustments in course requirements and class schedules to accommodate the needs of a clinical program are more likely to win approval initially than are like concessions in the interest of non-traditional

[7] LEGAL PROBLEMS AFFECTING PRIVATE SWIMMING POOLS (F. Dickerson ed. 1961). The seminar's objective is the study of legislation; the problem areas studied provided clinical material for that objective.

[8] Presumably this would seldom be extended beyond a single semester. Some ingenuity must be exercised in scheduling courses in high demand so that students would not be forced to an election between them and field research.

research. Yet the power of precedent is strong: if adjustments can be made to enable students to represent divorcing spouses and oppressed debtors and tenants, should they be denied to students who wish to examine the family court in action or to study the workings of new laws designed to control rapacious creditors and slumlords?

But would such concessions really be justified? Is experience in the conduct of non-traditional law-related research sufficiently rewarding to the law student participant to justify his being indulged a lighter-than-normal schedule of classroom instruction? An obvious difficulty in responding to that question is the diversity in the forms of non-traditional research. It may require only systematic observation unembarrassed by questionnaires or interviews. It may involve in-depth interviews with key people or, instead, a survey by interview or questionnaire.The student participant may be one of a team or may be operating alone. Hopefully he will have had a hand in planning the project and designing its instruments, but he may have had to join the staff of a study already in progress.

Is there any common reward which may be anticipated from these diverse activities? If the student's appreciation of the reasons for the study has been awakened by his instructor before he has had to embark on his undertaking, he will almost certainly have been obliged to confront a social problem with legal aspects very much more directly than the vicarious exposures in the classroom or library have required. Moreover, he will have become aware of the difficulties encountered when one seeks to make an objective evaluation of a condition as distinguished from formulating an adversary case. Each presents its peculiar problems of method, but commonly the distinction is overlooked by those who have been exposed to only one of the two species of inquiry. He may also discover that reporting the facts found is a process that can possess distinctive difficulties.

Sometimes a study will pose challenging problems of method with the result that the student researcher, guided by his instructor, will become acquainted with a number of the instruments in the social researcher's armamentarium.[9] However, in this early

[9]The number of law teachers prepared to give such guidance is not large. Over the period 1967-1972 their ranks were agumented by a program happily entitled "SSMILE" (Social Science Methods in Legal Education), conducted at the University of Denver College of Law with support from the Association of American Law Schools, the Law and

stage of law student involvement in non-traditional research, one must probably expect that most inquiries will be modest in objective and relatively simple in method. The candidate for the first degree in law will seldom approach in his own research the level of sophistication or the scale of effort that characterizes the work of the able Ph.D. candidate in the social sciences. His goals, quite properly, are more limited.

Student participation in non-traditional research may lead to either or both of two other involvements. Today the subjects of non-traditional law-related research are likely to be close to the domain of action. The student researcher may have already had, or may still be having, a share of that action in his law school's clinical program. Moreover, the very conduct of the research itself may sharpen public or administrative consciousness of the need for reform and perhaps reveal an opportunity for effective political pressure or judicial intervention.[10] Before or after graduation, the student researcher may himself begin taking part in activities designed to translate proposed solutions into actualities.

An alternative to activism may be the researcher's shift from the student level to that of a staff role in some more ambitious university or governmentally sponsored study. Indeed, we may now be witnessing the emergence of a new specialty among the legal profession's many specializations. Before long we may see opportunities multiplying for the law-trained man or woman with experience and skill in social research combined with an aptitude for working effectively with scholars in other disciplines, as well as with other professionals, officials, and businessmen.

As doubtless most readers of this paper are aware, the National Science Foundation has been developing a program of substantial dimensions entitled RANN—"Research Applied to National Needs." To the extent that those needs embrace needs for the improvement in the institutions and processes of our society,

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Society Association, the Meyer Research Institute of Law, the Russell Sage Foundation, and, more recently, the National Science Foundation.

[10]In several of the studies of jails which were conducted under grants by the Council on Law-Related Studies, the conduct of the research within the jails itself stimulated in the jail authorities an interest in the improvement of their institutions. Relatively limited surveys, moreover, pointed the way to more ambitious studies and action programs. In some cases, the resulting changes rendered the initial findings obsolete and unpublishable. But, even to a foundation, there are goals more important than publication.

The proliferation of pro bono publico law firms and lawyers is providing a new instrumentality for securing attention to research findings that reveal failures of officialdom to discharge its own functions or to police private interests that ignore legal requirements.

law is likely to be involved, and surely no lawyer is inhibited by the prospect that the products of his research may be applied. Though RANN, of course, is only a single body and its program, however ambitious, can reach only a fraction of the law teachers and graduates who are becoming interested in non-traditional research, its creation is symptomatic of a trend that is likely to grow.[11] If that growth should take place, I think it fair to predict that we shall witness in our law schools a corresponding growth of non-traditional methods of law-related research associated with non-traditional modes of legal education.

[11]An instrumentality that should serve to multiply research opportunities for law teachers and their students is the Office for Law-Related Research, the funding of which by the Council on Law-Related Studies and the Ford Foundation was announced in a press release by President Maurice Rosenberg of the Association of American Law Schools on March 6, 1973. The Office's administrator has yet to be appointed. A major development in the same direction would be the creation of the National Institute of Justice, a body for which plans are being developed by a committee of the American Bar Association.