Denver Law Review

Volume 40 | Issue 5 Article 6

April 2021

Law and the Behavioral Sciences: The Case for Partnership

Harry W. Jones

LAW AND THE BEHAVIORAL SCIENCES: THE CASE FOR PARTNERSHIP †

A COLLOQUIUM ON RESEARCH IN JUDICIAL ADMINISTRATION

By HARRY W. JONES*

I. INTRODUCTION

The subject of this colloquium has been announced as "Justice Explored." That exploratory enterprise, by the way, is precisely what this group of scholars in law and the behavioral sciences has been engaged in for the past three days, with the stout support and constant participation of three case-hardened working "explorers" in the field—two distinguished members of the Colorado judiciary and an eminent federal judge from the Second Circuit. Altogether, there were 12 of us—by happy coincidence a group of jury size—who deliberated at the La Garita Ranch on the Program in Judicial Administration proposed and planned by the College of Law of the University of Denver. I can announce this much: the verdict at which the jurors have arrived is a cordial and hearty "God bless you!" So, Dean Hurst and Professor Yegge, the jury finds that what you propose is eminently worth doing. Your program will be good for the College of Law and for legal education generally. It will be good for the administration of justice in Colorado, and, as your studies reach out to encompass problems of more general significance, the program will be good for the administration of justice everywhere. There can never be too many workers in the vast vineyard of judicial administration.

I could never cover my assigned ground this morning if I attempted to do very much by way of a formal definition of "justice." Justice has many faces, ranging from the Biblical conception of justice as conformity to divine will and compassion for one's fellow man to the conventional Anglo-American notion of justice as essentially the impartial administration of standing law. In any definition, of course, we must take account of the great "justice" concept that has come down to us over the centuries, that justice proceeds from the unfailing resolution of the legal order to give each man that which is his "due."

---

† A summary of the findings of the Advisory Committee to the University of Denver's new Program of Judicial Administration as presented by Professor Jones at the University of Denver Law Center, August 21, 1963. This article has also been published in the Journal of the American Judicature Society, Vol. 47, No. 5, October, 1963.

The distinguished members of the Advisory Committee, who participated in the sessions at La Garita, are: Donald R. Young, president, Russell Sage Foundation; Sterry R. Waterman, judge, United States Court of Appeals, Second Circuit, and President, American Judicature Society; Albert T. Frantz, Chief Justice, Colorado Supreme Court; Walter Gellhorn, professor of law, Columbia University, and president, Association of American Law Schools; Milton D. Green, professor of law and associate director, Institute of Judicial Administration, New York University; Geoffrey C. Hazard, Jr., study director and professor of law, Center for the Study of Law and Society, University of California, Berkeley; Harold E. Hurst, dean, University of Denver College of Law; Harry W. Jones, director of research, American Bar Foundation, and professor of law, University of Chicago; Wilbert E. Moore, professor of sociology, Princeton University; Henry E. Santo, presiding judge, Denver District Court; Glen R. Winters, executive director, American Judicature Society; Robert B. Yegge, director, Program of Judicial Administration, and adjunct associate professor of law, University of Denver College of Law.

* Director of research of the American Bar Foundation; Professor of Law, University of Chicago.

We were not philosophers at La Garita, and, to a large extent, we agreed on a rough working definition of the "justice" that we were exploring. Justice, in the sense that we were talking about it —lawyer's justice, if you will—is the determination of the controversies that arise in society between man and man, or between the individual and the state, in a way that takes due and proper account both of the demands of general legal principle and of the merits of particular concrete cases.

Of course, there is more to justice than this. Law is not a closed system; it lives and progresses and gains its great momentum only when the passion for justice is shared by all members of society. We have long been aware in Anglo-American societies that it is not enough that justice *be* done. It must also *be seen* to be done. Persons who come into touch with the functioning of legal institutions, as jurymen, witnesses or parties, must be persuaded of law's rightness, must be brought to say: "Yes, that was right; that was fair."

II. THE LAW EXPLOSION

At La Garita, we were agreed around our conference table that the problems of judicial administration in the twentieth century are made incomparably more difficult by the fact that we are in the midst of what I have recently been calling the "law explosion." We have heard a great deal lately about the population explosion. Now we have the *law* explosion, the proliferation of controversies and legal problems of range and number quite beyond anything with which an earlier legal order has ever had to deal. To a limited extent, this law explosion is a function of the population explosion: twice as many people, therefore twice as many lawsuits, twice as many offenses, twice as many delinquencies. But that is not the whole story. If it were, all that we would have to do is to increase the number of our judges by a factor equal to the increase of population that has occurred during the last 50 years, and all our problems would be solved. We know, however, that this is not true.

Contributing to the law explosion are all the tasks created for law administration by the vast and almost incomprehensible technological developments of this century. To take but one example, we have the development of the automobile and of mass transportation by automobile, and, in consequence, the staggering volume of automobile accident cases which our courts must hear and decide. Further, and particularly in the years since the end of World War II, great movements of population have taken place in the United States, from the south to the north and from farms and small towns to the great cities. These migrations have created terribly difficult problems of adjustment to the conditions of metropolitan life, and the caseload of law administration in every great city increases as newcomers fail to withstand the strains of metropolis. In addition to all this, law in our time has had to take on an increasing role as a force for social order and stability, because of the waning influence of the family and of other non-legal controls on social behavior. Contemporary statistics on divorce, family dis-

ruption, juvenile delinquency and mental illness testify to the ever-increasing burdens that must be carried by our legal institutions.

Whether we like it or not—I don't like it either, but we have to acknowledge it—the administration of justice is no longer a handcraft like custom tailoring or cabinet making. Law has become a mass production operation, perhaps the biggest assembly line of them all. This, in large part, is the challenge to contemporary judicial administration.

We are all uncomfortably aware of the fantastic congestion of our court dockets in matters of civil litigation. In criminal matters, too, and in matters of juenvile delinquency and commitment for mental illness, the case-load has become so heavy that adjudications have to be ground out, so many cases to the hour, as if the lives of the people concerned were mere blanks for processing. In some areas of law administration, quantitative pressures have caused the legal order to give up by default. In many parts of the United States, arbitration has replaced court litigation as the principal means for the resolution of important commercial controversies, and centuries of common law experience in the just decision of contract disputes are about to go by the board. In negligence situations, the state of affairs is even more discouraging. For most of our citizens, the "living law" of automobile accident compensation is not the law of courts and legislatures but the largely unregulated practice of insurance company claim adjustment. These adjustments and compromises may be fair and workable; my point is that they are not, in any realistic sense, within the *rule* of law.

Today's pressures on the legal order, and particularly on judicial administration are not exclusively *quantitative* pressures, however. This is a time of vast social change, a time in which we encounter not only massive increases in population but also new social conditions, new ideas of social justice, new and unsettling demands for equality of opportunity and status. In the courts and in the legislatures, effective spokesmen are expressing drastically changed social attitudes and proposing new social norms and social institutions. "Law must be stable, and yet it cannot stand still." If law stands still, it loses its power as a force for social stability.

One of the great issues that confronts any group like our little *ad hoc* jury at La Garita—or, for that matter, the bar of a great state—is this: what should law's relation be to the wider society that it seeks to order and stabilize? The great and important truth here is that law's relation to societal attitudes is a reciprocal relation, not a one-way street. In its content, law reflects the influence of societal attitudes and community morality, but law is also an article of our faith and a major influence on public ideas of morality.

Law must be responsive to social change, in the sense that law's prescribed norms of behavior must not be out of touch with prevailing societal norms. But it is equally important that law itself be seen in its aspect as an agency of social change, an instrument of social progress. To make my point that law itself is one of the great formative influences on community morality, let me repeat

a favorite quotation of mine, one that originated as a rebuke to me from a great legal historian under whom I once had the honor to study. Sir William Holdsworth once dressed me down sharply for something I had said about the beneficent influence of the English character on the growth of the common law. Said Holdsworth—and in anger:

> It is nonsense for any one to talk about the influence of the English character on the common law if he does not take at least equal account of the influence that the common law has had on the formation of the English character.

In planning any program for research in judicial administration, room must be found for such great issues as these: How can law and legal institutions be kept in touch with contemporary social needs and aspirations? What means are at hand to keep law's prescriptions reasonably responsive to prevailing social norms? How can law be made most effective as a force for social stability, progress, and public enlightenment? Questions like these will never find an answer if the legal profession continues to maintain its accustomed self-segregation from the other disciplines that study the problems of society. Lawyers alone cannot do the job of comprehensive law reform any more than medicine could have achieved it's near miracles without the advancement of the life sciences or industrial technology could have worked its wonders without drawing on developments in the physical sciences.

Law, in a sense, has been a technology in search of a "pure science" partner. Now, almost unbeknownst to us lawyers, the newer sciences of society have grown into maturity—sociology, social psychology, political science, anthropology, economics, even the traditional discipline of history in certain of its newer orientations. Social science insights and methods are there to be drawn on for the improvement of legal institutions. How are we lawyers to go about it? We must, I suggest, recognize that even legal competence is not infinite and unlimited, and acknowledge our urgent need for partnership in law improvement. In terms of the classic request, men of law must ask the behavioral scientists to come over into Macedonia and help us. Perhaps the greatest task that legal scholars, judges and practicing lawyers have in the years ahead is

to devise patterns of *colleagueship*—I steal the word from Donald Young—within which the subtle and disciplined knowledge and techniques of the social sciences can be drawn on for the advancement of legal understanding and the improvement of legal institutions.

III. The Benefits of Partnership

In a law-social science partnership, what benefits would be derived by each of the partners? We on the law side can furnish the behavioral scientists with a kind of equivalent of laboratory conditions and with data worthy of serious investigation. Law is not the only force of social control, but it is certainly one of the greatest influences on social behavior, and social norms are at best imperfectly understood if studied in total separation from the going legal order. Law's gain from the partnership will be even greater. Legal scholarship and practical law administration have urgent need of the new and developing insights of the behavioral sciences concerning the regularities of human behavior and the structure of social institutions. We need to know far more than we know today concerning the dynamics that underlie the formation of social attitudes and the gap that seems to exist in any society between that society's professed ideals and its day-to-day practices.

We have much to learn, too, from social science research methodology. Such interdisciplinary inquiries as we have had so far—the Chicago jury studies, the Columbia Project for Effective Justice, and a few more—have demonstrated the value for law of certain sophisticated and tried methods of social science research and data evaluation. These methods, if put to the use of the legal order, can give us means by which we can find out—as legislators, judges, practicing lawyers and law professors often must find out—*what* is really going on in the world outside the law library, *why* social behavior is what it is, and *how* we must go about fashioning a legal imperative that can become effective law in action.

This colleagueship in legal research is not something to be achieved by having lawyers call in the behavioral scientists from time to time for one-shot *ad hoc* collaboration, as a tax practitioner might call in an accountant to help him in a particularly troublesome case. The partnership must be full and continuing, even with respect to the identification of problems for investigation. Above all, perhaps, the law partner must work closely with the social science partner at the crucial stage of planning the structure of the basic research design, a task which—believe it or not—is fully as difficult as, perhaps even a little harder than, writing the brief in a close and complex case for the toughest of appellate courts. If such a partnership in research can ever be worked out, how marvelous the results might be for legal scholarship, for the behavioral sciences and for the administration of justice!

IV. Area for Study

May I try to suggest a few of the studies which might be undertaken here in Denver, or at some other institution of equal re-

sources, with the collaboration of the social scientists? Consider, as a general heading, studies of the relation of formal legal norms to the social norms by which members of our society live. How little we know of the "living law" of the social order! We have our lawyers' guesses, but we are learning these days that much of our lawyer folklore is quite unrooted in social reality. For example, to what extent do our positive law norms on racial discrimination correspond to, or differ from, the actual practice of society in matters of race relations? In my own field of contracts, to what extent does the formal law of contracts correspond to the prevailing norms of the business community in the negotiation and observance of contract provisions? In criminal law administration, to what extent do established codes of criminal procedure describe what is actually done in practice by policemen, minor magistrates, and those in charge of penal institutions?

At every point in law administration, need exists for what might be described as "efficacy studies." How is a legislative reform working in fact? To what extent have the hopes and expectations of the statute's sponsors been realized in action? Law reformers, I suggest, are far too ready to say "mission accomplished" as soon as a reform proposal passes the legislature and finds its way into the statute books. A long and painstaking second look, a few years later, may reveal that the mission has not been accomplished at all and, even beyond that, may suggest clues as to what might be done to make the statute more effective as a force of social control and social persuasion. Consider, for example, the procedures for judicial selection developed by the American Judicature Society and long supported by the American Bar Association. Is it now time for an "efficacy study" of the effect of these plans? Might we not, with the aid of the social scientists, take that long second look and try to appraise the extent to which the objectives of these selection plans have really been achieved in terms of better judges? This would be a hard study, of course, but it is not one beyond the reach of the most imaginative of contemporary social science research methods.

Let me suggest another category of investigation, this one related to what I said in my opening remarks about the necessity that justice not only *be* done but also *be seen* to be done. Most of the members of our society come into touch with the legal order only a few times in their lives, perhaps as jurors or as small claims litigants or as traffic violators. How do these people, these occasional subjects of the legal order, feel about their treatment by the law and its ministers? The sense of justice, we have agreed, has its most important location in the hearts of all the people, not merely in the impressions acquired by those who come to court often and usually in the company of lawyers. I was delighted to see that the Program in Judicial Administration of this university already includes a study of the functioning of the Denver small claims court. A study like this could serve as an ideal proving ground for examination, in collaboration with qualified social scientists, of the ways in which ordinary citizens form their impressions of the working of the legal order.

I think I have time for one more example, this one of a rather different research character. The Program in Judicial Administration at Denver might, my colleagues and I believe, address its attention to the causes of overcrowded dockets in the appellate courts. Is it true, as customarily asserted, that far too many cases are being appealed? If so, why are these useless appeals being taken? We discussed this problems at La Garita under the shorthand designation, "the Cardozo hypothesis." The reference is to a famous passage in one of Cardozo's books in which the great judge said that four-fifths of the cases that reached the Court of Appeals of New York should never have come there but should have been disposed of with finality in the trial court. The Denver judicial administration program might usefully undertake a carefully designed and sharply focused study of, say, the workload of the Supreme Court of Colorado over a span of two or three years, appraise the validity of the Cardozo hypothesis as applied to appellate litigation in Colorado, and offer explanations of the situation and possible ways and means of correction. Manifestly, the problem is one of substantial importance in the drive to reduce congestion in the courts.

The foregoing are only examples of many subjects of inquiry that might have been given. I have, by the way, been reporting these possible research areas from a tentative list prepared at the end of the second day of our La Garita conference.

V. Off to the Right Start

All of us—judges, social scientists and law professors—feel profoundly that the enterprise of the College of Law is to be warmly commended, not only for the imagination, sensitivity and modesty with which the enterprise has been devised but also because the University of Denver is getting off to the right start by bringing the behavioral scientists into the picture at the very beginning of its program planning.

Here, within the city of Denver and the state of Colorado, research scholars have access to legal institutions that can be studied on the spot and in depth, legal institutions that can be reached and examined, not simply looked at from afar. We profoundly hope that Dean Hurst and Professor Yegge and their colleagues of the College of Law will continue to enjoy support from the judiciary of Colorado—a support which is already evident in the presence of two judges among the 12 jurymen assembled on this platform. We hope, too, that the College of Law will have the continuing benefit of suggestions, criticisms and support from the practicing bar of the city and the state. People who don't like lawyers are fond of saying —and it is painfully close to true—that they cannot think of any profound improvement in the administration of justice that was ever brought about primarily at the initiative of lawyers. "Law improvement," so the jibe goes, "is too important to be left to the lawyers." All of us on this panel hope profoundly that the old charge will be disproved by research activities, such as those proposed here for the College of Law, that will be carried on by our law schools, our law-related research institutions and our bar associations during the years ahead.