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LAW SCHOOL DEVELOPMENTS

Once a year this department will carry figures on law school registration. In addition it will provide a medium for the description of experiments in curriculum, teaching method, and administration. Like "comments," the typical law school development note will be characterized by brevity and informality; unlike them, it will be descriptive rather than argumentative and will deal primarily with devices which have been tested in actual operation. As a general rule, the authors will gladly answer inquiries and, to the extent available, upon request supply copies of materials referred to.

ADMINISTRATION OF THE LAW OF TORTS: THE 1961 SUMMER RESEARCH TRAINING INSTITUTE ON INTERRELATIONS OF LAW AND OTHER SOCIAL INSTITUTIONS *

By HARRY KALVEN, JR.,[†] and RICHARD D. SCHWARTZ[‡]

Last summer's research training institute on administration of the law of torts was the fourth in a series of summer sessions concerned with probing the interdisciplinary ground between law and the social sciences. A brief review of the series will provide needed background for a description of the most recent institute, which was held at Dartmouth College from June 26 to August 11, 1961, under the auspices of the Social Science Research Council's Committee on Political Behavior.¹

The organization of the four institutes has been essentially the same, although the first two were part of the program of the former Committee on Research Training.² Each institute has been codirected by a law professor with special interest in the social sciences and a social scientist committed to the study of legal phenomena. The directors of each institute were given responsibility for mapping its program of study. The twelve to fifteen participants were selected in each case, from among applicants to the Council, by subcommittees whose members included the directors of the particular institute.

* Based on the report bearing the same title appearing in *Items*, March 1962, p. 2.

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¹ The members of the Committee are David B. Truman, Columbia University (chairman); William M. Beaney, Princeton University; Robert A. Dahl, Yale University; Oliver Garceau, East Boothbay, Maine; V. O. Key, Jr., Harvard University; Avery Leiserson, Vanderbilt University; Edward H. Levi, University of Chicago; *staff*, Bryce Wood.

² The institutes under the program developed by the Committee were held in 1954-58 with support from the Ford Foundation. They were designed to offer small groups of persons actively engaged in research intensive training in research methods or subjects not generally available because of their recent development.

The majority of the participants have come from the fields of law, political science, and sociology; but anthropology, economics, history, philosophy, and psychology have been represented also.³

In content, the institute programs have covered a wide range, depending not only on the special interests of the directors, but also on cumulative experience gained in preceding institutes. The first two were devoted largely to rather general exploration of the legal process.

The first institute, on law and social relations, which was conducted by Harold J. Berman and E. Adamson Hoebel at Harvard University in 1956, was focused on the development of legal doctrine and legal institutions.⁴ Materials studied permitted a detailed analysis of examples of the evolution of common law, such as the process that has brought about the extension of liability for injuries caused by defectively made products to cases in which the injured party did not contract directly with the manufacturer of the product. Also examined were variations in primitive legal systems, ranging from the rudimentary controls of the Eskimo to elaborate indigenous systems (in West Africa and India), studied in isolation or under the impact of cultural contact.

The second institute, on the judicial process, conducted by Carl A. Auerbach and William M. Beaney at the University of Wisconsin in 1958, also was concerned with a general treatment of its subject. Emphasis was placed on legislative action as an alternative and supplement to judge-made law. Considerable attention was paid to a specific body of law, workmen's compensation, whose development in the state of Wisconsin was viewed as a response to public opinion and functional requirements. Thus, both the 1956 and 1958 institutes concentrated to some extent on a delimited area of law and, more particularly, on the operation and consequences of that law in action. This tendency toward specificity became more apparent in the later institutes.

The institute on the administration of criminal justice, conducted by Frank J. Remington and Victor G. Rosenblum at the University of Wisconsin in 1960, examined the process of criminal justice in several jurisdictions. Using extensive American Bar Foundation materials as an empirical base, the institute conceptualized the process as a series of interrelated decisions made by

³The participants in the 1961 institute were Yehudi A. Cohen, Anthropology, Columbia University; Philip E. Davis, Philosophy, San Jose State College; Robert E. Furlong, Law, Fordham University; Edward Green, Sociology, Beaver College; Milton Greenberg, Political Science, Western Michigan University; Heinz R. Hink, Political Science, Arizona State University; Donald P. Kommers, Political Science, Los Angeles State College; Samuel Krislov, Political Science, Michigan State University; Colin Rhys Lovell, History, University of Southern California; Albert Anthony Mavrinac, Political Science, Colby College; Saul H. Mendlovitz, Law, Rutgers University; Jerome H. Skolnick, Sociology, Yale University; John W. Wade, Law, Vanderbilt University; W. J. Wagner, Law, University of Notre Dame.

⁴Cf. Hoebel, *Law and Social Relations: A Report on the Summer Research Training Institute, 1956*, Items, March 1957, p. 4; and Berman, *An Institute on Law and Social Relations*, Harv.L.Sch.Bull., Dec. 1956, p. 5.

public officials as to the disposition of the accused. The formal trial was seen as a point in a sequence that begins with discretion of the police to detain or arrest and ends with discretion of the probation or prison official.

The institute on administration of the law of torts, conducted by the writers, was focused on an even more narrowly defined area of law and concentrated largely on the law of defamation—that is, the law of libel and slander. It was concerned, like the institute on criminal justice, with the characteristics of decision makers and sought to specify those aspects of the social context that appear to be most relevant in appraising the functioning of a particular body of law. This report is concerned principally with the plans and activities of the fourth institute. Toward the end, we shall indicate some conclusions that we think can be drawn from the series of institutes and particularly from the fourth.

ORIGINAL AGENDA

Our initial plan was to interlace legal doctrine with relevant social science theory and research findings. The original agenda envisaged several steps:

1. We intended to begin with a week's study of defamation law, using *Cases and Materials on Torts*, by Gregory and Kalven.⁵ This material was selected both for the human interest of its subject matter and the rich complexity of its legal doctrine.

2. We proposed to go on to a consideration of judicial decision-making at the common law level, starting with Karl Llewellyn's *The Common Law Tradition*.⁶

3. Close examination of a second body of legal doctrine, liability for personal injury, would follow, giving special attention to the doctrine of negligence, under which liability is tied to careless action or the taking of undue or unreasonable risks. This area of doctrine was chosen for examination for several reasons: First, it must be mastered in order to understand judicial treatment of automobile accident claims—the civil cases most frequently heard in American courts. As enunciated and administered, negligence doctrine permits a large number of cases to reach the jury and gives the jury a wide range of discretion in arriving at verdicts. Second, the preoccupation of this body of doctrine with the standard of "reasonable care" provides fascinating insights into the values of American society. In this sense, negligence doctrine lends itself to historical and cross cultural comparisons that might clarify the relations between cultural values and formal norms, testing the extent to which law can be relied on as an indicator of more diffuse aspects of culture. Finally, negligence doctrine presents a striking contrast with the principle of liability developed in defamation law. Examination of this contrast was expected to show the variability possible even within the general field of tort law and to raise questions as to the reasons for the dif-

⁵ CHARLES GREGORY & HARRY M. KALVEN, JR., *CASES AND MATERIALS ON TORTS* (1959).

⁶ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

ferences. At first glance, the extreme divergence suggests that no simple relationship exists between values and legal doctrine, since the two sets of doctrine have been produced and followed by men of the same culture. The divergence might prove explicable, however, if analyzed in terms of the historical backgrounds and the diverse purposes that each body of law was intended to serve. Or the two sets of doctrine might be viewed as functional alternatives. Although defamation law does not require the plaintiff to establish an initial showing of carelessness on the part of the defendant, it has alternative criteria—*e. g.*, “publication” to a third party—that serve as a hurdle that the plaintiff must cross before getting to the jury. Judicial opinions defining publication suggest that in determining whether a given statement constitutes publication, the courts may take into account the state of mind of the defendant. Not only do these diverse doctrines permit judges to accomplish the same general procedural results—of controlling the flow of cases to the jury—but they also may be interpreted as having a common tendency to preclude from liability those claims that are least likely to cause disturbance to the society as a whole. (It is also interesting to note doctrinal convergences. For instance, even though the “mental element” plays no explicit part at the broadest level of defamation doctrine, a showing of malice or bad faith does in many instances help to defeat a claim of privilege.)

4. After a body of legal doctrine had been mastered, we intended to look at its operation in existing legal institutions. We proposed to view the legal process against the model of a large-scale organization, using particularly the conceptual tools provided by Simon in *Administrative Behavior* and by March and Simon in *Organizations*.⁷ The informational input available to the legal system concerning the effectiveness of law in action was of special interest. We were intrigued by the fact that legal decisions are often explicitly made on the basis of partial information; that the rules of evidence frequently contribute to the limiting of information that courts can consider; and that in general, the law has been reluctant to capitalize on new and seemingly relevant sources of information such as might be supplied by the social sciences. We were tempted to attribute this attitude to the tendency of legal decision-makers to “satisfice,” that is, to make a decision sufficient to meet criteria of satisfactoriness rather than to strive for the most satisfactory of all possible decisions.

5. Before any such inference could be seriously entertained, however, it seemed necessary to demonstrate that valid information on the legal process was available but was not being appropriately utilized in legal decision-making. Accordingly, we planned to examine the findings of relevant empirical studies: the University of Chicago Jury Project and the studies of court congestion that are being made at the University of Chicago and Columbia University Law Schools.

⁷ HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (2d ed. 1957); JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1959).

6. Finally, we intended to consider a specific policy issue, the reform of automobile accident law, to see how it is now being approached, to ascertain the relevance of existing information to the current thinking, to identify areas for research that could yield more useful information, and to appraise the reasons for resistance of legal decision-makers to greater use of existing and potential social information on this subject.

ACTUAL PROGRAM

In practice, this outline turned out to be too ambitious. Some of the departures from plan warrant discussion, for the light they may throw on the interrelations of law and social science and on the advantages and disadvantages of the case method of teaching law.

We had available a seven-week term, and we agreed to meet for two hours each morning for five days each week. The two hours expanded quickly into three hours; and toward the end of the term, we held some afternoon sessions as well. There were in all, therefore, approximately eighty-ninety hours of group discussion.

Our actual schedule, in contrast with the original agenda, ran about as follows: (1) defamation and related dignitary torts, thirty-five hours; (2) Llewellyn's *Common Law Tradition* and judicial process, twelve hours; (3) negligence law, fourteen hours; (4) Simon's *Administrative Behavior*, seven hours; (5) jury and court congestion studies, four hours. (6) The reform of personal injury law was never reached.

In addition, approximately fifteen hours was devoted to individual reports by participants in the institute on research on which they were currently engaged and that related in a general way to the concerns of the institute. By deliberate choice, we made relatively less use of guests than had the previous institutes, but were fortunate in having brief visits from three distinguished and helpful visitors: Herbert Kaufman, Associate Professor of Political Science at Yale University, who discussed organization theory; Paul F. Lazarsfeld, Professor of Sociology at Columbia University, who discussed the concept of measurement; and Hans Zeisel, Professor of Law and Sociology at the University of Chicago, who reported on Jury Project data. Finally, we had a robust session at which we attempted to frame some general questions that had run through our deliberations.

It is thus apparent that we spent the majority of the time on law school casebook law. Our plan misfired in the undue emphasis given defamation over negligence, in the failure to reach the issue of reform of accident law, and in the failure to do more than nod briefly to the data from the jury and court congestion studies.

REASONS FOR DIVERGENCE FROM SCHEDULE

Several observations are suggested by our departures from schedule—apart from the obvious one that we did not plan very well!

First, there is the familiar point that *interdisciplinary study*, if it is at all serious, takes time, and the apparently generous seven weeks at our disposal proved to be a shockingly short period. The very strength of such discussion "across disciplines" is also a weakness when viewed from the standpoint of efficiency. The group stimulated so much discussion and such lively discussion as to defeat any expectation of conformance with a short-term schedule. It is not clear what the solution of this problem may be. We wish to report only that the time costs of such ventures are formidable.

Second, if "students" as mature and professional as the participants in the 1961 institute are to be recruited, it is highly desirable to compromise with the *student-teacher arrangement* and give each participant a class hour or two in which to present his own research. The individual reports made at the 1961 institute were uniformly of high quality and greatly broadened the range of material available to the group. There is, however, an unresolved problem here. In so far as mastery of subject matter is the objective, use of the teacher-student device seems more efficient. In so far as the sharing of diverse professional experience, perspective, and insight is the objective, use of the individual seminar report is more effective. Both objectives seem highly desirable for institutes of this sort, and we cannot claim to have struck an altogether happy balance between them.

Third, the institute proved to be an interesting but puzzling experiment with the *case method of teaching*. The participants were quickly persuaded that the study and discussion of cases was the best method of looking at law. Their behavior was like that of a very bright law school class. The discussions were endlessly exciting and lively. Thus, the case method came off very well as a stimulating and realistic teaching device. These qualities are, of course, its familiar virtues, and it is perhaps impressive that the method was so congenial to a group containing so few law students. There is, however, the other side of the story, which is also familiar to the law school world. The method is not economical of time. The reason we spent so much time on defamation may have been simply that we began with the cases on it, and there was so much to talk about. Again, we see no easy solution to the problem and wish only to report that the time costs of the case method, which are recognized as a serious problem in legal education, are aggravated in interdisciplinary groups.

Fourth, it is difficult to anticipate the interdisciplinary significance of a particular area of law without considerable analysis. We had chosen the law of defamation more for its interest and breadth than from an expectation that it would be a promising area for sustained interdisciplinary collaboration. We were startled to find it so fundamentally related to basic concepts in the social sciences. Reputation, the interest that the law of defamation seeks to protect, is remarkably close to the dependent variables analyzed in sociological research on stratification and in social psychologic research on the perception of persons. Recognition of this link led us to formulate some questions of

importance that have been largely ignored by some or all of the fields they involve. A few of these questions were:

- a. How is reputation conceptualized—popularly, legally, sociologically?
- b. What kinds of communication—to whom, by whom, and about whom—are most likely to produce damage to reputation?
- c. In what ways is the maintenance of reputation functional for given societies as well as for the individual?
- d. What consequences to the individual's "life chances" result from the loss of reputation?
- e. In what ways does legal policy—existing or possible—deter or encourage defamatory acts and repair the damage that they cause?

Fifth, consensus on the interest of particular problems for research is more readily obtained in a group like the participants in the 1961 institute than is agreement as to the utility of any general scheme of analysis. We were all intrigued by the question whether the Princess Yousouff's reputation was likely to be damaged by a film showing her the victim of rape by the monk Rasputin. But we disagreed sharply over the utility of various decision-making theories that were advanced as means for predicting the judge's decision in such cases. Llewellyn's analysis was resisted on the grounds that it was too poetic; Simon's because it was not poetic enough. Our nearest approach to general agreement came from examining relatively specific issues that we all found important. As the following examples indicate, these issues covered a wide range: dismissal from governmental service for disloyalty as grounds for an action in defamation; the use of defamation law as an instrument of political struggle by the Nazis; the influence of the quality of legal representation on the exercise of discretion by judges and juries in criminal and civil cases.

From such examples, we tried to extract common elements that might lead inductively to a generalization about the areas of interest common to legal scholars and social scientists. The closest approximations we could make were the following:

- a. Any process that leads official decision-makers to deviate in their decisions from the limits of discretion formally imposed on them by law.
- b. Any process that permits or encourages use of the law by claimants other than those for whom the law is intended and prevents or discourages its use by those for whom it is intended.
- c. Any process that punishes or deters actors who are not the targets of law or frees from liability those whom the law seeks to regulate.

It is hoped that formulations such as the foregoing, if avowedly not exhaustive, will prove useful points of departure for future appraisals of areas of mutual interest for research in social sciences and law.

Our constant struggle with schedule perhaps suggests a larger point. We came away from the institute greatly impressed with the potential of interdisciplinary seminars for research and study. But the excitement about the potential should not blunt the fact that it is difficult to devise an appropriate organization and equally difficult to find an appropriate way of assuring some permanent record of what was accomplished. Being free from any requirement of a final written report or memorandum has great advantages in liberating the energies of the participants and inviting uninhibited discussion. But it means also that nothing more concrete can emerge than the acquisition of knowledge and ideas by individuals and their stimulation by discussion, which may later bear fruit in their research or in pervasive changes of emphasis in teaching. Here, again, we can only report a difficulty, and not a solution.

In brief, the institute completely persuaded us that such ventures are of high promise, but that we by no means know how to tap their potential effectively. Our thumbnail summary of the institute was that it had worked so well, it was a pity it had not worked better.

CONCLUSIONS

From our experiences and those of the preceding institutes, we suggest the following conclusions:

1. Mastery of a specific body of law is highly useful as a starting point for interdisciplinary efforts.
2. Virtually any body of law can be used to demonstrate the basic elements in legal reasoning.
3. Consensus is not easily obtained on a general theory of the legal process.
4. The communication barriers between disciplines are overrated as an obstacle.
5. The distinctive perspectives of representatives of the various disciplines do not readily emerge when they discuss a common problem. This is something of a puzzle and perhaps reflects the current unsatisfactory definitions of subject matter in the social sciences.
6. There is more of a gap within the social sciences today between those oriented toward empirical research with statistical techniques and those oriented to a more humanistic normative conceptual approach to the study of human behavior than there is between any of the social sciences, on the one hand, and law, on the other.
7. The central problem in interdisciplinary research is to locate those common points of professional excitement that have comparable significance for lawyers, sociologists, political scientists, *et al.* The summer institute offered fascinating examples of such points and is a fruitful way of exploring the common ground among various approaches to research on human behavior.

8. The time may have arrived for a serious attempt to develop a comprehensive strategy of sociolegal research, with the hope of turning existing differences in points of view into mutually compatible and supportive efforts. While we may have made little concrete progress toward such a research strategy, we were tantalized by the prospects, and we hope to see further efforts along these lines in the near future.

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