

bargaining.<sup>39</sup> That not so oblique *ad hominem* begs such important questions as whether the existing body of regulation is compatible with the diverse needs of an infinite variety of bargaining relationships, with the need for regulation that is and appears to be even-handed and reasonably predictable, and with an enterprise system that still depends on the discipline of the market. Ross, without confronting such questions, concludes that the Board's bargaining rules are workable and have not imposed "undue strain."<sup>40</sup> Plainly, so general an endorsement, unsupported by pertinent empirical or analytical considerations, is only a statement of personal faith.

Mr. Ross has usefully reminded us that analysis and appraisal should grapple with the operational consequences of doctrine, and, what is less routine, has not wholly ignored his own precept. But his effort might have been even more useful if he had paid more attention to the problems that elude Board statistics and that are obscured by approaching "collective bargaining" and the "bargaining duty" as if they were simple unitary concepts. On that level of abstraction, a love affair with the Board is easy, and Ross has fallen hard. Love for an object of study is pleasant but for a long time has not been considered helpful to analytical work.

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## Facts for the Law Maker: Three Recent Studies

**Arrest: The Decision to Take a Suspect into Custody.** WAYNE R. LA FAVE. Boston: Little, Brown & Co., 1965. Pp. xxxiv, 540. \$10.00.

**Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation.** ALFRED F. CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT L. BOMBAUGH. Ann Arbor: University of Michigan Press, 1965. Pp. xxviii, 506. \$12.50.

**The Pretrial Conference and Effective Justice.** MAURICE ROSENBERG. New York: Columbia University Press, 1964. Pp. xiv, 249. \$6.50.

It is a tradition of long standing in Anglo-American law to make broad surveys available to the legislatures whenever major factual prob-

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<sup>39</sup> P. 264.

<sup>40</sup> P. 265.

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lems are at issue. In the British Empire and later the Commonwealth, royal commissions, select committees, and ad hoc committees have done this magnificently. In the United States, on the other hand, the similar efforts of committees of Congress and other legislative and administrative bodies have met with varying success.<sup>1</sup>

Occasionally, and now increasingly, academic and related institutions have been called upon to assist in securing such factual knowledge. The results of three of these surveys have recently appeared. Each in its own way sets a new level of achievement in this growing process of providing facts for the law. The three studies, aside from bringing to our attention new facts on the law, also represent with distinction three types of advanced social science methodology: the experiment, the sampling survey, and the impressionistic, qualitative description of situations.

#### THE EXPERIMENT

The experiment reported in Rosenberg's book, *The Pre-Trial Conference and Effective Justice*,<sup>2</sup> was made to decide whether pre-trial hearings in personal injury litigation alleviate the workload of the courts either by increasing settlements prior to trial or by shortening the trial time if the case should reach that stage.<sup>3</sup>

It has been one of the more popular misconceptions that the controlled experiment must belong forever to the natural sciences which, for that reason, can aspire to more precise knowledge than the sciences that are forced to deal with complex human institutions. Both practical and theoretical difficulties are thought to bar experimentation in the social sciences and the exact knowledge it can provide. Yet here we have a legal experiment with its peculiar reward, most precise knowledge about the effects of a legal institution.

Although this is not the first legal "experimentation" in the sense of a tentative innovation and hoped for assayable observations of its effects,<sup>4</sup> the present experiment is unique in applying the experimental

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<sup>1</sup> The best of the American surveys are as good as the British, but their average level has been lower because, unlike most of the British inquiries, they have not always been sufficiently removed from the political demagoguery of the day.

<sup>2</sup> ROSENBERG, *THE PRE-TRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964).

<sup>3</sup> The study tried also to measure other effects, such as the quality of the trial, but not only are those measurements less significant because they involve judgments, but they are also clearly secondary to the issue. See note 9 *infra*.

<sup>4</sup> The recent decision of the British Parliament to abolish capital punishment for a test period of five years is an example of such "experimental" legislation. The tentative introduction of impartial medical experts in personal injury litigation in the New York Supreme Court is another. See Zeisel, *The New York Expert Testimony Project: Some Reflections on Legal Experiments*, 8 STAN. L. REV. 730 (1956).

technique as it is used in the natural sciences to a major legal institution.<sup>5</sup> The perfect experiment is a technically well defined procedure that can best be clarified by a brief description of this pre-trial experiment.

The following technical arrangements were made with the cooperation of the New Jersey judiciary, under the leadership of a distinguished judge and a progressive court administrator, Professor Rosenberg, who is the director of Columbia's Project for Effective Justice. The Superior and County Courts in seven New Jersey counties were selected as a representative sample of the state and, for about a year, all claims for personal injuries filed with these courts were divided randomly by a lottery process into two halves.<sup>6</sup> The cases in one half (the control group) were automatically assigned to pre-trial hearing; in the other half (the experimental group) counsel were notified that a pre-trial hearing would be held only if one of the litigants requested it.

It is this application of the experimental variable (optional pre-trial in our instance) to a random selection of cases and the withholding of it from a comparable random selection that constitutes the essence of the controlled experiment. Random selection is the only safe way known to science<sup>7</sup> to constitute groups that are for practical purposes identical<sup>8</sup> before the experiment begins. If, therefore, one of the random groups is exposed to an experimental treatment that is withheld from the other, any effect that appears in the experimental group but not in the control group must have been caused by that treatment and hence can be safely ascribed to it.

The New Jersey study bore surprising fruits. In the teeth of a long cherished tradition, especially strong in the State of New Jersey, obligatory pre-trial (requiring approximately one-half hour per case) was clearly proved to be a waste of time in alleviating the workload of the

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<sup>5</sup> The Moore-Callahan experiments, made in the forties at Yale, were fairly well controlled experiments, but they dealt with a trivial legal issue: compliance with varying parking ordinances. Controlled experiments are now being conducted on a growing scale in the area of prison management, primarily by the State of California. They are designed to improve and economize in the treatment of convicts.

<sup>6</sup> The even filing numbers went into one group, the odd ones into the other.

<sup>7</sup> The randomization is sometimes combined with a process called stratification, by which characteristics known or suspected to affect the outcome are controlled so as to be adequately represented in both the experimental and the control group, *e.g.*, the proportion of blondes and brunettes in the test of a hair coloring device. But such stratification is not necessary; it merely increases the power of the experiment. Randomization is necessary, because in its way it provides all necessary stratification.

<sup>8</sup> But the unavoidable sampling error prevents, as a rule, any two samples drawn from the same universe from being *exactly* alike.

court, for neither the settlement rate nor the trial length showed any difference for the two groups.<sup>9</sup> Here are the crucial data:<sup>10</sup>

- 1) The proportion of cases settled prior to trial in the group where pre-trial was obligatory was 22%; in the group of cases where it was optional (and in fact held only in about half of all cases) the proportion was 23%.
- 2) The average trial length for the cases in the obligatory pre-trial group was not shorter than the average trial length for the cases in the group where pre-trial was optional.

Acknowledging the results of the experiment, New Jersey promptly changed its rule and made pre-trial in personal injury automobile cases optional.

#### THE QUANTITATIVE SURVEY

The second piece of research is, significantly, a survey made jointly by lawyers and social scientists. The Law School and the Survey Center of the University of Michigan investigated the financial consequences of injuries sustained in automobile accidents.<sup>11</sup>

The issue is of long standing concern to the law and has a distinguished research history. The first major study was published in 1932 under the auspices of the Columbia University Committee for Research in the Social Sciences.<sup>12</sup> It too was a joint effort of lawyers and social scientists and surveyed broadly, if somewhat haphazardly, the reparation problem caused by automobile accidents. The evidence was drawn from a variety of sources but even where survey data were used there was no claim to precision and completeness. Nevertheless, as in many first efforts, the outlines of the problem and the areas of research emerged with great clarity and thus marked an important beginning. The next major step came in 1953 when Professor Adams of the Business School at Temple University studied the financial and legal history of a random sample of one hundred automobile accidents in the city of Philadelphia and thus established the pattern for the present Michigan study.<sup>13</sup> The Philadelphia survey displayed all the glories and some

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<sup>9</sup> On the other side of the ledger was a modest "gain in improving the quality of the trial process in some pre-trial cases that reached the trial stage." But the author himself adds: "The evidence of this is not of conclusive quality." See note 3 *supra*.

<sup>10</sup> ROSENBERG, pp. 48, 51.

<sup>11</sup> CONARD, MORGAN, PRATT, VOLTZ & BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964).

<sup>12</sup> REPORT, COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

<sup>13</sup> J. ADAMS, *ECONOMIC FINANCIAL CONSEQUENCES OF PERSONAL INJURIES SUSTAINED IN 1953 PHILADELPHIA AUTOMOBILE ACCIDENTS*, 7 *ECON. & BUS. BULL.* (Temple University, March, 1955).

of the inadequacies of an inspired, pioneering shoe-string operation. The present Michigan study is the apex of this development.

It covers all individuals killed or injured in automobile accidents that occurred in the State of Michigan during one calendar year and ingeniously combines two samples to represent this universe; one taken from the files of the police, the other from the files of the courts where personal injury claims are litigated. The difficulty of the yet unfinished court case was elegantly solved by substituting the results reached in a comparable group of earlier long-delayed cases. The major research instrument was a mail questionnaire to the parties concerned or to their heirs, thoughtfully supplemented at critical points with personal interviews, especially with the plaintiffs' lawyers in the cases.

We now have reliable, precise quantitative information on almost every aspect of the injury reparation process and hence a sound factual basis for the many debates which are currently raging over that problem area. To be sure we have this knowledge only for one year and only for the State of Michigan. But, the United States being what it is, one should not be in danger if one generalizes from these findings. If there are doubts, they can be reflected by duplication of the study elsewhere.

The survey provides, as any good survey should, information on both details and broad outlines. Roughly one out of every one hundred Michigan residents suffered some loss in an automobile accident during a year. For over 60% of the persons involved in accidents, the loss was below \$500; another 30% suffered losses between \$500 and \$3,000; and between 2% and 3% suffered losses beyond \$70,000.

In terms of all victims or their heirs, 23% received no compensation from any source, 37% received some tort liability settlement, and 48% of the victims received some compensation from loss, collision, medical or life insurance. But in terms of the total dollar amount paid to all victims, almost half of the total damages remained uncompensated. The sources of total compensation were tort liability, 55%; loss liability, 38%; workmen's compensation and social security, 7%. The surprising finding is the great role played by loss insurance. And social security should become a greater source under the impact of the new social security laws.

Finally, about 1% of all claims and roughly 5% of all serious claims (most claims that reach trial stage are serious) came to trial.<sup>14</sup> With the detailed information that fills out this general frame, the Michigan

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<sup>14</sup> CONARD, et al., pp. 144-58.

survey should provide policy makers with all the factual information they need for a long time to come.

### THE QUALITATIVE SURVEY

The study of the institution of arrest stands in stark contrast to the accident survey in that it is entirely discursive and void of quantitative findings. It is the first in a series of volumes to come out of the American Bar Foundation's Survey of Criminal Justice of which Professor Remington is the editor.<sup>15</sup>

Its raw material consisted of some two thousand field reports, averaging about ten pages each, of on-the-scene observations and interviews with police officers. The unending variety of arrest decisions are presented in a meaningful framework, with just the right amount of detail to make them individually vivid and to allow them at the same time to represent a type.<sup>16</sup> The book's table of contents plays a key role in providing the framework. Organized in parts, chapters, subheadings, sections and subsections—altogether five levels of specificity—it reflects the book's major achievement: the contribution of a systematic inventory. Nothing will convey its flavor better than an excerpt from the table of contents and the full text of one of the cases illustrating a subsection. The table of contents for chapter 16, for instance, reads as follows:

Chapter 16. *Custody of a Person Who Cannot be Arrested for the Crime Suspected.*

- A. Short Detention Not Considered Arrest
  - 1. Field Interrogation
  - 2. Brief Unrecorded Detention at the Station
- B. "Voluntary" Custody
- C. Arrest for Another Offense
- D. Arrest for Probation or Parole Violation

Subsection A.2. is then illustrated by the following case, followed by an appropriate discussion of the problems it raises:

An officer observed on the street a man who fitted a very

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<sup>15</sup> LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965).

<sup>16</sup> There was, therefore, no need for the editor to apologize for the absence of quantitative data. Moreover, the reason he gives does not hold: "The aim is not . . . measurable efficiency but rather a much more difficult to measure . . . exercise of discretion." The correct statement is made later: "Measurement is a second step which has meaning only after there has been . . . identification of the issues, practices and policies which ought to be subjected to measurement." *Id.* at xvii.

general description in the daily bulletin of the person responsible for a recent armed robbery. The suspect had no identification on his person but denied that he was the man named in the bulletin. The officer contacted headquarters on a nearby call box and was instructed to bring in the suspect. While the suspect was being brought to the station, the desk sergeant contacted an off-duty detective in the robbery detail, who he knew could positively identify the wanted man, and asked him to come to the station. The suspect was held at the station without booking for about an hour, after which time the detective appeared and determined that he was not the wanted man. The suspect was then released without any record being made of the incident.<sup>17</sup>

The discussion which follows raises a host of legal issues resulting from detention without arresting and booking.<sup>18</sup> For example, it is arguable that the police have acted in the suspect's interest by making quick exculpation possible without publicizing the incident. On the other hand booking can operate to the suspect's advantage by making his detention "visible" and therefore less subject to abuse. Such legal analysis is kept distinct from the factual reporting.

After this volume one may look forward with high expectations to other studies in the series on detection, prosecution, adjudication, and sentencing.

#### CONCLUSIONS

The three studies, each in its own way, raise the issue of how such empirical legal studies are to be integrated with the traditional type of legal discourse and writing.

In the case of the pre-trial experiment, the problem hardly arises, since there is little law on the subject. Whatever rationale there is concerning the purpose of pre-trial was easily incorporated into the design of the study so that it answered all or most of the relevant questions.<sup>19</sup>

Further progress, one would hope, would be made in the realm of controlled experimentation, for no other approach can yield knowledge of such exactitude. With some care, many a tentative legal innovation may permit precise subsequent evaluation.<sup>20</sup>

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<sup>17</sup> LAFAVE, pp. 347-48.

<sup>18</sup> LAFAVE, pp. 348-50.

<sup>19</sup> See note 9 *supra*.

<sup>20</sup> See, e.g., Zeisel & Callahan, *Split Trials and Time Saving: A Statical Analysis*, 76 HARV. L. REV. 1606 (1963). As to the Vera experiment concerning the release of arraigned defendants without bail, see Address by Sturz, Regional Conf. on Bail, Jan. 22, 1965. Concerning the general problem of experimentation in the law, see ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* ch. 21 (1959).

In the accident reparation study, the authors chose to keep the survey study completely separate from the legal argument, each forming one of the book's two parts. One cannot quarrel with this dichotomy, since it is the only way to preserve the integrity of the survey for use by other scholars who might have different views and suggest different solutions to the reparation problem. Such overall surveys, because of their broad coverage, answer specific policy questions only by indirection.<sup>21</sup>

The relationship between the law and collected facts is perhaps most interestingly posed in the arrest study. Whatever law exists is appended and clearly subordinated to the variety of factual situations, quite often only in footnotes. Nevertheless, the law plays a major if invisible role in that study by forming the background and actually deciding the structure of the book. To make an orderly inventory out of an amorphous mass of some two thousand individual case reports requires a system of classification and hence a conceptualization of what aspects of these cases are relevant. Thus, the process of classification and evaluation is informed by the issues the law now poses or might be expected to raise. The arrest study, with great sensibility, presents distinctions which the law could make in this delicate area but carefully refrains from gratuitous resolution of the issues it raises. This type of value judgment is quite different from value judgments in the conventional sense, since it tries to determine relevance to the frame of values established by the law, while the conventional value judgments make decisions as to what is good or bad. The arrest study thus contrasts sharply with the great crime studies of the twenties whose major concern was the laxity of law enforcement. The study is thus also an interesting contribution to the controversy over whether in writing about the law one must necessarily hold values as to what is the good law.<sup>22</sup>

The three studies thus set a new high-water mark of technical perfection for empirical investigation of the law. They give renewed proof, if such be needed, of the fruitfulness of the collaboration between lawyers and social scientists and of the necessity for lawyers to determine what is to be investigated.

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<sup>21</sup> See, e.g., BLUM & KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM—AUTO COMPENSATION PLANS (1965).

<sup>22</sup> The classical discourse on this topic was that between Fuller, *Human Purpose and Natural Law*, and a Rejoinder to Professor Nagel, and Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NATURAL L.F. 68, 77 (1958).

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