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Needed: The Social-Scientific Lawyer

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THE SIGNIFICANCE of the behavioral sciences for the lawyer, foreseen by Justice Holmes in 1897—"For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics" [1]—is now evident. Once confined to academic journals and considered irrelevant to American law, the empirical findings of the behavioral sciences are now the lawyer's tools. The Supreme Court not only accepts empirical data of the social scientists in briefs, but implicitly seeks such data in order to enable the court to make decisions.

Today, for example, the behavioral scientist is encouraged to produce information on prejudice, poverty, pre-trial investigation, police practices, confessions, and jury behavior. For a decade the Chicago jury project by the University of Chicago Law School, has conducted research and published findings regarding jury behavior. Other studies (including one by Cleveland-Marshall Law School) have contributed to changes in the bail procedures employed in our courts, and are raising the question of whether fines could be better punishment than incarceration for crimes presently involving short term imprisonments.

The introduction of sociological data in *Brown v. Board of Education of Topeka*,[2] is well known. To support the conclusions, "Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children," and, "Separate educational facilities are inherently unequal," [3] Chief Justice Warren cites in the famous footnote 11 not judicial authorities but sociologists and psychologists, including K. B. Clark and Gunnar Myrdal.

The use of this kind of data has been cited with favor, "There, by placing before the Court authoritative scientific opinions regarding the effect of racial classification and of "separate but equal" treatment, the plaintiffs helped persuade the Court in the shaping of a judge-made rule of law," [4] as well as criticism, ". . . in the long history of this country there has never before been a time when an Appellate Court or Supreme Court of the United States relied solely and alone on scientific authority

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1 O. W. Holmes, The Path of the Law, in Collected Legal Papers 187 (1920).

2 347 U.S. 483 (1954).

3 *Id.* at 494, 495. The first quotation represents a finding made by the Kansas court which was accepted by the Supreme Court.

4 Greenberg, Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation, 54 Mich. L. Rev. 953, 954 (1956).

to sustain a legal decision." [5] The crucial fact, however, is that the Supreme Court *is* using such scientific data.

If public policy is involved in judicial opinions, as Justice Holmes has observed—"Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . ." [6]—then the courts and lawyers appearing before the courts should have as much information as possible relating to the public and to policy.

Certain members of the Supreme Court not only have utilized data from the behavioral sciences, but have decried the lack of data relevant to certain issues. Justice White, dissenting in *Estes v. Texas*,[7] raises the question of the relationship of the communications media and a fair trial. "In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage," [8] and voices concern that the Court, ". . . in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials . . . although our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials." [9]

In *Miranda v. Arizona*,[10] it is clear that the lack of conclusive evidence regarding the question of confessions without counsel contributes to the division on the Court. Dissenting are Justice Clark:

> Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast,[11]

and Justice Harlan:

> Evidence on the role of confessions is notoriously incomplete. . . . We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, and that the Court is taking a real risk with society's welfare in imposing its new regime on the country.[12]

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[5] Senator Eastland, The Supreme Court's Modern Scientific Authorities, in The Segregation Cases, 4 (1955).

[6] O. W. Holmes, Jr., Common Carriers and the Common Law, 13 Amer. L. Rev. 630 (1879).

[7] 381 U.S. 532 (1965). Justice Brennan joined Justice White in dissent.

[8] *Id.* at 616.

[9] *Ibid.*

[10] 384 U.S. 436 (1966).

[11] *Id.* at 501.

[12] *Id.* at 517. Justices Stewart and White joined Justice Harlan in dissent.

But in the absence of full and complete information, Justice Warren, who wrote the majority opinion in *Miranda,* and Justice Harlan disagree in their interpretation of various investigative practices. Justice Warren notes:

> The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.[13]

However, Justice Harlan notes that,

> . . . there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual,[14]

and that ". . . in any event the FBI falls sensibly short of the Court's formalistic rules." [15]

Numerous questions involving quantifiable data were raised in this dialogue between the Chief Justice and Justice Harlan. Are the types of crimes handled by the FBI significantly different from crimes dealt with by local police? What are the practices of the FBI? What different skills and resources does the FBI have available to it? Are the practices of the FBI transferable to local authorities?

On the question of the need for lawyers at all pre-trial identifications, Justice White cites the lack of empirical data and cries out for research:

> The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications, in order to detect recurring instances of police misconduct. I do not share this perverse distrust of all official investigations. None of the materials the Court relies upon supports it. *Certainly I would bow to solid fact, but the Court quite obviously does not have before it any reliable, comprehensive survey of current police practices on which to base its new rule. Until it does, the Court should avoid excluding relevant evidence from state criminal trials.* (Emphasis added) [16]

Again, members of the court have noted the lack of evidence regarding the question of the effect of pornography on human behavior. Justice Harlan discusses the dilemma faced by judges:

> Clearly the state legislature has made the judgment that the printed words *can* "deprave or corrupt" the reader—that words can incite

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[13] *Id.* at 486.

[14] *Id.* at 521, note 19.

[15] *Id.* at 521.

[16] United States v. Wade, 388 U.S. 218, 251, 252 (1967). Justices Harlan and Stewart joined Justice White who concurred in part and dissented in part. They concurred in the holding that the Fifth Amendment was not applicable, but dissented from the holding on the Sixth Amendment.

> to antisocial or immoral action. . . . It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree.[17]

Lacking evidence establishing such a "causal connection," should the court sustain legislation regulating pornography? Justice Douglas, again noting the lack of reliable information, thinks not:

> The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has impact on action that the government can control.[18]

Justice Douglas cites data from the Kinsey report, from studies of experts in the field of juvenile delinquency, and then, with tongue in cheek, a survey reported in a reputable law review:

> Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man." Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73.[19]

The use of data from the behavioral sciences is gaining recognition. The voluminous reports from the President's Commission on Law Enforcement and Administration of Justice (1967) as well as the Report of the National Advisory Commission on Civil Disorders (1968) employed the empirical studies of social scientists and hired consultants from the social sciences to aid them in formulating findings and conclusions.

This article has deliberately omitted discussion of research in the area of judicial behavior—research concerned with why judges do what they do. Nor does this article deal with moral and ethical problems, such as the misuse of data and the invasion of privacy by researchers. Rather, the intent has been to suggest that the courts are interested in and are using the results of social research.

Since the Supreme Court, and to a lesser extent the lower courts, have indicated a willingness to examine the data of the behavioral sci-

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[17] Alberts v. State of California, 354 U.S. 476, 501 (1957). Justice Harlan concurred in *Alberts*, but dissented in Roth v. United States, 354 U.S. 476 (1957). These cases were decided together.

[18] Alberts v. State of California, *supra* note 18, at 511. Justice Black joined Justice Douglas in dissent.

[19] *Id.* at 509.

ences, the lawyer must know how to find such information and will need to be trained in the use of this data. A leading foundation, the Walter E. Meyer Research Institute of Law, which supports legal research, has observed from its own experience a gap between the law and the social sciences; where legal research is concerned, non-lawyers ". . . need basic training in the elements and methods of law," while lawyers ". . . need substantial exposure to the methods and principles of survey research and the management of quantitative data." [20] Law school curriculum is changing as law schools recognize that lawyers need some facility in the methodology of the behavioral sciences if the lawyers are to be able to utilize the research of the data gatherers.

There is an additional problem for the lawyer, that of locating the data. The Walter E. Meyer Research Institute of Law notes that although there has been an accumulation ". . . of scientific evidence about how human beings act and react in legally significant settings," these findings have been little utilized.

> Many of these findings or intimations may be of great use to the law; but they are out of sight so far as the legal profession is concerned; either because lawyers do not know they exist or are unaware of their importance. A systematic audit of social science literature, perhaps by a cross-disciplinary team, could produce an inventory of findings that might significantly advance the fund of materials for law improvement.[21]

The courts are making decisions which affect public policy, sometimes on the basis of empirical data offered in legal briefs, and at times in the absence of such data. It should be evident that members of the legal profession must have supportive data available to them and must know how to use it. The legal profession and the behavioral sciences no longer operate in mutually exclusive spheres.

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[20] Walter E. Meyer Research Institute of Law, Report for the Period July 1, 1964—June 30, 1966, 15.

[21] *Id.* at 15-16.