Field Research Strategies in Urban Legal Studies

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The subject matter of field research in urban legal studies is as broad or as narrow as we choose to define the field. The chief concern of this paper is research strategies. What type of research is a law school capable of doing? What type of research is appropriate–for a professional school that is part of a university and for a student body that is growing increasingly bored and frustrated at what it regards as an irrelevant curriculum?

In this paper, I plan to discuss three types of research strategies: (a) law-in-action; (b) the scientific study of law; and (c) action-demonstration. I realize that there are considerable difficulties with this classification. All of the approaches are empirical in the sense that the primary focus is what is actually going on in the real world. In practice, the three strategies are quite similar in that they often use the same methodological techniques and are used interchangeably for particular problems. Law-in-action and the scientific study of law, for instance, live comfortably within the field of sociology of law. Indeed, perhaps it is more accurate to consider the variations between these strategies relatively minor, as differences in degree, rather than to classify the strategies as separate approaches. For the purpose of his paper, however, I do want to treat the three strategies separately, giving polar or "pure" examples, since I believe that each possesses different strengths and weaknesses, requires different sorts of training, and raises somewhat distinct issues for legal research.

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LAW-IN-ACTION

Although one could hardly claim that a great deal of empirical research has ever gone on in law schools, our longest tradition has been the law-in-action approach. Within this approach has been the study of the actual operation of rules. Recent examples would be studies of the implementation of the *Miranda* (1966) and *Gault* (1967) cases. I would also include under this strategy most studies of municipal courts, small claims courts, the police, public housing authorities, and so forth. These studies are usually concerned with how the agencies administer particular rules rather than with studying the agencies as social systems.

The usual purpose of research using the law-in-action approach is to discover abuses, to show how particular agencies are not functioning the way they are supposed to (i.e., by following rules), and to propose specific remedies. These studies occasionally lead to law-reform efforts, which can be quite dramatic.[1] Although it is always hazardous to make claims about the influence of research on legislative and judicial decisions, I am thinking of the kind of work that was done on welfare abuses and the growing number of court decisions outlawing particular welfare practices. The latest example is a federal court decision holding that a welfare recipient has the right to refuse to let in a caseworker unless the caseworker has a search warrant (Wyman v. James, 1969). This decision was preceded, as we know, by many studies of welfare investigations where clients feel powerless and where quite punitive sanctions are imposed on the basis of very flimsy evidence (see, e.g., Reich, 1963, 1965; ten Broek, 1965). We can assume, I think, that this literature is making itself felt on the more sensitive courts.

One of the distinguishing characteristics of the law-in-action approach is that the problem to be studied is usually defined by lawyers. Quite often the studies have as their objective specific remedies that will help individual clients or require adjustments in agency practices. Again, to return to the welfare field, one example would be the problem of prior hearings before the termination of welfare grants. Studies have shown that the existing practice of granting appeals after termination of the grant in effect seriously nullifies the right to a hearing (see, e.g., Handler, 1969). The Supreme Court subsequently held that aid must be continued pending the hearing (Goldberg v. Kelly, 1970). This focus on remedies for individual clients is both a strength and a weakness. The strength is, of course, individualized justice, a goal that is not unimportant. Moreover, it is the type of activity that is within the conceptual role of the profession. Practicing lawyers, after all, are empiricists; they are skilled in the art of gathering facts for particular, predefined problems. In law school, students are trained and encouraged to think in such terms, and this type of training is a natural carryover to law-in-action studies. When the factual problems get more

complicated and require a higher skill of social science methodology, it is not too difficult to train ourselves or to retain social scientists to design the methodology and gather the facts. For this type of law-in-action research, the theoretical issues and the policy considerations are usually given.

The weakness of law-in-action studies is that they sometimes treat only part of the problem and do not touch more basic issues. In the welfare field, a great emphasis has been on objectifying legal rules, improving procedural due process, and developing rights of privacy. While one cannot deny the importance of these reform efforts, they will not affect the vast majority of welfare recipients. Most recipients will still remain ignorant of their rights, have no access to poverty lawyers, and, of far more significance, will be in such a dependent situation that they will think in terms of stability and even gratitude rather than asserting rights. The welfare bureaucracies, in turn, as is true with practically all bureaucracies that deal with powerless, dependent people, will be relatively free to ignore not only court decisions but also federal and state administrative regulations.

Many law reform efforts stemming from law-in-action research have broader application: for example, elimination of the residency test, or a hoped-for Supreme Court decision prohibiting the states from lowering welfare grants come readily to mind. There are also many instances where law reform has really been abortive. Our more intractable social problems are not going to be cured by legislative or judicial fiat. Recognizing this limitation is not to deny the over-all value of the law-in-action approach. In many situations, a partial remedy is better than no remedy. Even if an NAACP lawyer cannot eliminate racial slurring in schools, he can stop it at least temporarily for his client. And I think that we would prefer to have the *Miranda* decision even if the police sabotage it, and most arrested people still want to talk. The danger of this strategy is a failure to realize that quite often the remedies will not work or will work only partially—or to realize the unintended consequences of the action. In many instances the focus of this strategy is too narrow for the job that has to be done.

THE SCIENTIFIC STUDY OF LAW

The scientific study of law generally starts from a different perspective. It inquires into the nature of a social situation and the relationship of the legal order to that situation. In welfare, it would ask such questions as what is the nature of the welfare experience from the point of view of both the recipient and the bureaucracy, what are the issues in making the system more responsive to the needs of the clients, and what is the role of the legal process in confronting these issues? In this type of research, laws are treated as social facts designed to influence behavior in certain ways. How and why they do so—if in

fact they do—are the questions for research. Hypotheses are tested on the basis of observations, experiments, and other types of data. Properly conceived, this approach is within the tradition of academic social science research. It adds to the accumulation of basic knowledge about the nature of man, his institutions, and his environment.

The scientific study of law approach has a great appeal, at least in theory, to law schools. Unfortunately, little of it has been done in the law schools. This is true for several reasons. The undergraduate or even graduate legal training of most law professors does not equip them to take on this type of work. In law school we study laws and their relationship to each other. Laws are not looked on as social facts. Moreover, the scientific study of law requires social science training—something that is hard to acquire once careers in law schools are launched. One is in a different league of scholarship—that of the social scientist. Furthermore, good interdisciplinary research is difficult to come by, particularly team research efforts. The fact of the matter is that most good social scientists are not that interested in the legal system or in the policy questions which interest law professors. Another reason is that the scientific study of law research is not that relevant to the basic thrust of the professional school. Law students, for the most part, want to be lawyers. Though they may want to be broadly trained lawyers (we hope), they are not interested to the point of becoming social scientists of law. Too often we forget that there is this distinction. This means that the scientific study of law scholars will not have the same relationship to their students as that found in graduate social science departments.

In addition, the scientific study of law appears to be unpopular with the current generation of law students and faculty because this research is basic research. As such, it is costly in terms of both time and money, and it can be abstract and theoretical. Thus, it often appears to be somewhat removed from immediate policy considerations.

Although we have been talking so far about two types of research strategies, it should be obvious that the differences tend to be matters of degree and emphasis, especially when one begins to think in terms of specific examples. The polar types may be fairly distinct, but there are many points in between. The classification is not that important. What is important is to recognize that as one moves from narrowly defined law-in-action problems to more general, sociological issues, different questions have different professional interests and often require different sorts of empirical or scientific training.

ACTION-DEMONSTRATION

In recent years, the "in" thing in law schools, and in particular in the broad area of urban legal studies, has been to get out and do things for poverty-stricken

and other disenfranchised groups. Students, in their summers and even during most of the school year, work for legal services offices, with welfare client groups, and with community organizers. Very many of the ablest, young, energetic faculty spend their efforts in handling litigation and in giving legal advice. The stress is on action, on doing something now about social injustice.

There are many reasons for this turn of events, some of which are very positive; other are not. Certainly an important influence is the rise of militancy on the campus. The roots of this movement go back to the civil rights struggles and are fed by the frustrations of a society that promises but does not perform in the field of poverty and racial injustice, and at the same time carries on a hateful war. Although there may be an element of anti-intellectualism involved in this notion, there is mostly a sense of urgency that something has to be done—even if we do not know all of the answers. Students in this mold are "turned off" by what they perceive to be the traditional academic approach to problem-solving even while the ghettos burn, the poor starve, and the environment becomes increasingly disgusting. They feel that the issues of social injustice are clear, that suffering cannot wait, that the solutions are apparent, and that some sort of action is better than doing nothing while others cautiously debate, study, and analyze these pressing problems.

There is also a distrust of academic studies themselves. There is a feeling that research conducted by academics is either class-biased or incapable of really finding out what is going on among poverty groups. This criticism is most strongly applied to survey research, where it is claimed that the interviewers have little or no rapport with the people they are interviewing, that the questions are not appropriate, that the interviewees are not given the opportunity to really express what is going on, and that the issues and problems are far too subtle and complex to be uncovered during the course of a highly structured interview of one hour or less.

Another strand in this movement concerns the relationship between the people and the research professionals. On the negative side, those who are less than happy with the traditional academic approach see academicians as treating the poor as guinea pigs for their research projects. "Maximum feasible participation" now apparently applies to research also, in that it is strongly felt that the people in the community must have a decisive voice in the research being done on or for them. They are entitled to know what is in it for them. At the minimum, this usually means that no longer will respondents' time be given freely. More positively, they want to know what reforms are being considered and whether these coincide with what they think the community needs. As the price of cooperating, the people in the community want to control the resources of research for their own purposes.

The people in the community and the militants have a view of the researcher-professional expert as one serving the community. This view probably grew out of, or at least is analogous to, the role of the white professional in civil

rights: namely, that the people are the ones who should make the decisions, and the job of the professional expert is to offer facts, alternatives, and considerations. Too often the role of the professional, it is claimed, has been to limit choices, to tell people what to do and what is best for them, rather than to widen choices and let the clients decide what is in their own interests.

This concept of the role of the expert ties in with the distrust of traditional research. That research tends to be static in that it asks people how things are going or what they want. Given the circumstances of welfare recipients, minority groups, and other poor people, answers are likely to be far more positive than either is or should be the case. Welfare recipients, for example, are so dependent on the minimum economic security given to them that they are willing to put up with indignities; this is the price they think they have to pay. Similarly, there are waiting lists to get into most public housing projects. This does not necessarily mean that the applicants like public housing, but only that public housing is far better than their existing housing. In response to a survey, they will express gratitude and satisfaction at being in a public housing project where they are at least safe from fire and rats. A key feature of action-demonstration research is to show people what is possible, that they do not have to be satisfied with the present level or quality of services, that they, too, are entitled to better things.

This refusal to accept the status quo leads into the principal technique of the militant reformers—namely, community organization. Again, the basic idea is simple. Social change will come about for the disenfranchised only when power relationships change. A great deal of litigation effort is viewed in this light Lawsuits and legal victories are often used as techniques for political organization, hopefully leading to social change.

ACTION-DEMONSTRATION: AN EXAMPLE

Before discussing some of the problems with action-demonstration projects, I will describe as an example a project that we started in Milwaukee in 1969, dealing with health law.

The design of the project was the joint effort of some faculty of the Wisconsin Law School, the Wisconsin Medical School (Department of Preventive Medicine), and representatives of the Inner City Development Project, South Side Center (ICDP) in the inner-core south in Milwaukee. The two principal staff people from ICDP were full-time community organizers; they were responsible to a governing board of residents in the community. The law school faculty were those who were interested in developing a clinical training program at the law school. The goals of the medical school faculty were to involve the school in the broader social questions of the organization and delivery of medical services and to get medical students trained in these areas. Throughout all the initial planning stages and the operation of the project, the staff members of ICDP reported

back to their resident board, discussed the project with them, and obtained their approval.

When the project got under way, the day-to-day operations were supervised by one of the staff from ICDP. Two medical school faculty members and one law school faculty member put in about two days per week. There was some other consultation from time to time with faculty from the Marquette Medical School. The main student participation consisted of three students from law, two from sociology, one from medicine, and one from nursing. Occasionally there was also help from other medical students and some undergraduates. Residents of the community also helped in various ways.

Part of the work consisted of gathering facts on the distribution of health services, with particular emphasis on hospital care and the operation of Medicaid and Medicare. After several sessions with groups of residents in which we tried to ascertain their impressions and views of the problems, the students conducted a small survey in the area. One major aim was to determine the patterns of utilization of health care facilities by the South Side residents; that is, the extent to which they used different hospitals, clinics, private doctors, and specialists; how much knowledge they had of the health care facilities available; how much and what kinds of difficulty they had had getting medical care when it was needed; and how they felt they had been treated. In terms of Medicaid and Medicare, the aim was to find out whether the residents were aware of the program, how they became aware, the extent of their knowledge about the available benefits, how they actually used the program, and the problems they had encountered either in receiving certification or in receiving treatment.

The project also pursued the operation of Medicaid at higher levels. Interviews were conducted with hospital administrators and staff, public health nurses, intake workers in the Medical Assistance Division of the county welfare department, personnel at the State Department of Health and Social Services, and administrators at Blue Cross-Blue Shield who deal with Title XIX claims from providers of medical care. We were interested in finding out the extent to which hospitals accept Title XIX patients, patterns of referral by private doctors, how discretion is exercised by the welfare departments, the amount of information given to recipients, and the views of these various officials on their problems under the program.

The law students worked on developing a handbook on health law rights that could be used by residents and their organizers. Aside from uncovering problems as revealed in the statutes and regulations, much of their information on issues was obtained from periodic meetings with residents, from discussions with welfare and health people, and from the survey data. The handbook, when completed, will cover statements on the available facilities, benefits, how people get their participation cards, what the two types of cards mean, what their rights are under the program, and what to do if they run into any difficulties.

Additional legal research was started on the obligations of hospitals to accept poor people and people under the Medicaid program as set forth in federal and state law. Additionally, there were questions raised about the unqualified right of doctors to discriminate among patients.

Inquiry was also started into the Milwaukee Hospital Area Planning Commission. The project was concerned with the structure, personnel, and powers of this organization with particular emphasis on its obligations, under federal law, to have resident membership.

So far the project sounds a lot like impact analysis and sociology of law research. Where was the action? There was no doubt in practically everybody's mind that there was a dual system of law being applied in the health field and that the research was pointing toward the development of health advocates for the poor and litigation activity. In addition, the staff at ICDP and the residents who were active in the project were clearly of the opinion that the primary goal of the project was to lead the development of a community health center in the South Side. Most of the poor people had to go to the county hospital, which was a long distance away. Moreover, there were constant complaints of long waits, shoddy if not rude treatment, failure on the part of doctors to disclose information, insensitivity, and so forth. These people wanted their own health facility under their control and direction. In this way, medical facilities could be made more responsive to community needs. As a first step toward this development, ICDP and the residents, together with the Wisconsin Medical School faculty, began working on a proposal for a storefront health center, staffed primarily by health advocates. It was felt that this would develop the need for a community health center.

Of course, the project did not accomplish all it set out to do, and work is being continued. In fact, one of the implicit assumptions about action-demonstration research is that it continually uncovers and develops new problems. Work continues as long as the problems of the poor continue. But I have described enough to illustrate some of the strands of ideas that lead to this type of approach and to discuss some of the problems raised by this type of activity. The appeal is to faculty and students who want "to do something." By this they mean something that is practical, that has an immediate payoff for the poor, and most importantly, addresses itself to what they conceive are the burning issues of today.

ACTION-DEMONSTRATION: SOME CONSIDERATIONS

The problems of this type of approach can be discussed from two points of view—the university, and the community. From the university's standpoint, the basic question is whether this type of work belongs in an academic institution. These arguments are very familiar and need not be elaborated. There are clinical

and practice programs in the university and they can pose considerable problems to the function of providing detached, scholarly knowledge. As we in the law schools well know, the influence of the practicing bar can be very deadening. Social work schools and medical schools experience similar difficulties. This is not to condemn the use of practical knowledge and experience or clinical training. It is only to say that it has often proved difficult to direct along educationally rewarding lines and it is something that has to be handled with great skill and, most importantly, with a great amount of supervision. The action-demonstration approach has a very heavy practice orientation. There is a strong tendency for the students to look to the people in the field, professional as well as community leaders, for the definition of problems and solutions. This poses a serious problem for the university. The fact that the students turn to those in the field because the university may have nothing to offer only exacerbates the issue.

I think that there is much to be said for the argument that action-demonstration research generates a particular, unique kind of data that thus far has eluded other types of research. By doing things in the field, new issues are uncovered, different insights may be gained. Most important, it is an attempt to break the passive acceptance of dependent people. If social change will come about only when the disenfranchised become strong enough to demand it in the political arena, the expectations and attitudes have to change. There has to be a recognition that there is something better and that it is capable of being acquired. But the quality of these data must be assessed. The history of social welfare is littered with abortive reforms based on wholly inadequate knowledge as to both problems and solutions. The data-gathering aspect of action-demonstration research is particularly suspect. Those in the field usually have very fixed ideas as to what is wrong and how to go about correcting it, and, willy nilly, the research had better support these notions. There is no shortage of experts who can tell you what it is really like in the community.

The data that were gathered in the Milwaukee Health Law Project serve as a good example. Contrary to expectations, most of the residents of the South Side ghetto had private doctors and used them; they also used the county hospital. Although they complained about the long waiting time, they had very few other complaints. This was a very small study, but one could say that it seemed to question the need for a neighborhood community health center. On the other hand, ICDP and the active residents disagreed. They maintained that the people surveyed were grateful that they got well and for this reason overlooked, forgot, or repressed indignities or inconveniences. Besides, they had no experience in how much better a community health center would be for them. On the basis of my own research with welfare recipients, I lean toward this view. To give one small example, a significant number of welfare recipients in my studies say that they do not mind unannounced caseworker visits even though they have

telephones and it would be quite easy for the caseworker to call. Other recipients, where the caseworker does call, say that they would object to the unannounced visit. On a strict value preference, I think that caseworkers should call in advance. I would like to require this; in such a case the first group would also object to unannounced visits.

But what is happening in both my position and the ICDP position on the community health center is that the data are being thrown out if they conflict with value preferences. Moreover, there is a real danger that these preferences are being imposed. We may agree with the results, but the disenfranchised may still be manipulated on the basis of largely a priori knowledge. Thus, there is a heavy element of paternalism.

Action-demonstration research should also be suspect for another reason: it is university-based. Those in favor of action-demonstration passionately want the university to make a major commitment to social reform. Whether or not the university should take such a role is a debatable question; what I am concerned with is whether the university can deliver. The university is, I need hardly remind the reader, well connected with interests that tend to favor the status quo. Social reform, if it is to be meaningful, cannot be a matter of intellectual games; it involves a serious challenge to vested interests. The question is whether the university and its faculty can take the heat. Professors are a very privileged group who have, by and large, sought a sanctuary rather than a battlefield. There is a real danger that the university will find itself in a conflict of interest and seek to co-opt the community organization.

CONCLUSIONS

Although there are considerable problems with action-demonstration research, there is no doubt that it will take up a significant amount of faculty and student energy, at least in the immediate future. This is the temper of the times. And if the law schools will not take a hand in it directly as an integral part of their curriculum, then the "turned on" students and faculty will do it anyway. In view of the existing state of legal education and research, one can hardly blame them for that.

The task is to figure out the priorities of the various research strategies, how they fit together, and the available talent. In my own opinion, the central research program should be the scientific study of law approach because I believe that an academic institution's fundamental commitment is to the advancement of basic knowledge. And I think that policy studies and recommendations should be based on this type of research. However, for reasons which I spelled out in another paper (Handler, 1968), I do not think that this type of research program will or should be in the mainstream of a professional

school. I am thinking of true social science research, and although law students should be familiar with this work, I do not think that they have to be social scientists as well as lawyers. Law schools, however, can do a considerable variety of law-in-action studies, a lot of other types of empirical though nonquantitative work, and, of course, action-demonstration research. This type of research, as I have indicated, generates very valuable information, the type that social scientists sorely need.

NOTE

1. A good example would be the work of the Vera Foundation and others, contributing to bail reform.

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