

1-1-1983

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Recommended Citation

Franklin E. Zimring, Where Do the New Scholars Learn New Scholarship, 33 J. Legal Educ. 453 (1983)

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Where Do the New Scholars Learn New Scholarship?

Franklin E. Zimring

The first generation of American legal realists overdid it, but not by much, when they characterized much of conventional legal scholarship as narrow, dry, and unconnected with the emerging sciences of human behavior that must be the raw material for effective and humane legal regulation.¹ It is by now an oft-told tale that the realist prescription was far inferior to the realist diagnosis. Some of the best and the brightest of a generation of legal academics immersed themselves in what they considered empirical research; often, however, the process degenerated into a mindless gathering of data, or so their critics said.²

There have been sparkling exceptions to the inability of academic American law to get its feet wet in effective empirical research. I betray an institutional affiliation when I mention Kalven and Zeisel's work on the American jury as one sterling example.³ Still, there are inherent flaws in the way in which law professors learn to be legal scholars that inhibit the broadly based behavioral studies we all would like to happen. In part the problems relate to the socialization of legal academics. In part these problems are economic (aren't most?). In part they relate to the scale and compartmentalization of law as a professional education, what I shall call the Noah's Ark theory of how to build a great law school.⁴

I do not mean to suggest the situation is hopeless or even critical. Research sophistication in American law schools has improved vastly over the last two decades. The improvement is a combination of dedicated effort and blind luck. The effort of academic leadership in this endeavor is well known. Our

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1. John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *Buffalo L. Rev.* 459 (1979); John H. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *Buffalo L. Rev.* 195 (1980).
2. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, *supra* note 1.
3. Harry Kalven & Hans Zeisel, *The American Jury* (Boston: Little, Brown, 1966).
4. Get two but no more than two of the best of everything. And American law now covers an awful lot of everything. Two may not be sufficient critical mass for sustained empirical study.

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blind luck was the collapse of the market for research talent in most behavioral sciences and in the humanities. But the need for research training is still acute, and the issue is related not merely to what legal academia learns but also to the kind of lawyers the enterprise produces and the influence of their professional lives on the larger society. Under the circumstances, a brief rehearsal of the problem of learning research seems warranted. And if my fantasy life be indulged, one possible partial solution seems worth discussion.

The training and socialization of the "blue-chip law professor" has become almost amazingly routine. A fine record at a good university generates a ticket of admission to a first-rate law school. In the first year of law school, the student absorbs legal culture in large classes with distinguished results. This in turn leads to the law review, a *Lord of the Flies* social organization that is still a great success in teaching traditional legal research and writing. (Attempts at more ambitious empirical research have been uneven, even in the top journals.) Throughout the rest of law school our blue-chip prospect acquires knowledge in large classes, an occasional seminar, and from his peers on the editorial board of the law review. Rarely, a relationship of mentor to student develops between a law professor and the blue-chip law student. However, there is little of this experience in law schools compared to the graduate physical-science laboratory or the one-to-one relationship of doctoral students and professors in the social and behavioral sciences.

The closest analogy in graduate education to the blue-chip prospect's progress through law school is medical school. As in law, mentor-student relations are not developed during medical school. It is residency and postdoctoral fellowships that form the close personal relationships which pass on research traditions and involve our future geneticists and surgical innovators in the top of the state of their art.

The blue-chip prospect serves his "residency" on the Circuit Court of Appeals and the United States Supreme Court. This is the legal scholar's opportunity for one-to-one relationships and concentrated study. That is how men like the late Felix Frankfurter and William Brennan generated fan clubs in academic law that lovingly returned to reunion dinners to honor them, the mentors. This is also why the young law professor often wishes to specialize in constitutional law and federal procedure, using the concepts, philosophies, and analytic procedures of the judicial process as his basic tools.

The young teacher is usually not deeply informed about specific aspects of the legislative or regulatory process. This is the kind of in-depth knowledge that could be acquired by serving a second "residency." But opportunity strikes too soon. The best and the brightest are the object of hot competition between major law schools and are offered immediate entrance into the classroom and the world of legal research. Many, perhaps too many, find it an offer they cannot refuse. It is then only "on the job" that the broadening process can take place. But this is often difficult given the demands of the classroom and the felt need for instant productivity that is epidemic among young professors. The path of least resistance is the traditional legal scholarship they have learned so well.

A common variation on the progress of the blue-chip prospect is to spend a few years "in practice" in a large and distinguished law firm. It is a broadening experience, a second residency, and it develops subject-matter specialization in a way that clerkships do not. In areas such as civil procedure, antitrust, taxation, labor law, and corporate law, this second apprenticeship generates a knowledge base that can be exploited in initial research efforts and in the classroom. It is also a second residency that brings high financial rewards and a realistic test of law practice as an alternative to academic law.

Law practice has provided law schools with an entering cohort of individuals diversified in subject matter if not research expertise. The law library is still the king of the data bases, and the *Index to Legal Periodicals* and recent cases the stuff of legal research.

Even the most fervent practicing legal realist cannot deny the strengths of this system. Rhetoric, rigor, and a sense of appropriate analogy are taught more effectively through this process than in all but the very good departments of philosophy. No one would wish for a professionally oriented law school that did not contain a faculty in which a least half of the teaching professors were descended from this main line of legal analysis and almost all teaching faculty had mastered and benefited from the rigor of the traditional legal analytic education. The crucial question is, How can we supplement skills to enhance the research competence of those who wish to engage in legal studies with a broader base of research tools?

There are a variety of approaches that have been the subject of experimentation over the last decades. For purposes of economy, let me group them under four headings: the "do-it-yourself" model, the collaborative model, the double-doctorate model, and the "import an expert" model.

Historically, the do-it-yourself philosophy has a long pedigree in empirical legal studies. Despite the implied warning in the phrase "brain surgery self-taught," the legal academy includes a fair number of eccentric and often brilliant empirical researchers self-instructed in the broader empirical methods of the social and behavioral sciences. Jerome Frank, Underhill Moore, and the Johns Hopkins Institute serve as early examples of this pattern of work. More recently, Frederick Beutel, David Chambers, and many others have joined the legion of the self-instructed.⁵

The results have been mixed. At its best, self-instructed research in law and the behavioral sciences is a wonder. Unconstrained by the narrowed perspective of compartmentalized behavioral and social science, the law professor can develop new approaches and new tools. At its worst, and many horror stories are associated with an earlier historical period, the law professor reinvents the wheel but gets it wrong. Whether the research is good or bad, however, this process of acquiring information is unsystematic and inefficient. Each generation must reinvent its own wheel. The work of the do-it-yourself empirical researcher cannot be passed on to the next generation

5. See Frederick K. Beutel, *Experimental Jurisprudence and the Science of Law* (Bielefeld, Germany: Gieseking Verlag, 1975); David L. Chambers, *Making Fathers Pay: The Enforcement of Child Support* (Chicago: Univ. of Chicago Press, 1979).

because of the lack of close working relationships between mentor and student in law school. Professor Jones can do good research or bad research, but his students will only distantly perceive the skills he has taught himself. Typically, his colleagues will receive neither the benefit nor the burden of his self-instruction. Research traditions, the accretive processes of skill development in institutions, are stillborn.

The logic of the collaborative model is straightforward: the law professor seeks out a collaborator with appropriate skills in the behavioral sciences and the research task is completed with the collaborators contributing the skills specific to their particular disciplines. There is a rich history of such collaboration, but there is also a series of problems associated with pure collaboration which have rarely been successfully resolved. The first problem is the difficulty of defining in advance what skills, what questions, and what methods should be used in a particular social-legal study. Thus, it is difficult to select the most appropriate discipline before one has identified the right question and isolated appropriate methods for answering that question. The second problem is that bridges between schools of law and other departments, the institutional structures that facilitate collaboration, are shockingly uncommon. The third problem, referred to above, is the usual inability of interdepartmental collaboration to generate research traditions *within* the law school. Finally, there is a tendency for the legal academic to be coopted by the discipline of his collaborator. The analogic, eclectic, and inexact nature of "legal science" creates unease. The closer resemblance of other disciplines to exact science exerts a magnetic force that captures the imagination of the law scholar. Whether the law professor becomes a pseudo-sociologist, a pseudo-economist, or a pseudo-psychiatrist is not the issue; far too often, the initiate will leave behind the skills and skepticism of the law-trained scholar in pursuit of an intellectual land of Oz.

This last point, a "conversion" phenomenon, is one of many disabilities associated with the double-doctorate model. It is in many senses ideal to have individuals with doctoral level training in both law and a science or humanity closely associated with legal scholarship. Indeed, in recent years the legal academy has enjoyed a supply of bright, energetic, and highly trained rereads from the humanities and social sciences who have come to law school in pursuit of a second career. But reversing the sequence, pursuing formal doctoral training in another discipline after completing law school is uneconomical, inefficient, and unlikely for the truly blue-chip law professor of the future.

The diseconomies of double-doctorate work are two. First, the economic sacrifices required to pursue a law degree and a formal doctorate are formidable. Second, much of the formal coursework required for doctoral degrees, even the fabled joint degrees of the late 1960s and early 1970s, is wasted on individuals who have already learned to read and think. Related to this is the sterile and often sophomoric nature of dissertation research. The irony is that the brilliant young law graduate has both too much and not enough training to conduct empirical research: too much for a return to the boot camp of graduate education, not enough for the independent pursuit of basic knowledge in law-related fields.

Then why not send out for an expert? Why not, indeed? Psychiatrists, sociologists, economists, and other beasts have been invading American law schools for a number of decades. Despite their eminence, the invasion has usually not been a success. Typically, a sociologist or psychiatrist fondly anticipated by the law school finds himself relegated to the ghetto, far removed from most of his colleagues and from the mainstream of academic American law. We have been bringing in outside experts for forty years, and the legal academy has yet to extract anywhere near the benefits that could be gained from their presence. On occasion, of course, the outside expert has worked brilliantly. Again, I hope the reader will forgive my provincialism, but Professors Simons, Director, and Coase at the University of Chicago are praiseworthy examples, and economics has achieved a high prestige in academic law.⁶ But usually the outside expert is escorted down the hall, away from the action, and far away from the mainstream of professional education. In the sociometrics of the law school, the non-law-trained expert is frequently regarded as a second-class citizen.

What can be done? What I have in mind is a residency, perhaps after clerkship and before the formal obligations of law teaching. What if a private foundation were to assure two or three years of working closely under a person who knows what he is doing in empirical research? The prospect certainly bodes no ill for legal education and legal scholarship. Whether it will improve the breed is an open question.

At least ten major law schools have or are affiliated with sufficient expertise in particular areas of empirical research to establish limited training programs. And while some of these schools pride themselves on "teaching teachers," they have made no conscious effort to attract and train "cream of the crop" law students preparing for academic life. At present the graduate study of law is usually regarded as a mechanism for upgrading credentials and only rarely involves close collaboration between faculty and graduate students. It is currently disdained by the best and the brightest, and this is understandable. A more intensive enterprise would be expensive both monetarily and in terms of the attention senior faculty would have to devote to the nurturing of research training.

On a per-case basis, the program would cost up to \$50,000 a year. And there is, of course, no assurance that the institution that trains a blue-chip prospect will be able to keep him. Finally, it is not clear how many top prospects could be tempted to defer further the means to a career.

An alternative to such a "research residency" is to train young scholars, after an initial appointment, through strategies of released time or leave of absence to institutions of active specialists. The advantage of this plan is that highly recruited prospects would not have to defer tempting opportunities. The disadvantage of such a program relates to the typical short time-frame to tenure decision making. It is unrealistic to think that a formal leave could be more than a calendar year given three- and four-year schedules between initial appointment and tenure decision making. One year is an insufficient

6. *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 *J. L. & Econ.* (1983).

period for advanced medical residencies and would be inadequate, standing alone, for complete research training. If the "resident" could stay in touch with his research program during the year and return in the summer months, perhaps a research residency on the installment plan could be achieved. This "Martha's Vineyard" strategy in which special-area scholars from many home campuses work together in the summers has characterized the Chicago Center for Criminal Justice for some years.⁷

Much will depend on the perceived prestige of the program at the very beginning. It would be ludicrous to suggest that a flood of eager and well-trained, law-based scholars would issue from such a program. But even a trickle would be important to the research competence of the law schools of the future.

7. Many senior scholars continue to return to the Center in pursuit of the peer support that a critical mass of subject-matter specialists provides. One would hope these visits improve the quality of individual research. They certainly make scholarship less lonely.