

WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1971

Spring, 1971

Number 2

INTRODUCTION

LUCIUS J. BARKER*

In recent years there has been an accelerated emphasis on the relation and interdependence of law and the social sciences.¹ Some of this emphasis is undoubtedly due to a continuing intellectual concern to overcome interdisciplinary barriers to learning and scholarship.² Interwoven with this general concern, however, and perhaps the most crucial catalyst toward fostering closer relationships, especially as between law and social sciences, is the fact that in the last two decades American judges have been called upon to deal with the really tough political-social problems of our times, *e.g.*, racial segregation, legislative reapportionment, voting and political participation, and rights of persons accused of crime.³ This resort to the judiciary, and the posture taken by the Warren Court on these problems, have made much more visible the crucial role of law and courts as instruments of social change. As pointed up long ago, judicial decision-making on such matters

* Gellhorn University Professor of Public Affairs and Political Science, Washington University.

1. For a discussion of the potential importance of Social Science data to litigation see Greenberg, *Social Scientists Take the Stand*, 54 MICH. L. REV. 953 (1956). See generally J. STONE, *LAW AND THE SOCIAL SCIENCES* (1966) [hereinafter cited as STONE]; Kalven, *The Quest for a Middle Range: Empirical Inquiry and Legal Policy*, in *LAW IN A CHANGING AMERICA* 56 (G. Hazard ed. 1968) [hereinafter cited as HAZARD].

2. See Goldstein, *The Unfulfilled Promise of Legal Education*, in HAZARD 157. See also Kalven, *The Quest for a Middle Range: Empirical Inquiry and Legal Policy*, in HAZARD 56. For an overall account of the problems and prospects of reforms in higher education see generally L. HEFFERLIN, *DYNAMICS OF ACADEMIC REFORM* (1969); W. MARTIN, *CONFORMITY* (1969).

3. For commentary on the role of the Supreme Court in these areas see L. BARKER & T. BARKER, *CIVIL LIBERTIES AND THE CONSTITUTION* (1970); A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISIONS AS AN INSTRUMENT OF REFORM* (1968); *THE WARREN COURT: A CRITICAL ANALYSIS* (R. Saylor et al., eds. 1968).

requires more than just "legal" information; other types of information are required as well.⁴ These problems are so complex and varied that they go beyond the judicial process. They affect the entire governing system. They raise fundamental questions about the values of society, about the efficacy of law, and about the capacity and capability of our legal institutions—courts, legislatures, and administrative agencies.⁵

While political scientists have long been concerned with the study of law and legal institutions,⁶ there is little doubt that recent activity of courts as instruments of political and social change has stirred this interest anew. Indeed, since political science is concerned with the "authoritative allocation of values,"⁷ and with "who gets what, when, how?"⁸ its concern with law and legal institutions is obvious. Recent experience has shown vividly that judges as well as legislators and administrators participate in lawmaking and are part of this "allocation-determination" process.⁹ Consequently, courts, just as other institutions, are ripe for political and social science analysis. Understandably then, political scientists and others concern themselves with such matters as the role and function of courts and law in society,¹⁰ the relative benefits and deprivations of law for various segments of the

4. The prime example here, of course, is the social science data submitted to the Supreme Court in a brief prepared by Louis Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908). For more discussion on the use of such data see *COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 319 *et seq.* (W. Murphy & C. Pritchett eds. 1961) [hereinafter cited as *MURPHY & PRITCHETT*]; see also Greenberg, *Social Scientists Take the Stand*, 54 *MICH. L. REV.* 953 (1956).

5. See generally H. JONES, *THE EFFICACY OF THE LAW* (1969); Friedman, *Legal Culture and Social Development*, 4 *L. & SOC. REV.* 29, esp. at 39-44 (1969).

6. See Grossman & Tanenhaus, *Toward a Renaissance of Public Law* and Pritchett, *The Development of Judicial Research*, in *FRONTIERS OF JUDICIAL RESEARCH* (J. Grossman & J. Tanenhaus eds. 1969) [hereinafter cited as *FRONTIERS*].

7. D. EASTON, *THE POLITICAL SYSTEM* (1965).

8. H. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1950).

9. A comment by C.H. Pritchett seems especially appropriate here: "The conception of judges as part of the American political process rather than as 'a unique body of impervious legal technicians above and beyond the political struggle' is not happily received by all. Admittedly, the joinder of politics and law creates problems—semantic, philosophical, and practical. Law is a prestigious symbol, whereas politics tends to be a dirty word. Law is stability; politics is chaos. Law is impersonal; politics is personal. Law is given; politics is free choice. Law is reason; politics is prejudice and self-interest. Law is justice; politics is who gets there first with the most. The motto over the portals of the Supreme Court building is 'equal Justice Under Law' not 'equal Justice Under Politics.'" Pritchett, *The Development of Judicial Research*, in *FRONTIERS* 31. See also M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* esp. ch. 1 (1964) [hereinafter cited as *SHAPIRO*].

10. For a good collection of social science research focusing on courts and law see R. SCHWARTZ & J. SKOLNICK, *SOCIETY AND THE LEGAL ORDER* (1970). See also Koch, *Law and Anthropology: Notes on Interdisciplinary Research*, 4 *L. & SOC. REV.* 11 (1969).

population,¹¹ the use of courts by interest groups to achieve policy objectives,¹² the nature and operation of the judicial process and the participants in that process,¹³ the dynamics of judicial decision-making,¹⁴ factors determining the impact of and compliance with court decisions,¹⁵ the consequences of judicial policies,¹⁶ and the role and interrelation of courts, legislatures and administrative agencies in the overall governing process.¹⁷

These topics have not always been of central concern to political scientists. Though there remains some controversy within political science (as is true of other disciplines) over the various approaches to the study of social phenomena, including law, there can be little doubt that newer approaches (and methods) have broadened considerably the scope and content of what political scientists now study. Traditional "public law" political scientists, for the most part, studied appellate court decisions, mainly those of the U.S. Supreme Court. These decisions were used primarily to trace the historical development of legal doctrines.¹⁸ There was some but not much systematic attention given to the dynamics of judicial decision-making; nor was much consideration given to placing court decisions or courts in broader political perspective.

However, in the 1950's, "public law" political science, in keeping with political science generally, began to apply other research methods and approaches to the study of political phenomena. Herman Pritchett's *The Roosevelt Court*¹⁹ and J.W. Peltason's *Federal Courts in the Political Process*²⁰ portended the future course of political science with

11. See, e.g., H. JACOB, *DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES* esp. at 20-23 (1969) [hereinafter cited as JACOB].

12. See, e.g., C. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP AND THE RESTRICTIVE COVENANT CASES* (1959); Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 J. POLS. 41 (1967).

13. See generally T. JAHNIGE & S. GOLDMAN, *THE FEDERAL JUDICIAL SYSTEM: READINGS IN PROCESS AND BEHAVIOR* (1968); MURPHY & PRITCHETT.

14. See generally *JUDICIAL DECISION-MAKING* (G. Shubert ed. 1963).

15. For an extensive compilation and discussion of the literature, problems, and prospects with regard to "impact" and "compliance", see S. WASBY, *THE IMPACT OF THE U.S. SUPREME COURT: SOME PERSPECTIVES* (1970) [hereinafter cited as WASBY].

16. *Id.*; see also materials cited in note 5 *supra*.

17. See, e.g., M. SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* (1968); Barker, *The Offshore Oil Cases*, in *THE THIRD BRANCH OF GOVERNMENT* (C. Pritchett & A. Westin eds. 1963).

18. For a brief review of the development of judicial research in political science see materials cited in note 6 *supra*; SHAPIRO 5 *et seq.*

19. C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES* (1948).

20. J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* (1955).

respect to the study of courts and law. Pritchett, by using quantitative methods to consider why judges decide cases as they do, focussed upon judicial behavior and the determinants in judicial decision-making. His work foreshadowed what is popularly known today as the "behavioralist" approach to the study of law by political scientists.²¹ Peltason, in developing the "political process" approach, utilized the "group theory" of politics²² as a framework in which to view the role of courts in the political system.²³ Courts were conceptualized as arenas of group conflict not unlike legislative bodies, where particular decisions indicated judicial support of certain interests as opposed to others. These two approaches have done much to revitalize the study of courts and law by political scientists.²⁴ They have led us to ask new and different questions, to restudy old data and unearth new data, and in the process gain new insights into the role of courts and law in political systems.

While the "behavioral" and "political process" approaches overlap, they do bring to bear somewhat different emphasis. The behaviorists, for example, focus on internal factors affecting judicial behavior, such as concepts of judicial role, the political and social backgrounds of judges, and small-group analysis as a way of understanding decision-making in collegial courts.²⁵ Though not unconcerned with internal factors affecting judicial decision-making, those who use the "political process" approach tend to focus on courts in broader political perspective, *e.g.*, their involvement in resolving-accommodating political conflict, and their role and functions in the overall governing system.²⁶

21. For a description of this approach (in contrast to others) by one of its leading exponents see G. SHUBERT, *JUDICIAL POLICY-MAKING* esp. at 105-08 (1965). For commentary on "behavioralism" and the application of quantitative methods to judicial behavior see STONE 50-85.

22. Peltason generally based his work within the theoretical constructs stated by Arthur Bentley [*THE PROCESS OF GOVERNMENT* (1949)] and David Truman [*THE GOVERNMENTAL PROCESS* (1951)].

23. Also influential in this regard, and published about the same time as Peltason's study, is V. ROSENBLUM, *LAW AS A POLITICAL INSTRUMENT* (1955).

24. Shapiro refers to these research developments as bringing about the "new" or "political jurisprudence". "Such a jurisprudence is not, of course, an abrupt leap forward (or backward). Its roots lie in two earlier jurisprudential philosophies, judicial realism and sociological jurisprudence." See SHAPIRO 6, 15 and generally 6-15; see also Grossman & Tanenhaus, *Toward a Renaissance of Public Law*, in *FRONTIERS* 6-8.

25. See generally *A Symposium: Social Science Approaches to the Judicial Process*, 79 *HARV. L. REV.* 1551 (1966); G. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959); see also materials cited in note 21 *supra*. (Of course, this attempt at distinction of methods or approaches should not be construed as an effort to classify researchers or research accordingly. This would be much too simplistic for the sophisticated research now taking place, some of which embraces aspects of several methods or approaches.)

26. See notes 20, 23 *supra*.

Only recently, say within the last decade or so, have political scientists begun to fully use these research foci to study more than the U.S. Supreme Court. Like many others, political scientists have been overawed by the so-called "upper-court myth." But in any event, and as mentioned previously, these research methods have done much to expand the scope and content of what we now study. Indeed, we are increasingly undertaking research that focuses not only on other federal courts, but state courts as well. Kenneth Dolbeare's *Trial Courts in Urban Politics* (1967) and Beverly Cook's *The Judicial Process in California* (1967) are pioneering efforts in this direction.²⁷

Political scientists have given a great deal of attention to the use of courts in dealing with problems of great public interest such as racial segregation and legislative reapportionment. Nonetheless, it is true, as law professor Robert Dixon laments, that few political scientists today engage in substantive research on these important issues.²⁸ But whether this represents, as Dixon suggests, a "withdrawal from conflict and problem-solving, into the more esoteric and safer area of methodology," is far from clear.²⁹ To the extent that methodology becomes a fetish or preoccupation of political scientists, Professor Dixon's concern is well-founded. But, as discussed earlier, such research methods represent attempts to view these very problems (and others as well) from different perspectives—perspectives that may add to rather than duplicate existing knowledge. However, we do need much more research of all kinds on questions of social policy. Such research is particularly needed at the state and local levels, especially in terms of the impact and consequences of legal policies, and compliance with those policies.³⁰

While these great public issues deserve our continued concern, too long have political scientists neglected the unheralded yet vastly important area of civil law that has to do with the everyday use of law and courts by individuals in their relations with one another. Here is an area that does much to shape the perceptions that many have toward law

27. B. COOK, *THE JUDICIAL PROCESS IN CALIFORNIA* (1967); K. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS: STATE COURT POLICY IMPACT AND FUNCTIONS IN A LOCAL POLITICAL SYSTEM* (1967); see also Vines, *Courts as Political and Governmental Agencies*, in *POLITICS IN THE AMERICAN STATES* ch. 7 (H. Jacob & K. Vines eds. 1965). For a recent study dealing with lower federal courts see R. RICHARDSON & K. VINES, *THE POLITICS OF FEDERAL COURTS* (1970).

28. R. Dixon, *Political Science Research in Public Law: Who is Listening?* (paper delivered at annual meetings of the American Political Science Ass'n, Los Angeles, California, September 8-12, 1970).

29. *Id.* Mimeographed copy at 6.

30. For a review of research in these areas see WASBY.

and the legal system and toward government in general. Fortunately, we are beginning to focus on such topics. Take, for example, the work on garnishment and bankruptcy by Herbert Jacob.³¹ Conceptualizing courts from a "consumption perspective", Jacob describes the services offered by courts to individuals in this general area of the law and concludes that "all of the courts' decisions have some political relevance."³² Jacob observes that:

When courts decide automobile accident claims, divorce cases, eviction suits, and garnishments and bankruptcies, they make the public's power available to participants and administer public policy. The consequence is the distribution of significant benefits and deprivations. The resulting allocation of values is as authoritative and significant as that achieved by the public schools, the welfare department, or the tax system. Although participants do not ordinarily identify court outputs with politics, court services are an integral product of an existing political regime.³³

When one considers the care and thoroughness of this research effort, Jacob's observations cannot be taken lightly. His work at once reveals the crucial importance to the political system of this everyday area of the law and this "routine" business of courts and lawyers. In this connection, the expansion of legal aid services underscores dramatically the potential importance and benefits of law for those who have long suffered deprivations by others' use of law and courts.³⁴ The legal aid development also represents stark recognition of the crucial role that courts and law can perform in attacking social problems. In any event, continued social science research along these lines, building upon what we are learning from our study of the great public law issues, and what we are beginning to explore on a cross-national/cross-cultural basis,³⁵ should lead us to a better understanding of the overall functions (and limitations) of law and courts in political systems.

Jacob's "consumption perspective" provides a useful framework for viewing how those engaged in law and the social sciences might profit from the "services" of the other in their respective fields. However, university and professional structures (and the persons who man them)

31. JACOB.

32. *Id.* 132.

33. *Id.* 132-33.

34. See generally Stumpf, *Law and Poverty: A Political Perspective*, 1966 WIS. L. REV. 694.

35. See, e.g., T. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF COURTS* (1970); G. SCHUBERT & D. DANIELSKI, *COMPARATIVE JUDICIAL BEHAVIOR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST* (1969).

have tended to impede rather than to facilitate this profit-sharing.³⁶ Fortunately however, insofar as law and social sciences are concerned, some steps are being taken to overcome these traditional barriers to scholarship and knowledge.³⁷ But whether these steps are mere symbolic gestures geared to keep with the "in" thing, or are effecting meaningful and concrete changes in our structures, in curricula, teaching and research, and in the practice of our professions, remains to be seen.³⁸ In any event, the potential benefits (and costs) of such developments can best be measured when those in varied yet related disciplines and professions come to know more about the other.³⁹ Symposia of this nature can promote such knowledge.

In fact, the idea for this particular symposium was developed when the current editor-in-chief of the *Law Quarterly* was a member of my Honor Seminar in the Arts and Sciences college.⁴⁰ We both thought that the contributions (and potential contributions) of political and social scientists to the study of courts and law might prove of interest to a law review audience. The idea was thus born and this symposium is the result.

Unlike most symposia this one is not restricted to a single topic. The common theme of this endeavor, and there is even an exception to this, is that the research and ideas presented are those of professionally trained

36. For a perspective and provocative analysis of the situation in legal education see Goldstein, *The Unfulfilled Promise of Legal Education*, in HAZARD.

37. Harry Kalven, Jr. summarizes these developments as follows: "There are now social scientists who are full-fledged members of law faculties; for over ten years law teachers have been included in the select group of social scientists who spend a year at the Center for Advanced Study in the Behavioral Sciences at Palo Alto. There has come into existence a special association of lawyers and social scientists, the Law and Society Association, with its own journal. There are the American Bar Foundation, and the Walter Meyer Institute to sponsor interdisciplinary researches. There have been summer training institutes under the auspices of the Social Science Research Council, and the joint auspices of the American Association of Law Schools and the Russell Sage Foundation. And so on." Kalven, *The Quest for a Middle Range: Empirical Inquiry and Legal Policy*, in HAZARD 56, 57-58. (This writer himself benefitted from the "Liberal Arts Fellows" program in law and social sciences at the Harvard Law School. Many other such programs are in various stages of development.) For an overall assessment of the problems and progress in higher education generally, see L. HOFFERLIN, *DYNAMICS OF ACADEMIC REFORM* (1969); W. MARTIN, *CONFORMITY* (1969).

38. See Goldstein, *The Unfulfilled Promise of Legal Education*, in HAZARD 157, 161-66.

39. In a roundtable on curriculum reform in legal education a statement by Walter Gellhorn captures vividly a key variable to success in this and other areas. Said Professor Gellhorn: "We might as well be legal realists about the fact that you as a professor can't tinker very much with what another professor is doing." *Roundtable on Curricular Reform*, 20 J. LEGAL ED. 387, 420 (1967).

40. This honors seminar in American government, offered during the Spring semester 1970, focused on the topic "Law, Politics, and Legal Aid".

political scientists. But the exception—a contribution by a recent law school graduate—underscores the basic purpose of this symposium: to show the insights and values that can be gained by examining a variety of topics from social science perspectives.