The Research Program of the American Bar Foundation

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The Research Program of the American Bar Foundation

The American Bar Foundation, organized in 1952 as an integral step in the creation of the American Bar Center, is the largest legal research institution created in the United States since World War II. The present Administrator of the Foundation describes some of the broad and ambitious research programs it has attempted and some of the lessons it has learned. He also lists the Foundation’s current programs and some that are under consideration.

by Geoffrey C. Hazard, Jr. • Administrator of the American Bar Foundation

The American Bar Foundation was incorporated in 1952 as an integral step in the creation of the American Bar Center, the headquarters of the American Bar Association and its companion organizations. The objectives of the Foundation stated in its articles of incorporation were:

To study, improve and to facilitate the administration of justice; to promote the study of the law and research therein, the diffusion of knowledge thereof, and the continuing education of lawyers; also to foster the integrity of the legal profession; to publish significant materials on legal subjects; to maintain a law library; and to promote legal education.¹

The research program of the Foundation was formally initiated in 1954 with the publication of The Administration of Criminal Justice in the United States: Plan for Survey. This was the operational design for a project, conceived in the first instance by the late Justice Robert H. Jackson, for a comprehensive study of the processes of the administration of criminal justice. It is worthwhile even this long after the event to reflect briefly on the history of this project, for it illustrates difficulties with which the Foundation then had to contend and which to a large extent attend any attempt at empirical study of legal institutions.

The plan for the survey of criminal justice was later described as “the most ambitious and important research project which has been conducted by the Foundation”.² Indeed, the plan remains one of the most ambitious research proposals that has ever been advanced in the legal world. It called for a detailed study of all the processes of criminal justice from arrest to appeal in all types of communities in a dozen states from coast to coast. It contemplated both an intimate acquaintance with the subtleties of administrative operations and concrete, objective comparative data. The dimensions of the undertaking were not minimized by its initiators, among whom were some of the most thoughtful and sophisticated lawyers in the country. Nor were its dimensions unknown to its principal financial backer, the Ford Foundation, whose staff and leadership included some of the most thoughtful and sophisticated social scientists in the country. Indeed, it is precisely because those who conceived the project were so able that the problems inhering in the project are worthy of present attention.

Limitations Hamper the Project

The fact is that although intensive efforts were devoted to the criminal justice project from 1955 through 1957, physical, financial and indeed political limitations made it possible in that interval to do no more than the field work and preparation of a preliminary report of findings for cities in three states which had been made the subject of a pilot study. Since that time, these findings have been in the process of digestion and interpretation under the direction of Frank J. Remington, professor of law at the University of Wisconsin.

A series of commentary volumes based on the survey is in preparation. The first, on arrest, by Wayne R. La...
The Research Program of the American Bar Foundation

Faye, associate professor of law at the University of Illinois, was published in March, 1965. The remaining volumes, it is hoped, will come out during the forthcoming year. Proposals for selected studies on limited topics and with limited objectives have replaced the original plan for a large-scale, nationwide study patterned after the pilot project.

In retrospect the criminal justice research proposal appears much too broad and complex. Indeed, it is not an exaggeration to say that the Foundation’s research program staggered under the administrative and intellectual burden of that project and another equally broad and engulfing study of modern law practice and legal ethics. The consequent operational burden of that project and another limited objectives have replaced the original plan for a large-scale, national enterprise is not to reflect adversely on the past and certainly not, none within the preceding decade, in doing empirical research in legal institutions. The ambition manifested in the American Bar Foundation’s Plan for Survey was by no means unusual or, indeed, compared to many over-optimistic proposals that are being advanced in one quarter or another now.

My purpose in reciting this record of the early years of the Foundation’s research enterprise is not to reflect adversely on the past and certainly not to compare it invingly with a glowing future. Rather, it is to point out how terribly difficult, how complex, how time consuming and how expensive it is to study legal institutions empirically. Putting it another way, once it is decided that legal research shall extend beyond a study conducted in books—the cases and the statutes and the secondary sources—enormous difficulties in conception and technique are encountered, difficulties for which the lawyer’s formal training and (generally speaking) his practical experience simply do not equip him.

It has been necessary to learn, and to learn the hard way, how to do empirical research in legal institutions. Much of the learning took place in the Foundation. It is a testimonial to those who over the years have been the Foundation’s officers, staff and patrons—notably, the Ford Foundation, the American Bar Association Endowment and the Fellows of the Foundation—that this educational adventure persevered even in the face of recurrent disappointments. Fortunately, the Foundation’s program was balanced by successful completion of other, more modest projects.

Experience Was a Good Teacher for the Foundation

The salient lessons learned in the Foundation and elsewhere concerning empirical legal research are these:

1. Empirical research cannot produce evaluations of legal institutions. At most it can develop evidence of varying strength: There can be “hard” evidence, consisting of measured quantities of things or events identified with relatively sharp clarity and discrimination. There can be “soft” evidence, descriptive accounts of institutions and processes considered as a whole. What one obtains in the way of evidence, speaking generally, can be no more precise—no “harder”—than what one sets out to find.

2. The more precise the information sought, the more expensive, difficult and time consuming it is to discover it. The questions that lend themselves to precise answers at a reasonable expense are narrow and neutral. For example, one can find out that pretrial has some measurable effects on the outcomes of trials, and if sufficient time and money were spent one could determine other effects of pretrial, but one could not determine through empirical research whether pretrial is clearly a good thing. In consequence, the inherent general interest of a research question and the degree to which it is susceptible of precise proof are usually inversely related to each other, so that particular research can be either highly interesting or highly precise, but ordinarily not both.

3. The relative precision and consequently the value of the information developed in a particular project depend very largely on the rigor and thoroughness of the analysis of the problem that is made before going out after the evidence. To put the matter in more familiar terms, the evidence that will be developed by a research study depends, in the same way as the evidence developed at a trial, on a formulation of the issues at stake and an assessment of the evidence appropriate to illuminate those issues. Rigorous analysis of the issues is as important in field research as it is in any other legal enterprise. Field research is expensive; if it is done pursuant to faulty analysis, it will consume enormous amounts of money with little return.

4. The answer to the question whether in any particular project the aim ought to be to obtain relatively precise data, rather than seeking out more general, schematic or conclusory information, calls for a balancing of conflicting considerations. These include the present state of knowledge and of research in the field in question; the relative public importance of the subject matter; the foreseeably available funds and personnel with which to mount the project; the strength of existing beliefs concerning the subject matter; the time pressures, internal and external, that exert themselves “to get something done”; and the intrinsic complexity of the issues and the availability of evidence—in any acceptable form—that could enlighten the issues. It is a question of judgment, and as such it requires exploration, deliberation and consultation. And as with any question of judgment, in the end it calls for a decision based on an estimate of probabilities.

Another kind of research also was contemplated for the Foundation. This consists of more traditional legal research, usually conducted in smaller scale projects, aimed at ascertaining the law in a particular field for a particular practical purpose or set of purposes. This kind of research is often essential or useful to enlighten the work of the active agencies of the


organized legal profession—the Sections and Committees of the American Bar Association and comparable units of state and local bar organizations. The Foundation has conducted research of this type since its inception, most notably in its Research Memorandum Series.

Research Program Must Be Planned and Balanced

A research program, as the Foundation has come to know, does not—or at least ought not—simply to happen. Each project that is a component of the program should be undertaken only after a satisfactory accommodation has been reached among the competing considerations involved. And at any given stage in a program of research there should be several projects varying among each other not only in subject matter but also in scope, cost, schedule and hoped-for precision. Research is a risky business and in any risky business it is prudent to have not only several eggs but several baskets.

From its beginning under John Cobb Cooper as Administrator, the Foundation followed such a policy. Mr. Cooper, indeed, is associated with one of the Foundation's earliest major publications, Sources of Our Liberties, a compilation of chief documents in Anglo-American constitutional history with accompanying notes and commentary by Richard L. Perry, E. Blythe Stason, who became Administrator completed and published:

The Model Business Corporation Act, Annotated (in special co-operation with the Section of Corporation, Business and Banking Law) (1960).


MacKinnon, Contingent Fees for Legal Services (1964).

Greenwood and Fredericksen, Specialization in the Medical and Legal Professions (1964).

The Foundation also developed the serial index Current State Legislation, whose publication has now been assumed by the University of Pittsburgh; a series of checklists of the holdings in the Cromwell Library at the Bar Center, with special attention to publications of the organized Bar; a series of reports on the economic status and distribution of the legal profession; and a number of monographs on a wide variety of subjects, many of them published in the law reviews.

The projects in progress, most of them commenced in Dean Stason's administration, reflect an even greater diversity. The principal ones, in no special order of mention, are:

Corporate Debt Financing (in special co-operation with the Section of Corporation, Business and Banking Law): The development of model instruments of a corporate debenture indenture and a corporate mortgage, under the direction of Leonard Adkins and Lawrence Bennett of New York.

Federal Tax Procedure: The Foundation-Brookings Institution study of federal administrative and judicial procedures in enforcement of the income tax law, by Professors L. Hart Wright and Alan N. Polasky of the University of Michigan.

Space Law: An expanded study of the law of outer space, by Professor Howard J. Taubenfeld of Southern Methodist University and S. Houston Lay of the Foundation staff.

Lawyer-Legislator: A study of the ethical problems of lawyers who are in legislatures, by Professor Howard R. Sacks of Northwestern University.

Trends in Consumer Credit Legislation: An analysis of legislation regulating the business and practices of consumer finance, by Barbara Curran of the Foundation staff.

Representation of Indigent Accused Persons: A survey of the forms and availability of legal representation for poor persons accused of felony, by Lee Silverstein of the Foundation staff.

State Administrative Law: By Professor Frank E. Cooper of the University of Michigan.

A member of the Oregon and California Bars, Geoffrey C. Hazard, Jr., was graduated from Swarthmore College (B.A. 1953) and Columbia Law School (LL.B. 1954). After practicing in Oregon and serving as the state's Deputy Legislative Counsel and as Executive Secretary of the Oregon Legislative Interim Commission on Judicial Administration, he joined the law faculty of the University of California at Berkeley in 1958 and remained there until he was appointed Administrator of the American Bar Foundation in 1964. In addition to those duties, he serves on the faculty of the University of Chicago School of Law.

Fundamentals of Legal Drafting: By Professor Reed Dickerson of the Indiana University.

Case Law Legal Research by Computer: An analysis of methods by which case law might be searched by computer techniques, by William B. Eldridge of the Foundation staff and Sally F. Dennis of International Business Machines Corporation.

Hospitalization and Discharge of the Mentally Ill and The Mentally III Criminal Offender: Two

5. He had been Dean of the University of Michigan Law School for two decades before assuming leadership of the Foundation on his retirement from Michigan. In the fall of 1964 he resumed teaching, as professor of law at Vanderbilt University.

parallel studies of the procedures, civil and criminal, for determination of mental illness, by Richard Janopaul, Dr. Marcus Jacobson and Ronald Rock of the Foundation staff.

**Trends in Continuing Legal Education:** By Carroll C. Moreland of the Foundation staff.

**Evaluation of the Canons of Legal Ethics:** A study in co-operation with the American Bar Association Special Committee on Evaluation of Ethical Standards, by Professor John F. Sutton, Jr., of the University of Texas.

There are other projects in the planning stage, including further studies of the administration of criminal justice, a study of the conciliation services for divorce courts that have developed in recent years, and research in the legal problems of the poor. Still other projects are in the preliminary stages of discussion, criticism and evaluation and so are yet to be officially born.

**Research Program Must Have Unifying Conception**

In diversity there must also be unity, lest there be chaos. It is essential that there be a unifying conception of the Foundation's program so that it has an administrative coherence, so that its various individual projects reinforce each other in development of knowledge and of research technique, and so that there is a reasonably orderly deployment of the resources put at the Foundation's disposal. It is important also that the Foundation, insofar as possible, complement rather than compete with the activities of other legal and social research organizations. The extent of ignorance about the structure and dynamics of legal institutions is great enough to accommodate almost limitless research enterprise, but at the same time it is not so great as to obviate the necessity for some co-ordination of effort. The Foundation has sought and will continue to pursue a role in legal research that is both needful and distinctive.

The basic role of the Foundation, it seems to me, ought to be to direct attention at the institutional aspects of the law. By this, I mean the organizations, both public and private, and the processes, both formal and informal, through which the law functions. To use a phrase that is inelagant but expressive, the Foundation studies "law in action". I use the term to contrast this sort of research with doctrinal research, the study and analysis of what the law is in some sense "is", and with legal policy research, the consideration and exploration of what the law ought to be. These are, of course, exclusive categories, for a study of legal institutions requires an understanding of the law as it "is" and a sense of what it ought to be, and a study of what the law is or ought to be requires understanding of its institutions. But there is a difference in point of view and emphasis, and it is in terms of this difference that the Foundation's program has taken principal shape and will develop in the future.

It may be appropriate in this respect to sound a historical note. It seems fair to say that, aside from the university law schools, the most significant institution of legal research created in the two decades following World War I and now surviving is the American Law Institute. Originally conceived chiefly to rescue the common law from a supposed confusion, it is known best for the Restatements, which are unequivalently research in what the law "is" and what it ought to be. The A.L.I. continues to flourish not only in the Restatements Second, but also in its newer enterprises of model legislation, notably the Model Penal Code, which represent policy analyses of what the law ought to be.

I do not wish to question the usefulness or worthiness of these types of research or of the institutions endeavoring to realize their achievement. On the contrary, I think for one thing that the Model Penal Code ought to go down as one of the most important works of scholarship in Anglo-American law and surely it will be one of the most influential. For another, the law will always require intensive analysis of its terms and its purposes.

But to identify at any given time in any given field what are the law's terms and its purposes is not to guarantee the achievement in fact of an intelligent and effective administration of the law. To apply its terms and to fulfill its purposes, the law requires people, organizations, financial resources, political support and a viable reduction of social cross-purposes. It is a problem of means to ends, a question of designing ways to realize to a satisfactory extent legal terms and objectives already identified and agreed to for the time being.

**Foundation Attacks Problems of Means to Ends**

In a complex society such as America's has become, the means problem—the problem of institutions to achieve legal ends—has become increasingly intricate, acute and challenging. It is no accident that the legal research institutions created since World War II, of which the American Bar Foundation is certainly the largest and perhaps the best known, have been concerned chiefly with these institutional problems. This concern is the present program of the Foundation.

The program of the American Bar Foundation is an implementation of the Foundation's originally stated objective "to study, improve and to facilitate the administration of justice". The task of the Foundation's research program is to make it possible to know better the limits and the opportunities for reform of the law and its administration, to know the economic and social environment in which members of the legal profession perform their functions and to establish the basis for hard-headed pursuit of the public good. In a larger sense, it is a quest for the intelligent pursuit of ordered liberty. These are the proper aims of the organized legal profession and the proper objects of study for its research organization.