1990

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Recommended Citation
Law & Society Review, Vol. 24, Issue 2 (1990), pp. 217-226

INTRODUCTION

TRIAL COURTS AND SOCIAL CHANGE: THE EVOLUTION OF A FIELD OF STUDY

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This Special Issue of the *Law & Society Review* on longitudinal studies of trial courts represents the combined efforts of twenty-three scholars from many disciplines and methodological perspectives to assess the goals, achievements, problems, and potential of this research.[1] Work in this field is rapidly evolving beyond descriptive docket studies of trial courts, and is driven by engagement with theory and research on dispute resolution, legal culture, complex organizations, and the state. The Special Issue aspires to acquaint readers with the state of the art of this research and, at the same time, to break new ground that will change future work. To help the reader assess its achievements and its potential, the issue contains current research, constructive criticism of longitudinal research on trial courts, and, above all, discussion and illustrations of a broad range of potential theoretical foundations for future research.

The Special Issue extends the series of issues of the *Law & Society Review* on litigation and dispute processing (1974, 1975, 1980–81, 1985). The appearance of this Special Issue, like those that preceded it, marks important growth. Interest in trial courts as sites for longitudinal research on the role of law and legal insti-

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I am grateful to all of the participants in the Conference on Longitudinal Research on Trial Courts and to the contributors to this Special Issue for the extraordinary pleasure of working with them, for their help and cooperation in making this collaborative project possible, but most of all for what I have learned from them as colleagues and friends. Some of what I think I have learned is expressed in this brief introduction and in the Afterword. For assistance in composing both of my contributions to this issue I would especially like to thank Jim Atleson, Shari Diamond, David Engel, Felice Levine, Jack Schlegel, and Carroll Seron.

[1] As I acknowledge at the end of this essay, the articles and comments in this issue are edited versions of papers and comments presented at a conference on longitudinal research on trial courts held at the State University of New York at Buffalo in August 1987. The conference was supported by National Science Foundation grant SES-8512625, and this Special Issue of the *Law & Society Review* was made possible through a supplementary grant SES-8843466. The conference was organized specifically for the purposes of assessing this field of research and providing an opportunity for reflection and exchange about the contents of many of these papers.

tutions in modern developed countries now ranges widely across disciplinary boundaries and perspectives. In this introduction I will describe and examine the significance of this expansion of interest and research activity.

The body of research has grown not only in size but also in its potential importance for understanding fundamental issues of law and change. Work on dispute processing, litigation, and trial courts has addressed processes that we know occur over time, such as conflict, the social construction of legal culture, and litigation. Yet, it has been relatively rare for such research to incorporate the dimension of time. Because longitudinal study of trial courts is fundamentally about change over time, it has the potential to probe deeply into some of the most basic issues in the law and society field—change, resistance to change, the evolution of conflict and difference, and competition for power to control conflict and difference.

While interest in longitudinal research has grown, critics (including me and others who have put substantial effort into such research) have argued that its contribution to understanding fundamental issues of law and change has been limited. The contributions to date of the most common type of longitudinal trial court research, the docket study, is an important topic, one to which the first group of essays in this volume turn (Friedman, 1990; Sanders, 1990). There is, undoubtedly, a large gap between what longitudinal research on trial courts might potentially achieve and what it has already accomplished. A principal motivation for this special issue, therefore, and a major influence on its contents, has been assessment of the difficulties the research has experienced and development of ways to employ longitudinal trial court studies to examine previously unexplored but potentially important issues that arise in the context of change over time in and around trial courts.

Among the issues identified by constructive critics of longitudinal trial court research, the most compelling has been the need for theory that will help formulate important, insightful, and interesting questions. Docket research has sometimes been described as insufficiently engaged with ideas and as atheoretical. I argue later in this introduction that this has never been true, although the research in its early stages was inspired by an extremely narrow theoretical perspective and by correspondingly broad inferences from docket data that were used to support the theory. Consequently, a key to development of the field is a better theoretical foundation for the research. The evolution of longitudinal trial court studies reflected in this Special Issue may be measured by its sharper focus on fundamental theoretical issues and consequent movement toward data and methods of research appropriate to those issues.

As Special Editor for this issue I have been particularly aware of the need to strengthen the theory underlying longitudinal trial

court studies, and thus the collection, above all, illustrates particularly promising uses of theory. Two important benefits have been derived from the attention given in the essays to the theoretical development of the field. First, there is, in these essays, greater utilization of the broad range of available theories that might usefully be applied to longitudinal trial court studies. Many of these theories have been drawn from work in closely related fields of law and society research. The application of such theories could prove useful to those working in the related fields as well as broadening and enriching longitudinal trial court research. In this Special Issue, the theories applied to longitudinal trial courts range across the full spectrum of perspectives in current law and society research, including among others, perspectives derived from dispute resolution, studies of culture and difference, research on complex organizations, theory of the state, and law and economics. Second, and a point underscored by the recent discussions of the theory and method of social science in the law and society field, different perspectives on research entail asking fundamentally different questions, employing different data, and drawing inferences by means of different methods of data analysis. While the contributions to this Special Issue that discuss or illustrate the implications of these different perspectives for longitudinal trial court research may not resolve the basic social science issues that have moved the wider discussion (for example, the value of formal theory), the reader will have an opportunity to compare on a common ground the points of convergence and difference, the strengths and weaknesses, of the theories and methodologies of the different perspectives themselves.

ORIGINS

Theories of law and social change have their roots in nineteenth-century European social theory (Krislov, 1983; Daniels, 1984; Munger 1988). Various strands of nineteenth-century social theory are linked to implicit or explicit programs of social change (Giddens, 1971; Rule 1978). Specifically, the Durkheimian and Weberian strands that gave rise to modernization theory, and which in turn influenced American research on law and social change, focused on the function of public institutions in reducing or controlling the private conflict that arose from the industrialization and bureaucratization of modern society. In helping to perform this function, courts are said to facilitate the realization of values underlying the social ordering of society (Durkheim, 1964a; Weber, 1967). Thus law reflects society, specifically its culture (see Friedman, 1985).

James Willard Hurst provided an important bridge between this theoretical tradition and contemporary research on law and society (1956, 1964). At the core of his enormously influential

work on the impact of economic development on legal institutions in North America is a firm grasp of this theory. In Hurst's economic, social, and legal history of the Wisconsin lumber industry, as in his other works, law is described as a repository of community values. Actors facing conflict created by disruption of the social order during economic development turned to law to help them maintain the continuity of that order (see Munger, 1988: 60–61).[2]

Research on trial courts has been strongly influenced by this tradition in nineteenth-century social theory and its reflection in American legal history. In particular, a paper delivered by José Juan Toharia at Bielefeld, West Germany, in 1973 had a great impact on the theoretical development of North American caseload studies by describing the following empirical paradox in terms of modernization theory (1976). Toharia's Spanish data showed that while economic development had led to increasing resort to law to help order private relations, the quantity of litigation had not followed a similar pattern, initially rising with economic takeoff but eventually declining even though economic development continued.[3] Thus, on the basis of Toharia's research, the relationship between economic modernization and litigation appeared to be curvilinear rather than linear. Toharia's paper on trial court litigation inspired a highly influential study of two California trial courts by

[2] Hurst's careful historiography has always been broader than his theory. In contrast to his main theoretical framework, he acknowledges that factors other than law are at work in social change, and this acknowledgment, together with his detailed description of the litigants, their economic interests, and the manipulation of law to serve particular interests (often an implicit rather than an explicit theme), suggests new lines of theoretical development for research on law and social change. One might thus say that there is an invitation to look more deeply at the marginality of the law, at the inequalities of power among litigants, and at the state. These themes have yet to be developed fully in research on law and social change.

[3] Examination of the relationship of law to social change might have been pursued from these beginnings along many different lines of theoretical development, for example, by examining the apparently increasing dependence of private transactions on legal forms or the changing social construction of actor choices in conflict resolution in different cultures. It is interesting, for example, that none of the essays inspired by Toharia's work that appeared in the 1974 issue of the *Review* made the obvious connection between Toharia's research and the article by Marc Galanter that appeared in the same Special Issue on the *Review* (1974) on the impact of inequalities in resources and power on litigation.

Yet from one perspective it is not surprising that it was the impact of social change on the frequency of litigation that in fact received further attention. Of course, the availability of docket data was important. But another explanation seems equally important. Early longitudinal research on trial courts suggested that there was a connection between social conflict and the behavior of courts. These studies were conducted at a point in U.S. political history (the mid-1970s) when a similar connection was being made in policy debates about the appropriate role of courts in public and private conflict (see Burger, 1970). That the policy debates were being driven by political retrenchment following a period judicial and social activism, and thus were not motivated by concern for the courts themselves, seems to have been lost in the tidal wave of studies of court "overload" and "litigation explosion." (Compare Galanter, 1979.)

Friedman and Percival (1976a). Employing the hypothesis suggested by Toharia's paper and a historical perspective on courts from Hurst, Friedman and Percival's longitudinal analysis of trial court docket data offered a theory to support the curvilinear relationship between modernization and litigation. They argued that long-term trends in litigation were shaped by both the rise in conflict accompanying economic development and the subsequent routinization of social relations following change. In their view, long-term litigation trends thus reflected closely the need for dispute resolution in society.

Friedman and Percival's path-breaking essay virtually defined the field of longitudinal trial court research in its early stages and thus encouraged both the field's methodological emphasis on docket data and its theoretical orientation to the effects of economic development on litigation. Over the past fifteen years, studies of longitudinal trends in the activities of trial courts have proliferated. The body of data on trial courts now available to the research community is large and growing, and includes docket data series for substantial periods from trial courts in most of Western Europe, Japan, a representative sample of Latin American countries and a half-dozen states, in addition to data kept by the National Center for State Courts on recent trends in North American state courts (see Ietswaart, 1990; Clark, 1990; Wollschläger, 1989; Giles and Lancaster, 1989; National Center for State Courts, 1984; and generally Friedman, 1983; 1989b). Indeed, measured by their visibility in policy debates, the level of funding, or the interest in descriptive accounts of court activity of the past, studies of trial courts, in particular statistical research on caseloads, are increasing in importance (Galanter, 1983a, 1986b; Daniels, 1990; Nelson, 1988b). Yet the criticism is often made, both within and outside the field, that longitudinal research on trial courts has remained largely dependent on docket data and has been slow to develop beyond its Durkheimian roots. In this view, the research has not yet lived up to its promise to provide new insights into the emergence and maintenance of legal institutions and a fresh approach to the study of law and social change.

GETTING BEYOND DOCKET STUDIES

Many critics have suggested that the slow fruition of longitudinal studies of trial courts is attributable to methodological obstacles. For example, critics have pointed to the gap between concepts of change that drive the research and the actual measures of change yielded by docket data, errors in inference from docket data, and even problems in employing basic statistical research methods (Cartwright, 1975; Lempert, 1978; Krislov, 1983; Daniels, 1984; Munger, 1988). While these problems are certainly evident in longitudinal trial court research, the field is not unique in this re-

spect. Other critics have suggested that the real problems lie deeper. For these critics, problems in the operationalization and measurement of change in the "economy," the measurement and interpretation of rates of litigation, and of the operationalization of other concepts critical to the research reflect weaknesses of conceptualization and theory as well as poor methodology. While all researchers acknowledge that there may be better ways to operationalize and measure some processes of change, these critics nevertheless have suggested that more imaginative theoretical development and greater precision in thinking about those processes must precede development of research strategies (Engel, 1980; Krislov, 1983; Munger, 1988). Lack of theoretical development of the field may explain why, even after many years of labor, the body of published longitudinal research on trial courts is limited largely to basic profiles of change in the quantity of litigation, and the relationships between litigation and such potential correlates as industrialization, urbanization, changing patterns of wealth, political conflict, court capacity, or new law have yet to be systematically and imaginatively mined and examined.

There may be significant reasons for the multiple problems of longitudinal trial court research that have hindered its development. The practical and methodological problems of the research are difficult ones. Even the simplest longitudinal study is hard and expensive work.[4] Time and money are, however, not the only determinants of the reach of longitudinal research on trial courts. Ironically, the very success of caseload research in contributing to policy discussions or in aiding the description of an unexplored past may have retarded the development of research that could have made more significant theoretical contributions. Indeed, there may be no better illustration of the "pull of the policy audience"[5] than the repeated citation of the litigation explosion hy-

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[4] What is most interesting about these shortcomings is that they have been identified repeatedly by those within as well as those outside the field. This suggests that the conceptual and methodological problems of the field are difficult. Court dockets may have at first appeared to represent an accessible and easily understood measure of the relationship between law and social change. Yet we are a long way beyond thinking that docket data are to be easily understood, for docket data represent conflict and conflict resolution twice reflected, once by the social construction of disputing by parties, and once again by the construction of a "case" by the court system itself. Thus, in addition to the usual difficulties of archival research, docket data present difficult problems of inference about the processes of central interest. At the same time it should be remembered that this is not the only field of empirical study that presents such challenging problems for data analysis. Nor in my view are these even the chief problems of the field, as I explain below.

[5] In an extended comment on research about law and society Sarat and Silbey (1988) have argued that research representative of the mainstream of the field has been influenced by the assumptions which underlie legal ideology. This, they contend, is evidenced by the focus of research on one of two projects: attempting to verify those assumptions or attempting to undermine them. In either event, the topics and issues for this research are dictated by the assumptions of legal ideology, and thus reflect "the pull of the policy audi-

pothesis as justification for reviewing existing data on caseloads or for amassing yet another longitudinal data set to confirm or refute theories that have emerged from contemporary debate about the relationship between modern culture and change (see, e.g., Galanter, 1983a; 1984; National Center for State Courts, 1984; Ietswaart, 1990). Similarly, the importance of describing the past activity of the courts for purposes of understanding baseline phenomena, quite apart from one's analytic interest in the significance of the patterns in the past, may have encouraged somewhat repetitive research that avoided making broader theoretical contributions.

RESISTANCE TO THEORY

A more fundamental problem is also apparent. Challenges to the concepts and theory used by longitudinal research raise questions about perspective that deeply divide social science. The failure of this area of study to reach its full potential thus may reflect issues broadly affecting law and society research. Few recent studies of law and society consider processes occurring over time—whether maintenance of continuity and order, long-term processes of change, incremental change, or longitudinal comparisons between communities or between societies (see Sarat, 1985). Why has interest in law and social change apparently declined? "Modernization" theory still leaves a bad taste in the mouths of many (compare Trubek and Galanter, 1974). Further, modern Marxian theory, evolving rapidly since the early 1970s, has constructed increasingly ambiguous roles for law (see Thompson, 1975; Sugarman, 1983). Finally, research has increasingly been directed to small-scale social organization, a trend that fits well with the current interest in studying the construction of meaning (Geertz, 1973; Sarat and Felstiner, 1986) and in studying power from the ground up (Foucault, 1979; Yngvesson, 1982, 1988). Thus, the contemporary emergence of conflicting, yet incompletely articulated, paradigms for empirical research on law has made researchers cautious about formulating tentative generalizations of the kind longitudinal research invites (and even requires) in order to focus data collection and analysis. The sharpness of these differences (only partly interdisciplinary) has, in my view, made investigators cautious theoreticians. Progress has been slow in part because research carries the burden, in this as well as other areas of law and society research, not only of meeting the challenge of data analysis but also of reconciling the different perspectives on social science to which investigators themselves are drawn.[6]

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ence" to the exclusion of perspectives which favor assumptions that do not accord with the official view of the legal system.

[6] Expressions of criticism and doubt about the field of study have often begun by examining the units of analysis that docket studies have often taken for granted: "case," "court," and "dispute." Significantly, it is to this question

CONTRIBUTIONS OF THE FIELD

Because these differences in perspective are important in law and society research, it is perhaps not surprising that criticism of longitudinal trial court caseload research has undervalued both the achievements and the potential of the field. Caseload studies, though they represent only one type of longitudinal research, have already been quite important for our understanding of law in society. First, such studies represent one of the few subfields of law and society research that is systematically studying links between law and social change. Second, caseload studies have added to the range of historical experience on which we can draw to test our ideas (Hurst, 1959, 1980-81). Third, this body of research highlights the importance of inequality and of power in determining the use and impact of legal resources, particularly the ability of litigants with substantial power and longevity, such as organizations, to mediate the effects of law over long periods (Kagan, 1984; McIntosh, 1985; Munger, 1986a, 1988; Stookey, 1990). Finally, longitudinal research on trial courts provides compelling evidence that the courts themselves, and the state of which they are a part, are actors that compete with other normative systems and dispute-resolution processes.

In addition to these positive achievements and notwithstanding the rudimentary stage of their development, longitudinal studies of trial courts have established the inadequacies of existing theories about the role of courts and the nature of litigation. Here research has enabled rejection of the public perception of a rising litigation trend (Galanter, 1983a) and of the hypothesis that there exists a simple linear (or curvilinear) relationship between change and litigation (McIntosh, 1983; Daniels, 1984; Munger, 1988; Clark, 1990). In addition, the discussion of caseloads in historical perspective has also contributed to reassessment of ideas about the close relationship between cases, disputes, and conflict (Engel, 1980; Kidder, 1980-81). These hypotheses, now questioned or rejected as starting points for research, appear naive only in retrospect and served a valuable purpose opening the way to much broader issues (Trubek, 1980-81a).

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that investigators, as critics of the field, have directed much of their own introspection. Yet, addressing the criticism of the concepts employed in research by adopting a more theoretically defined unit of analysis presents another dilemma, namely, focused theory; indeed the use of any theory at all highlights sharp differences in perspective. There are no "natural" units of analysis; there are no questions to address that do not raise problems of perspective that deeply divide the research community (Abel, 1980). The presence of these differences in starting points creates an opportunity for comparison of contrasting approaches to specific questions (Nelson 1988b), but they may also divide trial court research along disciplinary or political lines.

ASSESSMENT

Longitudinal research on trial courts is demonstrating its potential by slowly evolving into sophisticated research about social change. Progress in this direction has been made by employing theoretical perspectives that encompass more of the worlds beyond the court and within the court by, for example, looking closely at changes in the culture and social organization of conflict and disputes, or tracing the effects of changes in the professionalization of prosecutors or judges, or considering the impact of political economy on the administration and financing of courts, to name but a few of the new approaches (and see Boyum and Mather's (1983) important earlier attempt to encourage theoretical development of court research). As further longitudinal research has revealed the complexity of the connections between trial courts and social change, it has contributed to the recognition that the deeper roots of legal change often lie in the intertwining of many related social changes both within and outside of courts (see, e.g., Friedman, 1985; Upham, 1987).

Not surprisingly, these advances in our understanding of disputing, litigation, and courts have led to calls for more contextualized study of courts and for research that relies less on docket data and more on information bearing specifically on the actors and processes identified as significant. And equally not surprisingly, the call for a more contextualized study of courts compounds rather than simplifies the difficult theoretical and methodological problems of the field. Given that problems are thus soon to be still more difficult and that criticism of existing work continues as that work yields significant achievements, the time seems ripe for an assessment of the value of longitudinal trial court research. The essays that follow are an effort to contribute to that assessment.

THE SPECIAL ISSUE

This Special Issue of the *Law & Society Review* on longitudinal research on trial courts is divided into four parts. In the first, two essays provide both positive and critical assessments of the development of longitudinal research on trial courts. The second part presents some of the best recent longitudinal research based on trial court docket data, together with comments by investigators experienced in trial court research who attempt to define more precisely the limits of this kind of longitudinal study by drawing on their own research experiences. Part III presents a rich assortment of theoretical starting points for longitudinal research on trial courts, including development of the dispute-processing paradigm; theorizing about complex organizations, the state, and the economy, and the social construction of meaning. In part IV, principal investigators from two major international comparative research projects on trial courts discuss the problems of

comparative research and means of overcoming them that are broadly applicable to research on legal institutions and dispute processing in various communities.

Prior to writing the last drafts of the essays appearing in this Special Issue, the authors assembled, with others, at a conference supported by the National Science Foundation, at the State University of New York at Buffalo in August 1987. The purpose of the conference was to enrich individual assessments of the field of study, to invite broader theoretical horizons for ongoing and future work, and to encourage, if possible, collaborative research, all through discussion of the field by scholars representing a broad cross-section of perspectives on social science and law. While an important result of the conference was to contribute to achievement of those goals in the work of those attending, its primary purpose was to share that progress with others. Thus, this issue itself represents a collaborative undertaking intended to contribute to the development of research on trial courts and social change, as well as to a better understanding of issues that cross boundaries of disciplines and perspectives more generally in law and society research.

I recognize that many others in the law and society field are doing work that enriches the longitudinal study of trial courts either directly or indirectly. A special issue of this kind cannot be more than a "sample" of work and ideas in a particular research area; thus, the other authors and I are indebted to all who have advanced our understanding of trial courts over time. As the numerous citations to other researchers suggest, each of us has incurred debts that extend not only to those who attended the conference but to scholars and friends throughout the law and society field.