Social Science in the Courtroom

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Statistical Techniques and Research Methods for Winning Class-Action Suits

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To Nicholas and Lucy,

who have brought such happiness to my life, and

to the small band of civil-rights lawyers,

who have brought hope and relief to so many lives.

Preface

From time to time, legal scholars tell us that the continued use of social science in court will sully or destroy the law. Pure social scientists lament that the practice will distort or destroy social science. A different lament is that social-science findings played a major role in litigation only during the Warren Court era of so-called judicial activism, while the more-conservative judges of the 1980s will find social science much less relevant. Meanwhile, the use of social-science experts in court continues to increase—and for good reason. Social-science findings and conclusions are relevant to the factual side of a wide array of cases. Indeed, the use of social scientists in many areas of litigation is primitive and just beginning. Twenty years ago, Judge John R. Brown wrote, "In the problem of racial discrimination, statistics often tell much and courts listen." [*Alabama* v. *U.S.* (304 F.2d 583, 586, 5th Cir., 1962)] Today this is true, not only in the area of discrimination but also in any area where judgments have to be reached about classes of people, groups of products, or large numbers of documents. As courts are beginning to take note of statistical techniques, law schools are beginning to teach lawyers how to understand and present statistical findings. The questions that remain, then, are these: Will cases go to court with their factual sides well prepared, benefitting from social-science expertise where appropriate? Will judges be familiar enough with social-science methods and statistics to critique incompetent or incorrect presentations? Will attorneys know enough about social science to know when to contact an expert, what kind to engage, and how to work with him or her as a partnership? On the other side of the disciplinary boundary, will social scientists understand what kinds of findings are relevant legally and what are not? And can they learn to present these findings effectively to an audience that may be ignorant of the nuances of research design but that is not stupid about the operation of the social world?

This book is written so that these questions might be answered in the affirmative. Its purposes are to help attorneys learn how and when to use expert witnesses and to help social scientists learn how to become more effective in their courtroom appearances.

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Contents

List of Figures

List of Tables

1 Why and When to Use Social-Science Experts

In 1979, Jean Paul Marat commented on the relationship of law to social justice:

> The lot of the poor, always downtrodden, always subjugated, and always oppressed, can never be improved by peaceful means. This is doubtless one of the striking proofs of the influence of wealth on the legal code.

Not a particularly radical statement, and certainly not a Marxist one—Marx was born a quarter century later. Marat's phrasing is merely a jarring way to say what every student learns in the first week of a course in the sociology of law—that is, the legal system usually functions to maintain the status quo.

If there is a U.S. antidote to all this, it would have to include the phrase, "nor deny to any person within its jurisdiction the equal protection of the laws,"[1] because we Americans believe that law is not only an instrument of power wielded disproportionately on behalf of those who already have wealth and prestige but also a route of redress for persons who, owing to their race, sex, poverty, age, or other characteristic, have not been treated fairly. Whole subfields of legal practice, seeking judicial remedy for societal wrongs, have developed—for example, civil rights law, sex- or gender-related practice, poverty law, environmental law, consumer protection, and much of the rest of the area known as class-action litigation.

Until recently, the key elements required to obtain legal redress of unfair treatment, particularly when that treatment amounted to racial, sexual, or other discrimination, were three: a courageous plaintiff, an informed lawyer, and the development of the law. The factual basis of the case was usually clear. In Mississippi, for instance, not one black was a member of the highway patrol in 1968. Discrimination was obvious.

Today, North and South, the factual situation is subtler. No longer does a large company have no women as higher managers, instead, perhaps 17 percent of its management are women, and that proportion may or may not indicate discrimination—other facts must be known to place it into context. Thus, a fourth element is often required today in lawsuits in order to determine if a class of people has been wronged: participation of a social scientist (or several) to make sense of the subtleties in the facts and to counter the inevitable arguments from those in charge of the institution that no discrimination was involved.

Social scientists and statisticians can also be crucial to winning other types of suits such as trademark infringement, charges of unfair or monopolistic business practices, and any cases involving large numbers of, for example, people, documents, or cans of clam chowder. Accordingly, parts of this book can profitably be read by persons working on cases ranging from torts to labor law. For example, chapter 9, "Selecting a Defensible Sample," and chapter 10, "Social Surveys," would be helpful to an attorney seeking to prove that two products were packaged so similarly that consumers often purchased the second by accident.

However, the book is especially directed to attorneys, judges, and social scientists who will one day be concerned with a case of alleged unfair treatment, where the treatment is said to result from the person's membership in a class that is usually being treated unfairly. This person may be a father seeking custody of his child in a jurisdiction that has awarded 98 percent of the children in contested cases to the female parent. It may be a fourteen-year-old girl not wanting to read a civics textbook that connotes, through its prose and photographs, that only men can govern. It may be a college sophomore on trial for felony possession of marijuana and who faces a jury in which the youngest member is in her mid-30s. Or it may be a Native-American army veteran seeking employment as a bus driver but unable to surpass the performance of white recent high-school graduates on a verbal-aptitude test. Properly prepared social-science testimony can make the difference between success and failure for each of these plaintiffs—and hundreds of others.

Most cases that cry out for expert testimony go to court without it, however. Also, when social scientists are employed, often they make less impact than they might because their preparation, and that of the attorneys using them, has been faulty. Communication between lawyer, social scientist, and plaintiff can be difficult for disciplinary boundaries are involved. Sociologists now speak an advanced statistical language that can only occasionally be comprehended even by other sociologists; rarely do economists write prose at all; and both groups are put off by legal jargon. Furthermore, researching an issue in order to develop courtroom exhibits and testimony is foreign to most social scientists and places new demands upon them for quick response, near certainty, conciseness, and relevance. On the one hand, social scientists must learn about the legal constraints of the case—for example, what kinds of discrimination are actionable and what are not. Attorneys, on the other hand, must learn something about statistics if they are to interface effectively with the experts they have engaged. They must also learn enough about the social sciences to know what kind of expert to recruit, what the expert probably can and cannot do, and what kinds of data will have to be furnished to the expert for analysis.

There is even a vocabulary problem. Two words in the previous paragraph are typical bones of contention. Social scientists with any feel for syntax believe that *actionable* is an incorrect grafting of a verb suffix onto a noun, while many