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FOREWORD: THE SCIENTIFIC STUDY OF LEGAL INSTITUTIONS

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With this double-issue symposium, *Law and Contemporary Problems* again enters the lists in support of the now august but forever ungratified movement for judicial law reform. Commenced by Bentham[1] and blessed by Weber,[2] the movement has had many American heroes, most notably perhaps Field, Pound, and Clark, and more than a few victories.[3] For a century and a half, the movement has been sustained in its endeavor to make judicial institutions more effective and more efficient in performing their assigned mission. But its adversaries are numerous, ubiquitous, and persistent; even its victories have qualities of evanescence that help to keep the movement always in need of more energy and ideas.

Science in the service of judicial law reform is an idea almost as old as the movement itself. As early as 1870,[4] America and the West generally were smitten with science to a degree having almost universal consequences. Perhaps the most dramatic political consequence of our attraction to science was the emergence of professionalism as the most important social force in American culture,[5] but almost nowhere in our country was science ignored. We did not need the teaching of the botanist-lawyer Pound[6] to recognize the

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1. Henry Brougham, the leading judicial law reformer in England in the nineteenth century, attributed the origins of the movement to Bentham in 2 SPEECHES OF HENRY, LORD BROUGHAM 287 (1838). *See generally* Dillon, *Bentham and His School of Jurisprudence*, 24 AM. L. REV. 727 (1890).

2. *See* A. KRONMAN, MAX WEBER 72-92 (1983).

3. *See generally* R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 52-64 (1952).

4. Earlier thinking is traced in T. PORTER, THE RISE OF STATISTICAL THINKING, 1820-1900 (1986).

5. The story is told in M. LARSON, THE RISE OF PROFESSIONALISM 144ff. (1977).

6. Pound's commitment to science is advanced as a coherent approach to law in the three-part series, Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); 25 HARV. L. REV. 140 (1911); 25 HARV. L. REV. 489 (1912).

possible utility of counting cases and otherwise measuring the performances of our judicial institutions.[7] By the 1920's, empirical study of legal institutions was the highest fashion in such precincts as the law schools at Columbia[8] and Yale.[9] The failed Institute of Law created at Johns Hopkins University in 1928 was animated in large measure by the hope that empirical work of the sort celebrated in this symposium would transform and elevate American law.[10]

Reformers learned quickly, however, that the building of a bridge between data and sound policy was harder than it looked, and the bridging of sound policy to enactment perhaps harder still. Mere counting did not yield wisdom, just as it had not for earlier statisticians in other fields. Indeed, this truth was perhaps the first principle of social science to be demonstrated: William Petty confirmed it as early as 1691 when, on the basis of his determination that the value of an English life surpassed that of an Irish life, he proposed that the King forcibly transport all Irishmen to England in order to increase the wealth of the kingdom.[11] The academic career of Thurman Arnold illustrates the difficulties. Arnold won an appointment at Yale and an offer of appointment at Harvard[12] by earning a reputation as a judicial statistician. He became sorely frustrated in his efforts, however, and abandoned them in 1932.[13] In 1965 he supposed that his data were still residing in slumber in government archives "awaiting the coming of the Prince who will awaken their true beauty."[14]

The development of a scientific tradition in the legal process has been hampered by the same difficulties present in other fields. There are, for instance, dangerous tendencies for data to be manipulated by advocates for adversarial advantage,[15] for scientists themselves to exaggerate the significance of data[16] or draw inappropriate inferences from them, and for scientists, at the other extreme with Arnold, to discover that the data they have painfully collected have no apparent significance.

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7. *See, e.g.*, Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

8. Currie, *The Materials of Law Study*, 8 J. LEGAL EDUC. 1, n.1 (1955).

9. L. KALMAN, LEGAL REALISMS AT YALE, 1927-1960, at 3-35 (1986).

10. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925, 942-44 (1931). For an account of the criticisms early empiricists faced, see W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 62-65 (1973).

11. W. PETTY, *The Political Anatomy of Ireland*, in 1 THE ECONOMIC WRITINGS OF SIR WILLIAM PETTY 129 (1899), *cited in* T. PORTER, *supra* note 4, at 19.

12. Arnold declined Harvard's offer. *See* Letter from Thurman Arnold to Roscoe Pound (Jan. 23, 1931), in VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 176-78 (G. Gressley ed. 1977).

13. Letter from Thurman Arnold to Frank Kenan (Nov. 7, 1932), in VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD, *supra* note 12, at 191-92.

14. T. ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE 63 (1965). For the similar disenchantment of Hessel Yntema, see J. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, at 154 (1981).

15. *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

16. Illustrative is Clark's use of meager data to dismiss the civil jury as wasteful and unreliable. *See* L. KALMAN, *supra* note 9, at 31.

In recent decades, empirical study of dispute resolution and civil justice has matured, reflecting in part the maturation of social science and the gradual elevation of our collective sophistication in the use of its results. We are collectively much better at this sort of study than we were a half century ago. Interest in such work has also strengthened, reflecting in part an enlarged understanding of the social and political significance of judicial institutions, and a greater sense of their role in what Kenneth Scott has so aptly described as "behavior modification."[17] A polity that uses its courts and civil procedure for so many purposes had best understand them as well as it possibly can. At the same time, as our authors will have frequent occasion to observe, there are still many slips between the cup of empirical study and the lip of policy.

PART I

The first half of this symposium is devoted to a review of the contemporary condition of the empirical study of civil procedure. It provides some recent history, some reflections on the political dimensions of such work, and a selective bibliographical review of the empiricists' accomplishments to date.

There has been since 1950 an accelerating growth in the empirical study of courts and civil procedure. The University of Chicago Jury Project was perhaps the first truly substantial effort to apply contemporary social science to the study of legal institutions,[18] and *Law and Contemporary Problems* takes this occasion to salute Professor Hans Zeisel, a mainspring of that project, for his important role in the development of the enterprise that is the subject of this symposium. Another major contributor in the formative years was Maurice Rosenberg, whose work in New Jersey on pretrial procedures was supported by Columbia University.[19] Rosenberg, too, deserves a special salute from *Law and Contemporary Problems* for his pioneering work in this field, and we are honored to have him lead off this symposium with an account of some of the larger empirical studies and a measure of their impact on procedural rules. He concludes, as did the late Harry Kalven, that effective research seeks "the middle range," being neither too trivial nor too pretentious in its scale. He lists a number of "middle range" subjects that are presently ripe for empirical study.

Partly inspired by efforts such as those of Zeisel and Rosenberg, and partly by the ambition to inform as fully as possible those reponsible for shaping our legal institutions, empirical study has itself become institutionalized. A number of important institutions have emerged since the time of Arnold's and Clark's efforts that have as at least one of their purposes the fostering of such empirical work. Especially noteworthy are the Federal Judicial Center in

17. *See* Scott, *Two Models of the Civil Process*, 27 STAN L. REV. 937, 937-40 (1975).

18. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

19. *See* M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION (1964). The project is described *infra* in Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, Summer 1988, at 13, 17-19.

Washington, D.C., the National Center for State Courts in Williamsburg, Virginia, the Rand Institute for Civil Justice in Santa Monica, California, the American Bar Foundation, the Institute of Judicial Administration at New York University, and the Institute for Legal Studies at the University of Wisconsin in Madison, all of which have appeared recently to provide much of the large body of work that is the background and subject of this symposium.

The Law School at Duke University has also recently entered this field in establishing the Private Adjudication Center, which co-sponsored the conference at which most of the papers in this symposium were first presented. The Law School had previously made a contribution to the empirical study of civil procedure through the work of its alumni, including notably William Eldridge '56, the Director of Research at the Federal Judicial Center since its founding, and Laurens Walker '64 and John Conley '77, scholars whose works are represented in this symposium. This symposium is in part a celebration of this past and future contribution of the Law School to this body of work.

One function of this symposium is to call attention to the development of these programs for the study of legal institutions and to the problems and issues they face now and in the future. While a comprehensive chronicle remains to be written, we hope to illuminate for the reader the significant developments that have received little attention from those not directly involved.

Russell Wheeler's article, for instance, recounts the history of the creation of the Federal Judicial Center. The Center is an arm of the federal judiciary and has both teaching and research missions. The creation of a research agency within the federal courts was not, Wheeler notes, an apolitical act. Rather, its organization reflected the realities framed by the expectations and aspirations of judges as well as by the interests and sensitivities of the Congress. It is, however, as Wheeler also explains, an autonomous institution with its own governing board, and much of the value of its contribution to research is probably attributable to the degree of independence wisely conferred on the Center when it was created in 1967.

In her role as officer of the Institute for Civil Justice, Deborah Hensler has experienced many of the problems recounted by Wheeler. In her paper, she points to the fragile nature of the link between empirical study of civil justice and the making of public policy. Particularly, for example, in the current debate over tort law reform and the role of insurance in our society, the conversation often takes on a strongly statistical aspect. It will be news to few readers to learn that advocates, even judges when explaining decisions, often manipulate data and inferences from data in order to serve the ends of advocacy. Unfortunately, there is not always an open marketplace of ideas or a crucible of truth in which the competing networks of data and inference are evaluated and synthesized, in order to form a single, well-tested, coherent model of reality on which policy can and will be based. Hensler reflects on the problems that this creates for researchers and on the ethical responsibilties

imposed upon them. She does not despair that institutional policymakers are slow and sometimes obdurate in the face of revealed truth.

Some of Hensler's account is redolent of an experience of Francis Galton who, in Victorian times, demonstrated empirically that prayer is ineffectual.[20] Among his data were comparisons of life expectancies of clergymen who presumably prayed for health and longevity with those of lawyers who presumably did not. Although his data could be viewed as compelling his conclusion, Victorians continued, to Galton's disappointment, to pray.[21]

Laurens Walker's article reflects on the need to enlarge our institutional capacity for empirical study of civil justice. In particular, he makes the case for permitting controlled experimentation with legal procedures in federal courts. He suggests several methods that might be employed, and regrets the demise of the proposal earlier advanced to allow controlled experimentation with local rules of court. Professor Walker's case is a strong one, and he defends it against the shallow objections that have been made to it, objections that are pale imitations of stronger arguments made in other fields of human experimentation. Of course, as he acknowledges, such experiments must be carefully designed to protect individual interests, and not every procedural arrangement lends itself to such controlled study.

Professor Walker's argument for controlled experimentation reflects the concept underlying the creation of the Private Adjudication Center at Duke, which hopes to combine private dispute resolution procedures with controlled experimentation. Its study of court-annexed arbitration—conducted in partnership with the Institute of Civil Justice, with funds provided by the National Science Foundation, and soon to be published—is an example of the use of controlled experimentation on the procedural arrangements of private dispute resolution. Its results are more instructive than they could have been without access to this method, employed with the understanding cooperation of the federal judges in the Middle District of North Carolina.

Professor Walker stops short of making an additional point, that more public money should be made available to support this kind of empirical work by scientists outside the government. The Federal Judicial Center, vital and important as that institution is, is the research arm of the federal judiciary, and its agenda is necessarily and properly shaped by that relationship. There is an important agenda of research on the issues of civil procedure, however, that are of substantial public concern, but that are not necessarily of primary concern to the federal judiciary. For a brief period from 1977 to 1981, there was a small fund of money available through the Department of Justice to support research on the improvement of the machinery of justice. This source of support gave rise to the important program of study now conducted at the University of Wisconsin. But no federal support has been available for

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20. *See* Galton, *Statistical Inquiries into the Efficacy of Prayer*, 12 FORTNIGHTLY REV. 125 (1872), *cited in* T. PORTER, *supra* note 4, at 137.

21. The story is told in T. PORTER, *supra* note 4, at 137.

this form of applied research since those years, save perhaps for occasional small grants from the State Justice Institute.[22]

This is an unfortunate oversight. Even in these days of Gramm-Rudman, a prudent federal government should be able to part with a few dollars to support empirical work genuinely promising to improve the quality of civil justice in its courts. While some private foundation money has been available in the last decade, and while work will continue without that bit of national support, the absence of any federal funding discourages even the private funding that is available, because it implies that those who are responsible for our institutional policymaking are indifferent to the truths that can sometimes be revealed by disciplined application of the scientific method to the issues of civil justice. A federal appropriation of even $1 million a year for university and nonprofit institutional research on federal dispute resolution would have significant middle-term effects on the quality of civil justice in America.

To document the achievements of the last quarter century of empirical study of civil procedure, much of which has been privately funded, the first volume of this symposium concludes with a substantial bibliography of the available work. This bibliography was prepared by Michael Chiorazzi and six staff members of *Law and Contemporary Problems*. The authors do not presume to criticize the methodologies employed, but do cluster their reviews to enable the reader to gain a sense of the overall significance and utility of what has been done. The bibliography is also intended to be a research tool for scholars and teachers of civil procedure who may be unaware of much of this work.

As Maurice Rosenberg's introductory article demonstrates, the corpus of available work leaves ample room for enhancement. There is, however, no longer room to suppose with the frustrated Thurman Arnold that such work is "pretty much bunk."[23] Empirical study of procedure has now come to adulthood and merits encouragement and support from the public institutions that will benefit from the enterprise.

PART II

The second part of the symposium, to be presented in the next issue of *Law and Contemporary Problems*, is less retrospective in its orientation. It first reports on several recent empirical studies of particular procedural devices or institutions that may influence future procedural innovations, and then considers the relation between empirical study of procedure and of substantive consequences of procedure, reporting on several studies that link procedure with substance.

Some Contemporary Studies of Courts and Civil Procedure. This first division of Part II of the symposium extends the corpus of work reviewed in Part I.

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22. *See* The State Justice Institute Act of 1984, 42 U.S.C.A. §§ 10701-10713 (West Supp. 1989).
23. L. KALMAN, *supra* note 9, at 34.

Thomas Rowe and Neil Vidmar describe their efforts to evaluate the effect of rules bearing on offers of settlement. In 1983 and in 1984, the Advisory Committee on Civil Rules of the Judicial Conference of the United States published for comment draft revisions of Rule 68 bearing on offers of settlement. The proposals evoked substantial criticism, some of it quite heated. While some commentators sought to apply economic analysis to the proposals, no one really had any experience at all on which to base his or her contentions as to how the rules would operate. These authors seek to fill that void.

At this point, the authors report, their data are wholly simulated, but they aspire to develop a research design sufficiently reliable and informative to make the gathering of more realistic data justified. Their work offers an outstanding example of the need for the kind of reform urged by Laurens Walker. These authors have already devised a careful and insightful design, and there will come a time when what they have learned from it will need to be tried in the real world. When that time comes, it should not be necessary for procedural rulemakers to apply their findings to every case in every court in their system. Their proposal ought to be tested on fewer than all cases in fewer than all courts.

At the same time, the Rowe and Vidmar article offers an excellent illustration of the difficulties encountered in this enterprise. The behavior they seek to study is very complex, involving multiple relationships and a plethora of possible motivations, many of which may even be unknown to, or at best dimly understood by, the participants themselves. Crude countings of such phenomena are at perpetual risk of representing only compound ignorance. While these authors are very cautious to avoid that risk, the reader can see the hazard at almost every step, and can thus see some of the issues of professional responsibility described by Deborah Hensler, as well as some of the reasons why prudent policymakers may be slow to respond to the published conclusions of scientists fresh from an empirical examination of such complex matters.

The study described by Francis McGovern and Allan Lind involves a procedural device far less complex than offers of settlement. The discovery survey is an instrument apparently invented by Professor McGovern to provide an efficient means of achieving discovery from 10,000 plaintiffs at once, with considerable savings of transaction costs. The device may be a significant step in the evolution of what seems to be the accelerating development of mass tort litigation. The authors have subjected the discovery survey device to a rigorous evaluation, but one limited by the parameters of the single instance in which it has been used. In order to confirm their findings, repetition is needed. Yet the study serves as a very useful illustration of the sort of work that needs to be done much more frequently. If they have only one instance of reality, that is one more than we have for the offers of settlement methods studied by Rowe and Vidmar. If through this kind of experimentation, we can gain (or lose) confidence in new methods of

discovery, it may enable us then to proceed with a bit less caution toward (or away from) mass tort litigation.

Marie Provine presents quite a different kind of study, but one that is also useful in evaluating institutional changes. Specifically, she directs our attention to the efforts of the United States Court of Appeals for the Ninth Circuit to employ the powers and perform the administrative responsibilities conferred by Congress in 1939 when it created the Circuit Councils.[24] In particular, Provine examines the influence of the Ninth Circuit on the development of the roles of its bankruptcy judges and magistrates. Recent years have witnessed an enormous increase in the use of delegation by United States District Courts. Indeed, one circuit judge has in my hearing described the chambers of some district courts as "beehives of delegation." Bankruptcy referees have been promoted to bankruptcy judges. The office of United States Magistrate has been created. Special masters are also in vogue.[25] With the advent of externs, it has been said than even the law clerks now have law clerks.

The Provine article describes and evaluates the effect of Ninth Circuit practices on these permanent delegates and their relation to the professional life and work of the circuit. Like the McGovern and Lind interviews with those responding to their discovery survey, Professor Provine's study is necessarily dependent on her interpretations of her own interview data. Moreover, there are implications of delegation that she does not attempt to address, if indeed they could be addressed empirically. Nevertheless, her study is quite helpful in evaluating the arrangements she describes, and illuminates as well the effectiveness of one Circuit Council. It is far more helpful than the untutored and uninformed intuitions of policymakers that would otherwise provide the basis for policy decisions.

Substance and Procedure: Civil Procedure as Sociology. The symposium concludes with studies of the substantive consequences of procedural arrangements.

David Trubek introduces this subject. He breaks new ground in suggesting an alternative intellectual framework for the empirical study of civil procedure. He describes what he calls a critical sociology of civil procedure, a sociology engendered by the earlier Realist movement that called for empirical study of the legal process in order to facilitate procedural aims. Professor Trubek points out, for instance, that the Federal Rules of Civil Procedure were in part the product of Realist thought. This is so although the movement to create such rules finds its beginnings during the era in which American formalism experienced its heyday, the decade of the 1880's. Certainly, the draftsmanship of the Rules reflects an awareness of the overriding importance of the courts' assessments of the substantive merits of

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24. 53 Stat. 1223 (codified as amended at 28 U.S.C. §§ 331-334 (1982)). The history of these provisions is told in P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 152-56 (1973).

25. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989) (forthcoming).

the disputes at hand. The aim of the Federal Rules expressed in Rule 1 is to assure the "just, speedy, and inexpensive determination"[26] of every action. "Every action" may in this phrase be taken to imply that the Rules are designed to fit disputes that come to court in a certain form that makes them amenable to the legal mode of disposition which the Rules seek to provide. As Trubek observes, it was assumed by Charles Clark, the draftsman of the Rules, as well as by those who founded the programs of empirical study mentioned above, that empirical study could assist rulemakers in the pursuit of those Rule 1 aims.

Professor Trubek's critical sociology questions whether the aims stated in Rule 1 are indeed the aims of Federal Civil Procedure, by pointing to the unresponsiveness of the institutions of reform to empirical demonstration that civil justice in the federal courts is sometimes slow, expensive and unjust. In this view, Professor Trubek builds on the observations set forth earlier in the symposium by Deborah Hensler that empirical work is vulnerable to misuse. Trubek's critical sociology also questions whether there are not at least some disputes that are, in the manner of Procrustes' victims, forced into the mold of a dispute amenable to resolution by formal means, but only by transformations that may bear considerable social cost.

These are substantial questions. Trubek does not himself presume to provide them certain answers. Nor do other authors in this symposium. But there are other scholars who share his preoccupation with the relation between procedure and substance and with the possibility of illuminating substantive law through the window of empirical study of process.

Richard Lempert and Karl Monsma, for instance, have set forth their findings from a field study of landlord and tenant disputes in Hawaii. Because this study spans data gathered over several decades and involving materially different procedures used to manage very similar disputes, it seems especially strong. As the authors describe, the Legal Aid Society of Honolulu struggled at some length and, in the end, successfully to compel the Hawaii Housing Authority ("the Authority") to conform its administrative process for eviction of tenants to a more formal or legalist model. One could call what happened in Hawaii the "due-processization" of public housing eviction. The authors conclude that if these efforts were intended to ease the plight of public housing tenants unable to pay their rent, the effort was misdirected, for the reformed Authority was more rigorous in its insistence on the payment of rent than was the less formal predecessor Authority that was criticized by lawyers for its procedural crudities.

The Lempert and Monsma article offers some support for the Trubek theses. One need not, however, doubt the good faith of the Legal Aid lawyers who wished to professionalize proceedings in order better to protect tenant rights to believe that these well-intentioned folk may have underestimated the likelihood that a more formal system would also be surer to impose legal

26. FED. R. CIV. P. 1.

duties on tenants. This may be an example, among others, in which middle-class ideas about rights and their enforcement are not very beneficial to the poor or other marginalized members of the society. On the other hand, Professor Trubek might ask, once the Lempert and Monsma study is assimilated by the Honolulu Legal Aid Society, should we expect that group to undo what it did, to lobby for informalization of tenant litigation before the Authority? Would, indeed, the tenants themselves as a group prefer to return to the informalities of the past? Like the authors of the study, I leave the reader to speculate on that question.

John Conley and William O'Barr present another study of informal procedure. Their paper is of interest in part because of the methodology, which they describe as "ethnographic investigation." Their data, however, also tend to confirm the Trubek hypothesis that lawyers and their process often misperceive and therefore misshape the needs and aspirations of civil claimants, for their claimants may not seek the results we might suppose.

At least some of the Conley and O'Barr claimants are, however, interested in something near and dear to lawyers: the right to be heard. Indeed, the authors' illustrative disaffected litigant is one who won a default judgment and was given no hearing because none was needed to grant her the substance of her request. In reading Conley and O'Barr, one may wonder what in fact is the "hidden agenda" of tenants appearing before the Hawaii Housing Authority. Possibly the Legal Aid Society is right in supposing that at least some losing tenants are more gratified by the additional formalities preceding their eviction than they would be by being allowed to hold over an additional month.

Thomas Metzloff is also highly attentive to the substance-procedure nexus. He has written a prospectus for empirical study of civil disputes focused on a particular class of dispute, that involving claims against health care professionals for professional malpractice. All readers will be quick to recognize the medical malpractice field as one that has given rise to a particularly high level of grievance against civil procedure practices. Research in this area is laden with interest group politics. The acute level of dissatisfaction, however, has often been unfocused. Few researchers have focused on the central substantive issue: Is tort law a useful means of regulating the conduct of health care providers?[27]

One need not be a doctor-defendant to suppose that a scheme of social insurance could provide better protection, perhaps at far less cost—particularly by eliminating most civil disputes presently arising from disappointments with the results of health care. Arguably, medical malpractice is a paradigm for a class of disputes that are, as Professor Trubek suggests, transformed and distorted by the formal legal process.

In focusing on procedural issues arising under the present tort-based system, Metzloff by no means contests the Trubek thesis nor belittles the

27. *But cf.* P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY (1985).

significance of larger substantive questions. He merely makes an assumption, for which there is ample basis, partly reflected in the paper of Deborah Hensler, that this society has decided to use tort law in this way for the foreseeable future and has thereby created the range of procedural issues he addresses in his article. He seeks Harry Kalven's "middle range."

Given this perhaps unfortunate reality that we are doomed to litigate what should be insured, can medical malpratice litigation be made more "speedy, just, and inexpensive?" The author demonstrates that there is much yet to be learned from a scientifically disciplined examination of the practical consequences of applying various available procedural devices to the resolution of this class of dispute. It is at least possible, Metzloff suggests and hopes, that some procedural arrangements can be devised that will produce the proper level of constraint on careless health care, assure appropriate levels of compensation for victims of bad health care, and do so at reduced costs, reflected not only in lower health care insurance premiums, but also in elevated morale for health care professionals.

At this less portentous level, it is at least possible that the product of the research he envisions could find an audience more receptive to the results of empirical observation of reality, and less inclined to pervert those observations into swords with which to skewer political adversaries. It is, however, also possible, as Professor Trubek suggests, that the range of inquiry Metzloff proposes will in due course lead back to the central substantive issue which he has provisionally chosen to ignore. As we become more sensitized by such work to the parameters within which civil procedure must be conducted, we may become more wise about the uses for which such ceremonies can be sensibly employed.

Finally, Michael Saks presents a contrasting perspective on the relationship betweens social science and civil procedure in his examination of the uses made in contemporary civil proceedings of empirically demonstrable observations that bear on the issues in dispute. Professor Saks demonstrates in this context the familiar reality that courts, even as finders of fact, are not single-mindedly devoted to the revelation of truth. If truth were the paramount consideration at all times, the attitude of courts toward social science data would be more receptive than it is. It does not diminish the significance of Professor Saks' article to say that he has but once again shown us that law is often more art than science, and that its processes are more cultural artifacts than sophisticated engines of social change.

That truth, too often forgotten in our lust for science and technology, furnishes a suitable caution and conclusion to this symposium devoted to the scientific study of law. Alas, that the Special Editor is unable to supply a poem celebrating the ineffable as a final punctuation! In the end, science may serve justice, but it will never define it.