

Spring 2001

Social Scientists Reflections on the Conference

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Recommended Citation

Dean Kilpatrick & Robert L. Nelson, Social Scientists Reflections on the Conference, 52 S. C. L. Rev. 547 (2001).

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Kilpatrick and Nelson: Social Scientists Reflections on the Conference
**SOCIAL SCIENTISTS REFLECTIONS ON THE
CONFERENCE**

DR. DEAN KILPATRICK, Professor of Clinical Psychology; Director of the National Crime Victims Research and Treatment Center; and Director of the National Violence Against Women Prevention Research Center at the Medical University of South Carolina:

I would like to say again, what a pleasure and how intellectually stimulating it has been to be here today. I have three bits of good news for you. One is I have got to get back to Charleston, so I am going to be brief. Secondly, you will be happy to know that there will be no slide projector this afternoon. And thirdly, I am only going to really hit on two things and hopefully, fairly quickly. The first thing concerns lying—how “we don’t lie” would be a good bumper sticker for the legal profession. I would analogize that to the situation I discussed this morning about the problem within the profession of psychology. When many psychologists are doing therapy they rationalize in some cases. Sometimes male psychologists, usually with young attractive women, rationalized how it was good for the young women to have sex with the therapist. They did not usually do that with ninety-year-old people, not to be ageist here. But the point here is it is a slippery slope, and it is easy to justify certain kinds of things if you are not careful about it. There are obviously situations where there are ethical complexities, and maybe that is what we need to deal with.

Let me hit the major point I wanted to make. I am struck after listening to this discussion today about the extent to which there are certain things that we do not know—we suspect, but we do not know. One of the things we do not know is that we really do not know. We know that the public has some problems with lawyers and that seems to have been based on bad perceptions, or it may be reality or whatever—it seems like we know that. What we do not know is how big the problem of unethical behavior is on the part of lawyers. It appears that we do not really know that. You cannot know that by looking at disciplinary complaints and things like that because, as we know, such complaints are like crimes. Just as most crimes are not reported to police, it is likely that only a small percentage of those who are displeased actually file complaints. Thus, complaints are only the tip of the iceberg. We really do not know how much is going on.

So I have yet another modest proposal. If you will note, all my proposals are modest in nature. The proposal is simply this: I think somebody needs to do a survey of lawyers. I will take the suggestion made today that there are really many subsets of different types of lawyers. I think we need to define the specific types of behavior that we view as problematic, questionable, and then maybe the good ones too. I think we need to do surveys of representative samples of these various subclasses of lawyers, and we need to do it in confidential situations. We need to figure out ways to ask lawyers specifically about the extent to which they engage in these behaviors. Now you are probably going to say, “That is really a stupid idea because nobody in their

right mind would tell you if they were doing unethical things or maybe even some illegal things.” But you know what? One of the things I do for a living is conduct surveys of people about stigmatized behavior, in some cases even illegal behavior, such as drug and alcohol abuse among adolescents. We have done a large study of a national probability sample of adolescents in which we have gotten information about whether they have been sexually or physically assaulted, whether they have engaged in alcohol or drug abuse, and whether they have gotten involved in delinquent behavior. People will answer those questions in a confidential anonymous setting. People have actually done studies of sex abusers in the community—not that I am advocating that—but if you do it correctly, it is possible to get information about non socially desirable behaviors. You will never get entirely accurate information, but you can get a lot more accurate information than we have now. I would submit that we need this information to answer the question that has been posed today: “Do conferences like this make a difference?” The question is, if you do not define it, you do not measure it. If you do not measure it, then you will never know if there was any change, and furthermore, you will not know how big the problem is. From the point of view of a pointy-head intellectual researcher who does a lot of research on sensitive topics, I believe the technology exists, if it is done in conjunction with the people who know what they are doing legally, to be able to measure this problem and see how big it is. Once you know how big it is, it tells you several things, like where should you focus your energies. What are the biggest problems here? We may think we know what the problems are, but nobody has really presented any data here today. Once you do that, I think it is possible to measure change. So, with that modest proposal, I am going to say thank you very much, and I am going to go back home to Charleston.

ROBERT L. NELSON, Professor of Sociology and Law at Northwestern University and Senior Research Fellow at the American Bar Foundation:

As someone who studies the legal profession, this has been an immensely rich smorgasbord of observations about what is going on in this world, and I am very appreciative of the opportunity to have been here. In my closing remarks I do not want simply to be a research curmudgeon. It is always easy to demand detailed, relevant scientific data to judge the impact of a social program, and then condemn the effort if no such data are available. Yet, I will make a couple of observations that run in that direction. One is, if we think about the program of the last two days and the various efforts that we heard about, how many of those efforts have an evaluation component built into them of some kind or another? Relatively few. Jim Elliott made reference to one. There were some other references to studies, but this is still a relatively underdeveloped aspect of what this profession tries to do. What that leads to, I think, is that we still rely mostly on clinical judgments about what we think the problems are and what we think will work. It is not an unreasonable position. It is exactly what Deborah was saying in her initial paper, which was that there is a sense that something is wrong and “we have to do something to try and make it better.” That is essentially a clinical judgment about something

being wrong and then, based on an analysis of what we think the problem is, going forward to some kind of treatment. Until there is a more developed research community that provides information that is more relevant and informative, we are going to be left with clinical judgments.

But then, my final comment is that we also need to have deeper understandings of some of the processes that we are talking about. This is an analogy for social scientists or scholars looking at professionalism to what Chris Whelan was saying about lawyers. You know that we need people who can have a deeper understanding of what the issues are in a certain context, who are doing research on a particular area. I want to take just two examples of findings or of suggestions that we heard about today. The first was Judge Warren's reporting of the results that the public does not like lawyers. I would like to see an analysis of the reasons why the public does not like lawyers. I would like to raise the issue of: how much do we really know about why the public does not like lawyers and how does that connect to what lawyers do? Unless we have some kind of variation over time, or across contexts, we cannot really get very much analytic purchase on that question. Mark Galanter, for example, when writing about the litigation explosion and the sense of crisis about the so-called explosion in litigation in American society, has talked about the problem that lawyers are identified with morally ambiguous work. As a result of the work they do in our society, lawyers are going to be a lightning rod for all kinds of concerns and criticisms. I am not dismissing the issue that there may be serious problems with lawyer performance, and I am also not attacking the idea that the public should be involved in discussions about how the profession should be organized. But how much do we really know about the relationship between what lawyers do and the public's evaluation of lawyers? The second example strikes even closer to home for me in a way. It goes to Professor Green's suggestion that we mimic the example of Holland & Knight and adopt professionalism creeds across firms. I have written that I believe that regulation in the work place is where much of this action needs to be, but we do not know how best to do it or whether it will work. We cannot just adopt a slogan that there be professionalism creeds without knowing what function they will serve in the law firm context. I mean the Hilton has a service code in the elevator, but the room service was late this morning. There could be even more insidious examples of where there are pronouncements about what the ideals of an institution are, which are not honored in practice.