



W. LAURENS WALKER 

Improving Legal Procedures Through Social Science

LAURENS WALKER'S TEACHING AND SCHOLARSHIP are animated by the belief that legal procedure is of primary importance in resolving disputes effectively. Additionally, procedure strongly influences the perceived fairness of the substantive result of litigation. Walker's view of the central significance of procedure reflects years of empirical study of the perceptions of parties whose conflicts are resolved under differing procedural regimes. This research began before Walker joined the Virginia faculty in 1978 (after visiting for one year) and continued during his early years in Charlottesville.

Walker's project involved a fruitful partnership with a distinguished social psychologist, John W. Thibaut of the University of North Carolina, where Walker began his teaching career. For nearly a decade, Walker and Thibaut carried out a series of laboratory experiments, first creating conflicts among volunteers and then resolving those conflicts by a variety of procedures. While the study was wide-ranging, the comparison that proved most interesting was between an "adversarial" model styled on the Anglo-American legal tradition and an "inquisitorial" model styled on the French and related continental traditions.

Walker and Thibaut concluded that the adversarial model and its feature of party (and attorney) control were clearly preferred. “The disputants’ freedom to control the statement of their claims constitutes the best assurance that they will subsequently believe that justice has been done regardless of the verdict,” Walker says in summarizing the pair’s findings. The results of the Walker-Thibaut collaboration were reported in a number of articles and summarized in their book *Procedural Justice: A Psychological Analysis* (1975).

Further investigation revealed that process can shape the parties’ beliefs about the distributive (and not merely procedural) fairness of the outcome. This insight was reported by Walker, Alan Lind, and John Thibaut in “The Relation between Procedural and Distributive Justice,” 65 *Va. L. Rev.* 1401 (1979). The experiments reported in the article showed that parties’ preference for an adversarial procedure influenced their perceptions of substantive fairness, even for participants disappointed in the outcome. According to Walker and his colleagues, “[A]t least with respect to perceptions, ‘ends’ (distributive justice) cannot justify ‘means’ (procedural justice), but ‘means’ can indeed justify ‘ends’ to the extent that for participants, the perception of procedural justice partially determines the perception of distributive justice.”

At Virginia, Walker formed a new research partnership with John Monahan, a member of the Law School’s faculty and a clinical psychologist thoroughly experienced in litigation. Walker and Monahan observed that litigants were increasingly introducing social science research into trials and that courts found it difficult to determine when and how such research was relevant and probative. Walker and Monahan therefore set out to define a comprehensive set of principles to manage courts’ use of social science research. The result was a series of three articles: “Social Authority: Obtaining, Evaluating and Establishing Social Science in Law,” 134 *U. Penn. L. Rev.* 477 (1986); “Social Framework: A New Use of Social Science in Law,” 73 *Va. L. Rev.* 559 (1987); and “Social Facts: Scientific Methodology as Legal Precedent,” 76 *Cal. L. Rev.* 877 (1988).

Walker and Monahan’s core idea was that the process for using social science research in court should be carefully tuned

to the function of the evidence in particular cases. First, they identified three separate purposes for which social science research is introduced, defining them as “authority,” “fact,” and “framework” use. Authority use invokes research results to make law. Fact use invokes research results to determine case-specific facts. The identification of “social framework” use was novel. They noted that courts sometimes admitted social science research to provide a context or “framework” for the task of deciding case-specific facts. For example, courts had admitted general research findings about eyewitness identification to help juries (or judges) decide whether a specific identification was probably correct. The framework concept identified by Walker and Monahan has now become the standard description for the continuing trial practice.

Next, Walker and Monahan described suitable procedures for each of the three uses. They argued that for authority use, courts should treat social science materials just as legal precedents are treated under the common law. They wrote, “From a theory that posits social science as a source of authority in the law flow two corollary propositions regarding how a court should obtain empirical research: the parties should present empirical research to the court in briefs rather than by testimony; and the court may locate social science studies through its own research.” On the other hand, they argued that social research used to prove case-specific facts should be managed under the general rubric of relevance that determines the admissibility of other kinds case-specific evidence. The same can, of course, be said for most ordinary evidence. The framework condition, Walker and Monahan wrote, falls somewhere between the authority and fact function and hence calls for a blended treatment, partly like legal precedent and partly like case-specific fact. They suggested that if a trial judge decided a framework would be helpful, “the applicable research should be communicated to the jury in the same manner that the court’s evaluation of the applicable statutes and case law is communicated to the jury, that is, by instruction.” Thus a legal technique—jury instruction—was suggested to assist the jury in performing a fact-finding role.

Three years after completing their initial series, Walker and

Monahan treated the “null case” condition, the problem of questions lacking social-research answers. In “Empirical Questions without Empirical Answers,” 1991 *Wis. L. Rev.* 569 (1991), Monahan and Walker suggested a pragmatic treatment—reliance on plausible assumptions with careful attention to assigned responsibilities for proof. Most importantly, they called on courts to leave the door open for future social research which might be helpful in later cases.

Walker and Monahan incorporated and illustrated their proposed structure in a casebook, *Social Science In Law: Cases and Materials*, now in its fifth edition (2002). According to the preface, the book’s purpose is “to apprise the reader of the actual and potential uses of social science in the American legal process and how those uses might be evaluated.” Walker and Monahan explain, “we here view social science as an analytic tool in the law, familiarity with which will heighten the lawyer’s professional effectiveness and sharpen the legal scholar’s insights.” Since initial publication, *Social Science in Law* has been used in dozens of American and foreign law schools and is a standard fixture in judicial education programs as well as a reference for scholars.

Walker’s third set of interests is traditional in name, federal civil procedure, but in substance his work has been strikingly unconventional. In “Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments,” 51 *Law & Contemp. Probs.* 67 (1988), Walker called for controlled field tests of proposed rule changes, a version of the method used earlier in the procedural-justice investigations. Otherwise, he argued, rule changes would remain unpredictable yet significant in effect. Walker broadened this view in “A Comprehensive Reform for Federal Civil Rulemaking,” 61 *Geo. Wash. U. L. Rev.* 455 (1993), calling on federal civil rulemakers to adopt a policy of refusing rule-change proposals not supported by valid impact analysis. He argued that federal rulemakers function as a small administrative agency and should establish standards for official action, much the same as administrative agencies function according to regulations. Later, in “Avoiding Surprise from Federal Civil Rulemaking,” 23 *J. Legal Stud.* 569 (1994), he discussed the potential use of economic theory to predict the impact of civil

rule changes. Walker also discussed the political history of federal procedure in “The End of the New Deal and the Federal Rules of Civil Procedure,” 82 *Iowa L. Rev.* 269 (1997).

Walker continues to emphasize the importance of process through his teaching and research in complex civil litigation. He was among the first law professors to offer a course in Complex Civil Litigation, and this teaching has generated a number of scholarly projects. Not surprisingly, his research combines an interest in procedure with an appreciation of social-science methods. Again in partnership with John Monahan, Walker has focused on the class-action device and the problem of trial in cases with thousands, sometime millions, of litigants. Walker and Monahan advocate using statistical sampling to reduce litigation costs in complex cases. Sampling, the random collection of data from less than all potential data sources, is widely used in the social and natural sciences. Sampling can radically reduce the cost of collecting information and in many cases can produce more accurate results than universal data collection.

Walker and Monahan’s article, “Sampling Damages,” 83 *Iowa L. Rev.* 545 (1998) carefully reviewed scattered judicial efforts to use sampling and suggested a more efficient technique which might routinely permit the determination of damage awards. They followed with “Sampling Liability,” 85 *Va. L. Rev.* 329 (1999), which made the then-novel argument that sampling could reduce the cost of adjudicating liability as well as damages.

Walker discussed sampling in a broader context in “A Model Plan for Resolving Federal Class Action Cases by Jury Trial,” 88 *Va. L. Rev.* 405 (2002), a response to current controversies over settlements in large class actions. He noted that the frequency of settlement is a response to litigation costs, but argued that reducing those costs through sampling and related techniques may better serve the parties. Walker’s proposals incorporate division of issues for trial, sampling inclusion of future claims, and the use of trusts for distribution. He defended the proposals as favoring neither plaintiffs nor defendants, but making jury trial of major federal class actions possible on a routine basis. While these elements diverge from the traditional model

of litigation, the alternatives may be a collusive settlement or a simple failure to adjudicate legal claims. This position takes Walker full circle, to the notion that the parties' participation in framing and resolving their disputes is fundamental to the perceived fairness of the legal system. ❖

EXCERPT FROM:

A Model Plan to Resolve Federal Class Action Cases by Jury Trial

Laurens Walker

88 Va. L. Rev. 405 (2002):

I. THE MODEL PLAN

The Model Plan consists of four simple and effective elements combined in a single trial plan. I address in order (1) polyfurcation, (2) sampling, (3) deciding future claims, and (4) distribution trusts. These are the disparate techniques developed in recent years by federal judges that, in combination, would open the door to federal class action cases. The serial trial of decisive issues with sampled evidence, awards distributed by trustee, and absolute closure of all known and future claims would allow for the determination of all the significant legal issues in a complex class action suit before a single jury.



A. Polyfurcation

The generic term “polyfurcation” describes the practice of dividing for trial one or more elements of the cause of action, defenses, or damages.³¹ The more specific term “bifurcation” is typically used to describe the division of the trial of liability from damages. The term “trifurcation” indicates a three-part division for trial—usually causation, other elements of liability, and damages. The addition of the adjective “reverse” means that one of the separated matters is tried out of the usual order.~ The reason for separation (and reversal) is practical: In some situations trial of one part of a case may prove decisive, saving the cost of

trying the rest of the case. For example, the separation and initial trial of an affirmative defense would, if the verdict were for defendant, end the case. In a complex civil case this practice might save months of trial. The process, however, is controversial. The common law tradition prescribed a unified trial to correct error even if the error was limited to a single aspect of the case.



B. Sampling

“Sampling” is the process of collecting information from fewer than all potential sources.⁴⁸ Typically, the sources selected for investigation are chosen randomly from among all potential sources to enhance the probability that the sampled sources are representative of the whole. Sampling is a fundamental aspect of scientific methodology and a standard response to the problem of prohibitive cost in data collection. In civil litigation, sampling has been used in essentially the same way as it has been used in scientific research—to collect representative information and avoid prohibitive costs. However, like polyfurcation, this powerful device has also proved to be controversial.



C. Deciding Future Claims

The term “future claims” in fact describes three significantly different types of civil claims, usually involving product liability.⁷⁸ First, there are claims that involve exposure to the product and injury, but which have not been filed. Second, there are claims that involve exposure to the product but no current injury. Finally, there are claims from future exposure to the product. The first and second categories are the most important in product liability suits, because withdrawal of the allegedly dangerous product from the market can usually eliminate liability under the third category. Defendants almost always prefer a result that determines future claims in the first two categories and thus provides closure. The obvious rationale for this preference is the elimination of contingent liabilities and an enhance-

ment of stock value.



D. Distribution Trust

The distribution trust is a novel version of the traditional trust format. A trust is created by the transfer of property by one person to another person to hold for the benefit of some third person in order to achieve a variety of goals. In the distribution trust, a defendant in a civil case transfers property to a non-party to hold for the benefit of claimants in order to provide an independent mechanism for tailoring individual payments over time. Thus far, the distribution trust has only been used in bankruptcies, but very similar distribution techniques have been used in class actions.



E. The Elements Combined

These four elements offer complementary devices that can surely resolve the significant issues raised by the trial of a federal class action case before a single jury. Although they are not without controversy, these elements, combined in the Model Plan, offer a method to use jury trials for the resolution of federal class actions. Polyfurcation (with reversed order of elements, as appropriate) may bring the matter to an early end. This element divides issues for trial and brings potentially decisive issues forward for early decision. If a longer trial is necessary, sampling would limit evidentiary costs by collecting information from fewer than all potential sources, and deciding future claims would provide closure by ensuring that present costs constitute total costs. Distribution by trust adds a desirable element of precision to the remedy stage and to the entire Plan by permitting a good fit between verdict and reward. ❧

FOOTNOTES

³¹ See Albert P. Bedecarré, “Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases,” 17 *B.C. Envtl. Aff. L. Rev.* 123, 138 (1989).

⁴⁸ See John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials* (5th ed. 2002) (containing cases and materials describing the advent of the use of sampling methodology to determine damages); Shari Seidman Diamond, “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence* 229 (Federal Judicial Center ed., 2d ed. 2000) (describing the sample survey technique); Laurens Walker & John Monahan, “Sampling Damages,” 83 *Iowa L. Rev.* 545 (1998) (suggesting that sampling be used to solve the “numbers problem” associated with determining damages in mass tort litigation involving thousands, or even millions, of claimants); Laurens Walker & John Monahan, “Sampling Liability,” 85 *Va. L. Rev.* 329 (1999) (proposing a model for adjudicating liability elements in complex civil cases via sampling).

⁷⁸ See Richard L. Marcus, “They Can’t Do That, Can They? Tort Reform Via Rule 23,” 80 *Cornell L. Rev.* 858, 882 (1995) (discussing the authority of courts to adjudicate future claims in a class action).

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