

Spring 1959

Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science, by Frederick K. Beutel

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Recommended Citation

Mendlovitz, Saul (1959) "Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science, by Frederick K. Beutel," *Indiana Law Journal*: Vol. 34 : Iss. 3 , Article 9.

Available at: <https://www.repository.law.indiana.edu/ilj/vol34/iss3/9>

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BOOK REVIEWS

SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE. By Frederick K. Beutel. Lincoln: The University of Nebraska Press. 1957. Pp. xvi, 440. \$6.00.

For at least four decades now the law-school world has had within its midst a cadre devoted to broadening legal research and legal training by including therein the perspectives, techniques, and information of the social sciences. Sociological jurisprudence and realism, the ideological banners of the cadre's movement, need only be mentioned to suggest the genuine contribution (as well as the fuss) this movement has made to American legal training. Non-doctrinal materials, that is, perspectives and materials of other disciplines that might shed light on some aspect of the problems confronted by law or on the legal process itself, while not as widely used as either proponents or opponents of their use believe to be the case, have been introduced into legal training with a fair amount of success. To the extent, however, that the movement was meant to inspire the individual law teacher or larger units within law schools to sponsor and engage in systematic, rigorous, empirical research—the *basic source* of non-doctrinal materials—there has been precious little to show. While a good many reasons have been suggested for this lack, two stand out. Aside from minimal returns and heavy costs, there was the usual vested-interest resistance which seems to spring up in opposition to any change. Secondly, and more germane, social science was a good deal more primitive than many of its law school sponsors realized and therefore was unable to meet the expectations generated by enthusiastic and exaggerated claims.

A jurisprudence which espouses empirical investigation of legal problems has persisted nevertheless and a brave new generation is attempting to meet the challenge of this task. Work in this area is, for example, being seriously contemplated or actually begun or being written up, at University of Chicago Law School, Rutgers Law School, Yale University Law School, Columbia Law School, and University of Pennsylvania Law School. Recent events suggest, moreover, a likelihood of modest success from these efforts. The past decade has undoubtedly witnessed substantial advances in social science technique which make possible both more reliable reporting or gathering of data and relatively

more sophisticated, systematic analysis of this data.¹ Then, too, younger members of the law-teaching profession, having had recent undergraduate and graduate experiences in these techniques, are providing a willing and able pool of personnel easily accessible for these ventures. Finally, there has been some generous support from the large foundations who wish to further research in the social sciences.

Despite mature years and no direct foundation support,² Professor Beutel's work clearly exhibits that his heart belongs with the brave new generation. Given his devotion to the cause, his presence must be considered most welcome. On the other hand, it is conceivable that other members of the faith would not have been unhappy if there had been less haste in getting into print the publication under review. For Professor Beutel has written a book which invites adverse criticism.

It is difficult to characterize what kind of a book Professor Beutel has written. It contains within it a clarion call for bringing science to law, an exposition of the logic and logistics by which science may be related to and made useful for law, a somewhat sketchy and sporadically presented program for involving necessary personnel and institutions in a movement to accomplish this purpose, a survey of the problems hindering such a potential movement, some description of the present integration of scientific information and techniques with law, a report of a number of pilot empirical investigations of the operation of certain laws, and a full-blown monograph reporting on an empirical study of the operation of bad-check laws. Despite a formal organization of materials which places most of the empirical investigations in separate sections, the average reader will undoubtedly be hard pressed to match moods with the ever-changing roles assumed by the author and the switches in literary style necessitated thereby. Pamphleteer, traditional scholar, speculative and original essayist, hard-headed man of affairs, knowledgeable on how to politicize his program, painstaking empirical investigator of social fact, over-meticulously reporting non-meticulously gathered facts, all tumble over one another in a manner reminiscent of Keystone cops who vainly pursue each other while the felon escapes. In engaging in this almost vaudevillian performance, the author has asked not only too much of the reader, he has asked too much of himself.

It may seem picayune to carp at such matters, especially if, as I believe is the case in the present instance, there is something worthwhile

1. In general see the articles in *SOCIOLOGY IN THE UNITED STATES* (Zetterberg ed. 1957). In particular see in the same volume, Rossi, *Methods of Social Research* 21.

2. The University of Nebraska made funds available to Professor Beutel for this research. BEUTEL, *SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE* 191 (1957).

being said. Leave that for the pedant with blue-pencil mentality. But the rub is that each of the jobs attempted needs doing and for those who follow, these tasks have become more difficult because of the generally untidy fashion in which they are presented here. At a minimum it cannot help but create a less than receptive audience for those efforts which have the same general perspective as to what is worthwhile doing in legal research. I feel, moreover, that damage greater than this minimum has already resulted. Let me be quite specific.

The Journal of Legal Education, official publication of the American Association of Law Schools, recently contained a lengthy article-review written by Professor David Cavers, Associate Dean of Harvard Law School, of Professor Beutel's book.³ That review states fairly and fully, without quibbling over confused thinking, let alone literary style, the very best sense of Beutel's work; evaluation is thorough, exceptionally thoughtful, and eminently reasonable. Furthermore, Professor Cavers, whose Deanship portfolio includes research and who is active in allocating research funds, has chosen in this review to examine the whole question of whether law schools should engage in empirical investigation or, as he so felicitously puts it, "nonlibrary legal research."⁴ His conclusions might be summarized thusly: Any approach to empirical research, including Beutel's Experimental Jurisprudence, which attempts to follow precise scientific methodology, has too little to offer for the legal researcher to become so involved. Some limited empirical research, preferably large scale projects such as that done by the Gluecks at Harvard or the Jury and Arbitration Projects at the University of Chicago Law School, is about as far as we should go at the present. In terms of the priorities in this kind of research, it would be wiser to attempt to utilize the empirical work done by others through think-pieces such as the well-known work done by Hall in *Theft, Law and Society* or Berle and Means in *The Modern Corporation and Private Property*. Rushing off into the "field" and reporting back is still not the job of the legal researcher.⁵

3. Cavers, *Science, Research, and the Law: Beutel's "Experimental Jurisprudence,"* 10 J. LEGAL ED. 162 (1957).

4. *Id.* at 163.

5. *Id.* at 163-64. It is hardly appropriate to engage in full debate about these conclusions, but perhaps a few remarks are in order. Since Professor Beutel has related empirical investigation to precise scientific method, including experiment, Professor Cavers is justified to confining his remarks to this relationship. At the same time empirical investigation need not slavishly ape scientific method in order to be fruitful to study of legal problems. For example, Professor Kingman Brewster, Jr. in his recent book *Anti-Trust and American Business Abroad* has a chapter (ch. X) reporting the results of his interviews of strategically placed individuals in seventy firms doing business abroad. Although these firms were not selected by representative sampling, the results are interesting and important; furthermore, it is apparent that the nonlibrary

Now it would be naive to believe that a single review of a single book—even granted the stature of the author and the perspicacity of the comments—could drastically alter an intellectual movement of merit. At the same time, Professor Cavers' review must be considered a powerful vote cast against any full-scaled empirical activity in our law schools. Certainly persons who are applying for research funds and those who wish to make a rational and meaningful investment of limited time and monies to research cannot help but be influenced in a direction away from empirical investigation to more fruitful (or safer?) projects.

It may well be that Professor Cavers' caution to go slow in this area is well taken. Yet, one must feel that if Professor Beutel had been more modest in his claims and less jumbled in his presentation Professor Cavers might have given a cautious vote on the affirmative side for more rapid expansion of nonlibrary research. Since, for reasons best left for another occasion, I would vote for this more rapid expansion of empirical investigations conceived and carried out by persons professionally committed to the study of law, I should like, despite some considerable reservation about Professor Beutel's work, to indicate the contributions made by him.

The book is divided into two parts. Part I contains an exposition of Experimental Jurisprudence by which legal research will bring the "(1) . . . discoveries of other sciences, both physical and social, into such a focus that they can be used as tools to aid in lawmaking and enforcement" and for "(2) conducting legal research into the effectiveness of statutes as actually enforced to accomplish the purpose for which they were enacted and . . . to develop by research and experiment the jural laws controlling such social phenomena."⁶ It also includes a discussion of the lag between science and law, and some present illustrations of the use of science by law. Part II is, in the main, a report of a study of the operation of bad-check laws which was directed by the author and is in-

research provided Professor Brewster with insight and sophistication about the range of problems he discussed which would not have been available otherwise. His work illustrates the added point that large scale research is not necessary to achieve solid usable results. Of course it might be said that the work is not "scientific." However, there is enormous value in this kind of first-approximation or sensitive exploratory empirical research. Professor Caver's suggestion that we engage in "think-pieces" and let others collect our data neglects the important contribution of such research.

6. BEUTEL, *op. cit. supra* note 2, at 189.

7. Moore and Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943).

8. So far as can be discovered there are only three serious attempts to evaluate this work: Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L.J. 196 (1950); Yntema, "Law and Learning Theory" *Through the Looking Glass of Legal Theory*, 53 YALE L.J. 338 (1944); Hull, *Moore and Callahan's "Law and Learning Theory": A Psychologist's Impressions*, 53 YALE L.J. 330 (1944).

tended to be illustrative of the method of Experimental Jurisprudence.

Beginning with Part II, what I choose to call the monograph portion, we discover a magnificent attempt to study the full range of questions related to the "bad-check problems." Assuming some minimal notion of relevance, the reader is certain to find discussion of bad checks in terms which will be congenial to one's own judgment of what might be a profitable way to investigate this matter. To be sure, the virtue of seeing all questions carries with it a concomitant vice of not adequately dealing with each; for those interested in bad checks, however, here are all the questions and a good number of the answers.

In this connection it might be worthwhile to speculate on the question-generating potential of empirical research. Hard study and acute analysis of cases and other materials certainly lead to fruitful questioning, but field investigation broadens horizons in a unique way. The necessity of meeting the test of generalizing from seemingly disparate, idiosyncratic behavior found within the complexity of social behavior provides a much different matrix for questions than that of library research. The experience of the hard, stubborn fact remains with us and theory, on which we all dote, is more realistic and perhaps less pretentious. Questions remain with us. Beutel's range of encompassing questions about bad checks was undoubtedly partially produced by this research experience.

One of the major contributions of the study stems from the relatively simple frame of reference used to construct questions and gather data. No attempt was made to demonstrate a particular theory of human nature like Watsonian behaviorism, or to speculate on the utility of some pet psychoanalytic doctrine to understand prosecution patterns. This simplicity permitted the fullest use of materials collected and there is no instance of data being forced into an improper category because of theory demands.

This leads to the very important strategy point of what is presently researchable by those persons interested in empirical investigation of law stuff. Beutel's work, albeit by indirection, makes this very clear. While the book can be read as having dealt with the general problem of the impact of sanction severity upon potential criminal behavior and although there is some discussion of the characteristics of the persons who pass bad checks, these matters are not central. The focus or story concerns itself directly with the question: How does the law of bad checks actually work in operation? The interest is, then, not in causes of human behavior but in the description of a particular set of practices in administering a rule of law. This is a very sensible and realistic approach. At present our knowledge of the causes of deviant behavior, let alone criminal

behavior, is quite limited and studies pegged around such a problem would mean getting involved either in the quagmire of infinite variables or retreating to a theory either too limited to explain or too general to be satisfactory.

The full value of a simple, straightforward, almost common-sense frame of reference can perhaps best be illustrated by reference to another more famous research attempt. In 1943 Moore and Callahan published a study of the operation of municipal parking ordinances vis-à-vis driver behavior in New Haven. The study was intended to be illustrative of the way in which a certain learning theory, then popular in psychology, explained parking habits. Now aside from the merits of the study and whatever else it might be, it is a monumental bore. Despite its prominence in historical accounts of the movement towards more nonlibrary research, it would be surprising if more than two dozen people have ever read the study in its entirety. The writing is ponderous and formidable precisely because it attempts to maintain a meticulous adherence to a psychological theory and to scientific presentation. Beutel has with his much simpler scheme avoided that particular danger and thereby, without detracting from rigor or theory, made his materials available to a much larger public.

In cataloging Professor Beutel's contributions at the level of what has been learned about the feasibility of carrying on systematic, reliable, empirical investigation of our legal institutions, I do not want to be understood to be suggesting that the particular study of bad checks is of little value. The detailing of the amount of bad checks (ingeniously constructed from several sources of data), what businesses receive the brunt of them, the number and manner in which various law enforcement officials become involved in the passing of a bad check, some suggestions as to who passed bad checks, the shocking percentage of the prison population of Nebraska who are bad-check violators, and the cost to Nebraska to hold them in custody, are obviously genuine contributions to rational and intelligent law administration. The more general finding that where our law officials become involved in bad-check situations they tend to become a collecting agency rather than an enforcement agency suggests the richness of further investigation into the problem of law enforcement as it relates to business community practices and needs. The less reliable and even more general finding that sanction severity is inversely related to strict law enforcement is some evidence on the very important question of the theory of deterrence in criminal law.

All this does not mean that Part I is devoid of contribution. To begin with, Beutel does challenge conventional law library research and

produces a model for research which includes systematic and rigorous description and experiment. Furthermore, when this thesis is buttressed by some research and shrewd speculation on the relationship of law to science, there is something to mull over and to learn. In this connection Beutel's inclusion of physical as well as social sciences as a matter of concern for law may say more than it might first appear. Just as the previous century witnessed our society's adjustment to the industrial revolution, today we face the problem of coming to grips with profound changes which will inevitably come about because of what may be called the scientific revolution. It is generally acknowledged that in most matters of societal adjustment legal institutions perform a braking function and it is rare indeed that significant portions of law become transformed at sufficient rate to meet the demands of rapid social change. A phrasing of a general problem as to how might law best adjust to these advances in physical science, then, has considerable merit. Beutel's research which indicates where and how in our society significant scientific information, standards and theory become embraced by legal institutions, as well as his discussion of the impediments to further advance, are interesting exploratory essays in this area.

Professor Beutel informs us that he spent less than \$15,000⁹ to do the study of bad checks. This may seem like a good deal of money. But when we think of the amounts of money spent in physical sciences to make a small advance, the figure is quite reasonable. The fact, moreover, that it was directed by a law-trained person and that it was produced for a legal research audience makes the venture more valuable. As another pioneering attempt in this area, it is a vast improvement over what has gone before.

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9. BEUTEL, *op. cit. supra* note 2, at 192.

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