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The Use/Nonuse/Misuse of Applied Social Research in the Courts

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THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS. Edited by *Michael J. Saks* and *Charles H. Baron*. Cambridge, Mass.: Abt Books. 1980. Pp. ix, 189. $26.

Social science data are increasingly being used at trial to prove facts that are otherwise difficult to observe.[1] Courtroom uses of empirically generated data include, for example, determining markets in antitrust suits,[2] calculating expected future earnings in personal injury cases,[3] and supporting and rebutting employment discrimination charges.[4] Courts have now become accustomed to hearing from economists, psychologists, and sociologists on an endless variety of subjects.

Unfortunately, this growing use of social science research has been accompanied by profound misunderstandings between the social science and legal communities.[5] These misunderstandings stem primarily from a lack of knowledge within each field of the other's purposes and methodologies. In *The Use/Nonuse/Misuse of Applied Social Research in the Courts*, Michael Saks and Charles Baron bring together the suggestions of social scientists, lawyers, and judges for improving the working relationship between their disciplines. The book's objective is straightforward: to enhance the critical and intelligent use of social research data in the courts by narrowing the gap in understanding between the two communities (p. ix). The perspectives represented in this symposium cover the ideological spectrum, ranging from a sociology professor's frustration after attempting to explain the fundamentals of multiple regression analysis before an administrative law judge (p. 99) to a state court judge's reluctance to believe one study's findings about the reliability of eyewitness testimony (pp. 138-39). By juxtaposing such perspectives, Saks and Baron hope to explain why the quality of most courts' use of social science data is "miserable" (p. 8) and to illuminate the advantages and disadvantages of proposed reforms.

Judges, lawyers, and social scientists all contribute to the nonuse and misuse of social science data through their differing perceptions

1. For a discussion of the historical and potential use of social science data in courts, see P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972).

2. *See, e.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 330-33 (1961).

3. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 905-06 (4th ed. 1971).

4. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 337-40 & n.20 (1977); Washington v. Davis, 426 U.S. 229, 237, 251 n.17 (1976).

5. There is ample literature describing the misuse of social science data at trial. *See, e.g.*, Hallock, *The Numbers Game — The Use and Misuse of Statistics in Civil Rights Litigation*, 23 VILL. L. REV. 5 (1977); Comment, *Judicial Use, Misuse, and Abuse of Statistical Evidence*, 47 J. URB. L. 165 (1969). *See generally* Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROBS. 217, 236-40 (1975) (discussing the ramifications of courts having to choose between competing presentations of social science evidence).

of the purpose and meaning of research data. Judges, for example, are often skeptical about social research (pp. 11, 17, 48). This skepticism results from several factors. First, the credibility of expert witnesses is undermined because they act as "hired guns": each witness supports his side's theory, hence the testimony at trial diverges sharply. The confused fact-finder therefore concludes that the data are unreliable and ignores all of the experts (p. 137). Second, social science findings change more rapidly over time than do legal principles because subsequent research suggests different ways to explain the observed data (pp. 38, 150). Third, since judges are generally untrained in social science research methods, they often are unable to comprehend the data presented (pp. 15, 101).[6] Finally, counterintuitive data may be rejected simply because it offends the judge's preconceived notions of reality (pp. 37, 139).

Lawyers contribute to the misuse problem because their role as advocates in an adversarial process affects their treatment of applied research. Their objective is not to establish a record consisting of scholarly detachment and commitment to truth, but to win a favorable verdict (p. 12). Lawyers thus have an incentive to manipulate data or to avoid presenting a balanced picture (pp. 12, 37-38). Similarly, since lawyers must build a case from "facts," they have an incentive to mischaracterize the nature of social science data. Data interpretation is couched in terms of probabilities and confidence levels (p. 70); for example, if the result "*A* causes *B*" can be shown by data that explains twenty percent of the variance between two variables, that data is considered good by social scientists (p. 37). For purposes of simplicity, however, lawyers ignore that eighty percent of the variance is not explained and simply argue that "*A* causes *B*" (p. 37). In so doing, they attribute a much higher level of certainty to applied research data than would social scientists (p. 71). The adversarial process, therefore, can itself confuse the issues, particularly when each side presents its own statistical analysis.

Use/Nonuse/Misuse does not significantly criticize social researchers or offer any meaningful advice to them about improving legal-social science communication. The authors do suggest that researchers recognize the fundamental difference between the goals of each discipline. Courts are not in the business of seeking scientific truth; they are concerned with resolving disputes and are interested in ultimate scientific truth only to the extent that it furthers dispute resolution. Researchers should, therefore, recognize the inquisitional nature of court proceedings, expect to be questioned, and re-

6. When only one side has presented complex social data in support of its case, this lack of understanding may confront the trial judge with a dilemma: If the court lacks the resources necessary to evaluate the data, it will have to choose between ignoring the data or accepting it on faith. P. 76.

spond by defending their analysis in terms understandable to the court (p. 79).[7]

Contributors to the book make a number of suggestions for improving the legal profession's use of social science data. Some of these ideas, like the proposed Science Court (pp. 53-59), have been advanced before.[8] This specialized court, comprised of impartial scientific experts, could arguably make more informed judgments between competing theories than general courts. The book's discussion, however, does little more than inform the reader of the ongoing debate. Another proposal urges courts to use procedures authorized under the Federal Rules of Civil Procedure to digest complex evidence more thoroughly. These procedures include appointing a special master[9] or a court adviser and trying the issue before an advisory jury (pp. 133-34).[10] These proposals are also undeveloped; readers must turn elsewhere for an evaluation of their merits.

Two proposals emerging from the symposium do offer grounds for new debate. The first, made by Professor Baron, advocates educating lawyers about social science research by making that research available in an indexed form similar to the West system currently used for cases (pp. 154-56). Lawyers skilled in the use of social science data will win more lawsuits, Baron argues, so that the proposal will induce more lawyers to develop these skills. As lawyers become more sophisticated, the bench will also become conversant with data interpretation. Baron does not explain, however, why such an incentive system has not already improved the quality of social science evidence presented at trial.

The second proposal, made by Professor David Baldus, addresses a particular policy issue: the constitutional reasonableness of the death penalty in specific cases. Baldus advocates using quantitative analysis to determine whether a death sentence in a particular murder case is "excessive" when compared with sentences of other "similarly situated" defendants (pp. 83-94).[11] State courts typically apply a subjective "salient features" test to define the relevant pool of comparison cases (pp. 84-86). Using standard multiple regression

7. The absence of any significant advice to researchers may have resulted from the book's structure: of the 34 contributors, only 12 were lawyers, judges, or law professors.

8. For a discussion of the Science Court proposal, see Martin, *The Proposed "Science Court,"* 75 MICH. L. REV. 1058 (1977).

9. FED. R. CIV. P. 53. Special masters are experts appointed by the court to hear complex matters. The special master makes findings of fact and law and reports these to the court.

10. FED. R. CIV. P. 39(c). Such an advisory jury could be composed of impartial scientific experts. P. 134.

11. Since the Supreme Court's decision in Furman v. Georgia, 403 U.S. 238 (1972), states are prohibited under the eighth amendment from statutorily authorizing "excessive" death sentences. Whether a penalty is "excessive" is determined by comparing the challenged sentence to sentences given to other defendants convicted on similar facts.

methodology, Baldus has identified thirteen factors or "main determinants" that were important in California juries' sentencing decisions between 1958 and 1966. These determinants vary significantly from the factors used in applying the salient features test; Baldus's test, therefore, will generate a different pool of comparison cases. Although his description is cursory, his methodology seems sound and his proposal should provoke considerable scholarly debate.

The strength of Saks and Baron's work, however, lies not in these proposals. It rests instead in the varied collection of thoughts and opinions that the book offers. The work is surprisingly free from social scientists' technical jargon, and the brevity of the essays allows each contributor's personality to emerge. Although the book does lack developed substantive discussion, it exposes the reader to a variety of perspectives and thus serves a useful purpose.