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Beutel: Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science

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RECENT BOOKS

SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE. By *Fredrick K. Beutel*. Lincoln: University of Nebraska Press. 1957. Pp. xvi, 440. \$6.

For so many years now one has heard of this wonderful jurisprudential theory which, although perhaps originated by Continentals, was developed into an important contribution by American thinkers who often were referred to as sociological jurists. The scientific intentions and dispositions of these social engineers and juristic scientists continually gave promise that we were but steps away from the new age in law which would result from the adoption of the techniques and knowledge developed in the more spectacular and successful sciences. It is not surprising, therefore, that one rather vigorously seizes upon Professor Beutel's book with its provocative title; for here there appears to be that first book-length treatment of law as a science.

Before reading this work I had often puzzled as to what it could mean to say law is a science. After reading the book I have an idea what Professor Beutel means; this can be put in a somewhat homely fashion by saying that in law, as in life, it is generally useful and sometimes indispensable to know what one is talking about. Before legislating about the planting of trees one should inquire of botanists as to the distance between trees which will result in the best stand of trees. Before legislating about the required sterilization of barber tools the effect of various disinfectants upon the cutting edges of scissors should be determined. When legislating about bad checks one should know, at least, how the business community responds to the passer of such checks and what officials can effectively do to reduce the loss from such checks.

The second and larger part of *experimental jurisprudence*, to which we turn first, is devoted to a somewhat detailed analysis of the questions to which one should have answers when lawmaking about the passing of bad checks. There is also a terse description of attempts to study some other problems which have been graced with legislative attention: the planting of trees, the sterilization of barber tools, and the required size for building bricks. It is, however, the bad check problem which is the subject of approximately one half the book.

Professor Beutel is careful to point out that financial and other limitations prevented him from making a full and proper study of the bad check problem, but he nonetheless gives the reader an enormous amount of detail on the statistical aspects of the study. In light of the fact that the study is intended only as an indication of a direction for research and in view of the fact that in a very few pages the results of the study could be given (pp. 405-406), I wonder why the reader is asked to follow the author over more than 50 pages of statistical machinations.

As a result of the bad check study and other like attempts at Experimental Jurisprudence (the author capitalizes the expression throughout the

book), Professor Beutel offers five "jural laws." (1) Laws are seldom enforced literally. (2) In a changing society, inflexibility is likely to result in the death of a law. (3) Obsolete, unenforced, or unenforceable laws are likely to cause a breakdown of law enforcement in related areas. (4) Crimes do not seem to be deterred by severe punishments any more than by mild penalties. (5) Despite contrary legal provisions, where different governmental units compete in law enforcement, the unit most effectively satisfying the "actual wants" of the people will replace the less efficient units.

What Professor Beutel does in Part II of his book has been indicated because he is there engaged in the *doing* of Experimental Jurisprudence, and from this one may secure some idea as to the nature of the enterprise and its apparent scientific character. I would but add that what is experimental and scientific in this activity is hardly jurisprudential and what is jurisprudential is not shown to be scientific or experimental. This is not to suggest that Professor Beutel is wrong to urge that better information about the movement of traffic and its response to different controls will produce laws more effective in securing given objectives. Instead, I only question why this is thought to make law a science. It could be argued, analogously, that morality is made a science [Experimental Morality (?)] if before deciding whether or not to lie about the death of her child to a sick and dying mother, one were to ascertain what happens to mothers upon learning about the death of their children. If this study into the ways of mothers revealed that blood pressure went up, heart beat went down, and pain increased, would that decide whether or not the lie should be told?

This point has perhaps been belabored because it is crucial for the entire notion of law as a science; the central question here raised is one which Professor Beutel seeks to avoid in Part I of his book where, in offering the theoretical analysis for law as a science, he advises that all questions of value are to be eschewed, at least for the present. In Part I which consists largely of selections which have previously appeared as law review articles, the author first offers a definition of the scientific method (pp. 4-5) and then after rejecting Pound's definition of law as the adjustment of social interests (p. 17) Professor Beutel gives the eight steps of the method of Experimental Jurisprudence. (p. 18) In explaining the nature of Experimental Jurisprudence the author quotes (p. 28) with approval from Lundberg's well-known *Can Science Save Us*, "The only value judgments which any properly trained scientist makes about his data are judgments regarding their relevance to his problem. . . ."

Suspecting as I do that "the scientific method" is very little more than providing intelligent men with the funds necessary to pursue investigations into matters of interest, and that it is hardly like a too-often imagined technique or procedure which can be printed and distributed to all graduates of technical schools, it would not be difficult for me to accept the notion that one may behave scientifically about lawmaking. But when

Professor Beutel argues that there is some sharp line between judgments as to what should be the proper distance between planted trees and judgments as to the morality of capital punishment, I find some difficulty in appreciating what it is that he understands by "the scientific method," and, in turn, what he means by speaking of law as a science. That he thinks there is some such sharp line is suggested by his insistence upon rejecting all value judgments—an insistence made more puzzling by the failure to reveal what are these anti-scientific judgments.

My difficulties with this attempt to separate "is" and "ought," which is what is here involved, were not lessened when Professor Beutel advises (p. 63) that a crucial task for the experimental jurist is to discover not general theories advanced to explain the purposes of government, but rather to discover "the effect of a particular law in accomplishing the *real purpose* for which it was created." (Italics added.) Nor is there comfort to be gained when we are advised that the experimental jurist is to take account of human needs and demands, but these only as "objectively discernible by social research." (p. 395)

It is somewhat disconcerting to imagine that man's needs and demands for warmth, love, companionship, and freedom are to receive legal recognition by the new lawmakers as envisaged by the experimental jurist only to the extent that they are "objectively discernible" by science. Were this to become the case, one would indeed wish to know, Who researches the researchers? That Professor Beutel does place an improper emphasis upon science and its role even in a creative society is strongly suggested when he writes that the "democratic process . . . is not adapted to social change" based upon scientific ideas (p. 73) because only six percent of the population have bachelor degrees in science and can thus "hope to comprehend the implications of scientific developments or to construct means whereby they can be adapted to the use of the legal and governmental machinery. If, therefore, sufficient public interest is to be developed in adopting new scientific methods, it will be necessary for this small nucleus from which came the able scientists to convince the great majority to agree to types of governmental and legal devices which the overwhelming mass of people cannot even understand." (p. 75) It is submitted that the reasons for questioning this line of argument are apparent.

To conclude only on this note of criticism would be unfair to a book which is a pioneering effort and which does contain much that is laudable. I am referring to the actual study of the functioning of law in society, as illustrated by Professor Beutel's investigations into the bad check problem. As already indicated, there is, I'm sure, none who doubt the need for such researches. What has here been questioned has been the theoretical superstructure which Professor Beutel apparently considers to be a necessity for such researches.

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