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Book Review

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Book Review

EXPERIMENTAL JURISPRUDENCE AND THE SCIENSTATE. By *Frederick K. Beutel*. Bielefeld, West Germany: Giesecking, 1975. Pp. 404. Cloth, \$34.00; Paperback, \$29.00.

I.

Modern jurisprudence is moving on an abstract plane. The works of John Rawls¹ and Ronald Dworkin² are characteristic of this tendency, motivated by the contributions which moral philosophy can make to juristic theory. It is easy to forget that the predominant work in American jurisprudence during this century was based upon a very different orientation. It had sought to discover the connection between legal theory and concrete realities. The labors of Pound, Cardozo, and the Legal Realists,³ were fundamentally different from that of our contemporaries. They understood law as an instrument of social control. They believed that to be authoritative, the legal system must mediate the conflicts and tensions which characterize life in an urban, industrial society. They were pragmatic where contemporary jurists tend toward idealism. The earlier realism was also motivated by visions of the good. By articulating jural postulates and systemizing social interests, Pound⁴ sought to bring qualities of civilized existence to the policy judgments of judges and legislators.

The present work by Professor Beutel reflects concerns which bring it within the sociological tradition of American jurisprudence. Like Pound, Beutel understands law as a social process. His concept of

1. J. RAWLS, *A THEORY OF JUSTICE* (1971).

2. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

3. Roscoe Pound (1870-1964) began to develop his sociological jurisprudence at the turn of the century with criticisms of the effectiveness of the administration of justice in America. His work culminated with his *magnum opus*, *Jurisprudence* (5 vols.) (1959), published shortly before his death. See Patterson, *Roscoe Pound on Jurisprudence*, 60 COLUM. L. REV. 1124 (1960). For a general study see D. WIGDON, *ROSCOE POUND: PHILOSOPHER OF LAW* (1974). Earlier evaluations of Pound can be found in E. PATTERSON, *JURISPRUDENCE*, Ch. 18 (1953) [hereinafter cited as PATTERSON], and J. STONE, *HUMAN LAW AND HUMAN JUSTICE*, Ch. 9 (1965) [hereinafter cited as STONE]. Benjamin N. Cardozo (1870-1938), who was an Associate Justice of the United States Supreme Court, is best known for his three books on the judicial process: *The Nature of the Judicial Process* (1921); *The Growth of the Law* (1924); and *Paradoxes of Legal Science* (1928). There are studies of both Cardozo and of American Legal Realism in PATTERSON, *supra*.

4. See I & III R. POUND, *JURISPRUDENCE*, Ch. 6 & 14 (1959) [hereinafter cited as *JURISPRUDENCE*]; PATTERSON, *supra* note 3, at §§ 4.60-61; STONE, note 3 *supra*.

society is, however, more developed. In *Experimental Jurisprudence and the Scienstate* concern is centered upon the role of law in a highly technological, industrial society. And in this work Professor Beutel advances a conception of the good which differs profoundly not only from his predecessors but from that of contemporary legal philosophy. It is his contention that the jural problems of a common social life are of such magnitude that their adjustment is beyond the competency of judges and politicians. Their decisions are guided by arbitrary emotional preferences. A technological civilization—which accommodates scientific discovery to public needs—can arise only if the instruments of social control pass into the hands of those capable of addressing those problems through the process of hypothesis and verification which characterizes the scientific discipline.

Government, so transformed, becomes a *Scienstate*.⁵ Under such a regime, when the techniques of systems engineering are fully in place, the moral dogmatism which now generates conflict will give way to the scientific and rational development of the race. The *Scienstate* thesis differs considerably from its sociological progeny. It is more imaginative, part of the genre of scientific utopianism.⁶ And it also draws its inspiration from some common assumptions of the modern world.

Professor Beutel is a child of the Enlightenment. He rails against the obscurantism of religion and traditional morality and denounces the pernicious, reactionary consequences which they have had upon material progress. In legal administration, judges and lawyers are execrated for extending into secular life the machinations of a priest craft. Reverence for precedent, ritual, and verbal manipulation are the modern counterparts of the dogmatic theological inflexibility which rationalism was designed to overthrow.

The passion with which Professor Beutel attacks religion seems incongruous in this tolerant age. The author writes out of deep conviction and does make some telling points. It is probable, as he asserts, that an uncritical extension of principles of personal responsibility in the law of torts obstructed the development of an adequate automobile accident system. There are other illustrations of the gaps between moral principle and social need.⁷ But the wider claim, that religion and morality are essential negative influences, is untenable. The modern administration of justice is greatly enhanced by principles of equitable administration whose origins are canonical. Further, Beutel's general thesis is contradicted by modern scholarship. Christopher Dawson has

5. F. BEUTEL, *EXPERIMENTAL JURISPRUDENCE AND THE SCIENSTATE*, Ch. IX & X (1975) [hereinafter cited as *EXPERIMENTAL JURISPRUDENCE*].

6. *E.g.*, H.G. WELLS, *A MODERN UTOPIA* (1930).

7. *EXPERIMENTAL JURISPRUDENCE*, *supra* note 5, Ch. II.

shown that religion is a source of creative activity and that it has played an important role in the development of human culture.⁸ To split law and religion into two spheres—one public, the other private—neglects the contexts in which legal rules are expressed. As a living process, law shares with religion transrational values which involve the whole human person.⁹

If Beutel's wider claim is untenable, it nevertheless retains a certain critical importance. The rising influence of Islamic religion upon the legal systems of the Moslem world is, at best, a mixed blessing. As a nation, we have been victimized by that spirit of intolerance and emotional fanaticism which the author identifies as a regressive factor in the development of civilization. And on a related front he, like B. F. Skinner,¹⁰ does the academic community a service by pointing out the emotional roots of many of the claims made on behalf of human dignity. Whether the scientific criterion of the true and good is satisfactory is the more serious question which is raised by this provocative book.

II.

One way of understanding law is to view it in terms of utility. A law may be judged to be useful if it promotes the greatest good of the greatest number. Pragmatically, its usefulness is judged by the reaction of those subject to the rule. Adopting the latter definition,¹¹ Professor Beutel offers an experimental jurisprudence to resolve the most pressing problems of the lawmaker. He must know whether the law satisfies the demands which caused its enactment and its effects upon the whole legal system as well as the general public. The effectiveness of legal norms is of central importance to a legal system. The author here highlights some of the more subtle aspects of good legal administration. His insights can be extended, for empirical research has a much broader range of potential application than is commonly appreciated. Criminal convictions are frequently reversed by appellate courts upon the assumption that the accused is subject to retrial. How often does that in fact occur? And if the percentage of retrials should prove to be slight, what effect should such facts have upon the procedural rules?

8. C. DAWSON, *PROGRESS AND RELIGION* (1960).

9. See H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974). Berman's study is cited by Beutel, see *EXPERIMENTAL JURISPRUDENCE*, *supra* note 7, at 12 n.5, but is not evaluated.

10. B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1972).

11. Beutel's work more closely resembles the instrumentalism of John Dewey than the pragmatism associated with the Jamesian tradition. This is especially true with respect to the scientific method. See C. MURPHY, *MODERN LEGAL PHILOSOPHY* 66-76 (1978).

The experimental method is also offered as a solution to the sociological problem of interests. Pound's method provided for the identification and classification of the *de facto* claims and demands which individuals or groups make upon the legal order.¹² Beutel would separate needs from demands. The former are subject to objective verification; the latter are the arbitrary desires of individuals. What are needs? The offered definition is unclear,¹³ but it is probable that he has in mind the elementary requirements of food, clothing, shelter, as well as the exigencies of living in a complex society. They are interests which all would want satisfied. Transportation is illustrative. Its value is not controversial. It can be taken for granted by the social engineer responsible for devising an adequate traffic pattern. But the scientific method can also be applied to areas of life where the issue of values is more complex. It contributed to the sterilization of Carrie Buck¹⁴ as well as vehicular control in New Haven. Beutel argues that the responsibilities for perverse policies lies with the legislators rather than the scientists.¹⁵ But he does not see how some of the philosophical principles which he endorses implicate the experimental jurists in the applications of their method.

The familiar distinction between *is* and *ought* expresses the difference between scientific and valuational propositions.¹⁶ But, as the work of Lasswell and McDougal has demonstrated, human values are implicit in any decisional context. Dignity, personality, and human nature are elements of the problem to be solved. And when the scientist is the problem solver his conception of human values is critical. For now he has passed from observation to the experimental phase of science. He is exercising a power of control over the subject matter.

The author adopts the belief that the meaning of man, even in terms

12. III JURISPRUDENCE, *supra* note 3, Ch. 14.

13. The definition which Beutel posits is as follows:

Needs are a third class of interests or wants which play the most important part. They might be said to be those conditions or things in the current state of society which, if present and effective, would cause the individual or society to function with the least friction and more in accordance with the natural order of his or its universe at that moment. Needs clearly change with changing conditions in society. Primitive man needs no automobiles, airplanes, machine tools or universities, but modern American society could not exist without them.

EXPERIMENTAL JURISPRUDENCE, *supra* note 5, at 99-100.

14. *Buck v. Bell*, 274 U.S. 200 (1927). Considerable public interest in the subject of involuntary sterilization has been generated by a series of articles on the Virginia laws commencing in February, 1980, in the *Richmond Times-Dispatch*.

15. The standard case is the responsibility of scientists in the development of the atomic bomb. See EXPERIMENTAL JURISPRUDENCE, *supra* note 5, Ch. XIV.

16. For a discussion of scientific ethics, see PATTERSON, *supra* note 3, § 4.54. See also E. PATTERSON, *LAW IN A SCIENTIFIC AGE* (1963).

of ultimate life, is subject to scientific cognition. Following Skinner, he assumes that the dogma of free will had been disproven. He also assumes that such speculative questions are irrelevant. Recent legal developments, however, have demonstrated that the issues cannot be avoided. It is not pointless, as he suggests, whether or not man is understood in mechanistic terms. The *de facto* accomplishments of modern surgery (to use his illustration) are not, of themselves, a justification for a legally sanctioned lobotomy. That psychosurgery presents a threat to human nature is a fact generally being recognized by members of the scientific community as well as ethicists.¹⁷

Confidence in a purely scientific understanding of human nature is generated not only by the marvels of scientific discovery but also because of the exaggerated belief that science, and science alone, is capable of understanding the subject. We now have sufficient experience to see the dangers implicit in such an assumption. We need to also understand how such a mental outlook can cripple our capacity to deal effectively with jural problems. We are told that, in the future, experimental jurists may find that parental love and family life are essential virtues. Yet the very tentativeness with which these ideals are held impedes their effective implementation in areas where they are important, such as juvenile law.¹⁸ It is not only the lack of conviction which here impedes progress. It is a failure to see that the scientific method has a role to play in *confirming* as well as discovering values. And this deeper failure is traceable to the cognitive assumptions which, in an extreme form, characterize scientific instrumentalism.

In spite of these shortcomings, scientific proof remains an integral part of modern legal and political decisionmaking. Its relevance to fair judgment in the area of products liability will become increasingly important in the future. In matters such as the Love Canal Controversy, the balance between personal apprehension and real damage may have been struck differently if the available scientific evidence was given better credence by the responsible public officials. We are indebted to Professor Beutel for having stimulated reflection on such issues through this book which is his *magnum opus*.

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17. See 13 DUQ. L. REV. 673-936 (1975) (symposium on medical experimentation).

18. Compare the criticism of Beutel's earlier work. Schuman, 56 MICH. L. REV. 477, 479 (1958) (review of F. BEUTEL, SOME POTENTIALS OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE (1957)).

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