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Application of Beutel's Experimental Jurisprudence to Japanese Sociology of Law

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Leading Articles

APPLICATION OF BEUTEL'S EXPERIMENTAL JURISPRUDENCE TO JAPANESE SOCIOLOGY OF LAW*

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Translated by Toshira Isa

This translation of a Japanese study of an American scholar's work in Experimental Jurisprudence is perhaps best introduced in the words of the Japan Reading Newspaper *review of February 29, 1960:*

> *Shin Oikawa ... tries to absorb Beutel's study which is, among the recent fruits of American Jurisprudence, inclined toward legal realism, and he does so from the standpoint of a specialist in sociology of law in Japan. Considering the present condition of Japanese Jurisprudence, it is important to realize the necessity that such an article be read by many people. Conclusively, his article has important significance.*

Professor Oikawa's article is presented as an interesting supplement, from another part of the world, to an American venture in law and social science.

The Editors

I. HISTORICAL AND SOCIAL BACKGROUND OF EXPERIMENTAL JURISPRUDENCE AS A BRANCH OF SOCIOLOGY OF LAW IN AMERICA

This article is, in part, a continuation of the author's preceding article, "The Trends of Sociology of Law in America."[1] The critical sections of that article may be summed up as follows:

American sociology of law has been established upon expansion of its objectives toward real society as "an application of the

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1 THE QUARTERLY LAW REVIEW 60 (No. 26, 1958).

achievements of various social sciences, particularly of sociology." Among some of the characteristics of American sociology of law thus developed are rigorous practical interest, experimental positivism, and inadequacy of historical considerations. Japanese sociology of law, when considered as an adaptation of American sociology of law as described above, should highly evaluate scientific empiricism supported by its vigorous practical interest.

The author's preceding article, concerning the achievements of sociology of law in America after World War II, mentioned only a few scholars such as Arthur T. Vanderbilt (1888-1914), Roscoe Pound (1870-), and Kenneth S. Carlston (1904-). If, however, the preceding article is to be expanded to show the real achievements in sociology of law, it would seem that experimental jurisprudence must be considered first. At this juncture our attention is called to a work by Frederick K. Beutel (1897-)[2] entitled *Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science,* published in 1957.

Various divergent views toward such an attempt to grasp Experimental Jurisprudence within the stream of American social science are to be expected for the reason that Beutel's Experimental Jurisprudence does not require a foundation upon sociology of law. In view of the fact, however, that realistic jurisprudence, which in the past did not expect to be a part of sociology of law, is now considered a branch of sociology of law by George Gurvitch (1894-)[3] and Pound,[4] and more recently by N. S. Temasheff,[5] it does not seem too outrageous to study as a branch of American sociology of law the experimental jurisprudence which can be considered to have developed from realistic jurisprudence,[6] and neither does it seem too outrageous to undertake a critical analysis of its system.

Thus, in order to recognize Experimental Jurisprudence as a trend in American sociology of law from such a standpoint, we must first grasp Beutel's Experimental Jurisprudence as a development of realistic jurisprudence. Consequently, it seems desir-

[2] Concerning Beutel's career, see Takeo Hayakawa, *Experimental Jurisprudence—An Aspect of Contemporary Legal Thought in America,* THE QUARTERLY LAW REVIEW 12 (No. 25, 1958).

[3] GURVITCH, SOCIOLOGY OF LAW 135 (1947).

[4] Pound, *Sociology of Law,* 20TH CENTURY SOCIOLOGY 337 (1945).

[5] Timasheff, *Growth and Scope of Sociology of Law,* MODERN SOCIOLOGICAL THEORY 425 (1957).

[6] Takeo Hayakawa, *supra* note 2, at 8.

able to describe what kind of historical and social background lies behind the formation and development of American realistic jurisprudence and to comment upon the position that Experimental Jurisprudence occupies within the stream of such events.[7]

In the latter half of the nineteenth century, the rapid development of modern industry which was ignited by the termination of the American Civil War (1861-65) brought about the fruition of the capitalistic economic system, which in turn forced jurisprudence to find new areas of application. To be more specific, jurisprudence which limited its objective only to pure "legal" phenomena did not go beyond mere interpretation of positive law or case law and became inapplicable to modern society. In other words, as pointed out by Vanderbilt, within a remarkably urbanized and industrialized society, it became impossible for jurisprudence to isolate itself from all other social sciences.[8] The man who is recognized as having pioneered realistic jurisprudence under such circumstances is Justice Oliver Wendell Holmes (1841-1935). Holmes insisted upon the application of the achievements of various social sciences to the field of jurisprudence and sought to find the function of law in the judicial process.[9] His pioneering achievements blossomed as a formative development of realistic jurisprudence in the twentieth century.

In the twentieth century, America entered a period of fluctuation. In 1917 America entered World War I, and, without encountering direct catastrophy, enjoyed the properity of a spectac-

[7] Among such approaches attempted toward the observation of civil law from the standpoint of sociology of law are various manuscripts written by Prof. Fukuchi. In observing the Juridical Theory of Rudolf von Jhering (1818-1892), he considers historical and social regularity which provides a concrete background for logical structure and says, "Although such things as ideology and logical concepts are linguistic structures and cannot exist without language, the language itself, whether it is a vocabulary or a grammatical construction, derives, in its final analysis, from the vocal and symbolic expression of the emprical facts of nature and society (their objective aspects or mutual relationships), and is nothing but a product consciously formed as a means of social communication. Therefore, it must be said that ideology, logic, and conception are eventually related to, founded upon, and defined by objective facts." Extracted from Toshio Fukuchi, *On Jhering's Juridical Theory,* 8-9 JOURNAL OF LAW AND POLITICS (Nos. 3 and 4, 1957, and No. 1, 1958).

[8] VANDERBILT, MEN AND MEASURES IN THE LAW 25 (1949).

[9] See the following articles in HOLMES, COLLECTED LEGAL PAPERS (1920); *The Path of the Law,* at 169; *Law in Science and Science in Law,* at 210.

ular postwar increase in the accumulation and circulation of national capital. In 1929 a heavy decline in stocks and a sudden increase of unemployment caused social disorder and anxiety. As a counteraction against such a period filled with fluctuation and confusion, the formation and development of realistic jurisprudence took place. Thus, Karl N. Llewellyn (1893-)[10] who, like Holmes, stands on sociological achievement and places heavy emphasis upon judicial process, Jerome N. Frank (1889-1957)[11] and Roscoe Pound, who, accepting sociological achievements, lays stress on judicial process and administrative process,[12] have all made outstanding contributions to the achievement of sociology of law. It is safe to say that their studies were all directed toward the maintenance of the balance against social change.[13]

In 1941 America entered World War II and within only five years magnificent economic expansion took place. At the end of the war in 1945 she started the reduction and rebuilding of an inflated economy which was beginning to enjoy capitalistic prosperity. Simultaneously, cold war started between American fronts and Communist nations, which developed into the Korean conflict in 1950, and United States—Russian relations started downhill. Under such circumstances, it followed as a matter of course that America, which stands against the Soviet Union, turned toward the strengthening and maintenance of capitalistic prosperity, paving the way toward a modern democratic society within the framework of the rule of law. Studies by Carlston[14] and other realists were conducted along this line.[15]

However, along with recent rapid technological progress, which may be symbolized by the discovery of atomic nuclei and the invention of artificial satellites, the ups and downs of society also became more frequent. Accordingly, the law which governs the fluctuation of society is forced to fluctuate with it. As a result a necessity arises for a science which contributes to legislation by measuring the effect of law upon society through the cooperation of various social sciences—and that is the science of legislation.

[10] LEWELLYN, THE BRAMBLE BUSH 3 (1930).

[11] FRANK, LAW AND THE MODERN MIND 46 (1949); PAUL, THE LEGAL REALISM OF JEROME N. FRANK (1959).

[12] Pound, *supra* note 4 at 300.

[13] For further details see Oikawa, *supra* note 1, at 56.

[14] CARLSTON, LAW AND STRUCTURES OF SOCIAL ACTION 71 (1956).

[15] For further details see Oikawa, *supra* note 1, at 59.

One of the new branches of jurisprudence, or realistic jurisprudence, attempted in this social background is Beutel's Experimental Jurisprudence.

II. BEUTEL'S SCIENTIFIC METHOD OF JURISPRUDENCE

Concerning Experimental Jurisprudence, which was formed in an historical and social background such as that described in the foregoing section, Beutel himself makes the following statement showing his interest in the solution of the problem:[16]

> For some time there has been a realization among philosophers and others interested in the course of social development that social science and government[17] were failing to inspire practical social changes comparable to those made in the application of physical sciences and engineering. Although the last century alone has witnessed phenomenal technical and scientific progress on the material side, the general science and art of lawmaking, law enforcement and government seems to have developed practically nothing new since the days of the Roman Empire. In fact, so striking has been the failure of the philosophy of social control and the machinery of government to keep pace with the revolutionary developments of physical science that the resulting mental, political and social maladjustments have persuaded at least one leading sociologist to classify the present age as that of the decay of modern culture.
>
> This failure of man to govern himself as adequately as he has been able to achieve control over nature was dramatically illustrated at Hiroshima and Nagasaki where highly advanced mastery over nature was graphically displayed against anarchy in human relations. Since that time even the physical scientists, who have long proclaimed their neutrality in matters of law and government, have begun to fear lest they have placed God-like destructive powers in the hands of a political animal who, due to his absence of control over the passions and frictions of the society in which he lives, might be so stupid as to destroy not only that society but even humanity itself.
>
> In the light of this obvious disproportion between man's power over himself and over the elements about him, it might be wise to direct attention to the question of whether or not the techniques and knowledge so successfully developed in the physical sciences could be transferred into the field of social control; or, putting it another way, whether or not jurisprudence and the political and

[16] BEUTEL, SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE 3-4 (1957). [Unless otherwise indicated, Prof. Beutel's footnotes are omitted throughout this paper (Ed).]

[17] "Government," according to Webster's Dictionary, means the mode or system of governing, that is, the governing system embracing the functions of legislation, jurisdiction and administration. It is in this sense that the term is used in this paper.

> social sciences could be placed on a footing and subjected to methods of study and control similar to those which prevail in physical, biological and medical sciences. . . .

Although Beutel's words just quoted are in themselves quite plain, his methodic approach and, furthermore, his timely interest in Experimental Jurisprudence are revealed by those words. This is to say that Beutel, realizing the importance of the reality of present society which is characterized by "the lag in social science and government," turns his attention toward natural science, which already possesses a system of remarkably developed techniques and knowledge, and asks "whether scientific method may be applied to jurisprudence" as a means of coping with such problems. In other words, Beutel is emphasizing the necessity of creating Experimental Jurisprudence from a realistic standpoint. However, the question of whether or not Beutel's Experimental Jurisprudence is worth applying to sociology of law in Japan must be preserved until his methodology has been discussed.

We are now about to discuss Beutel's methodology, but what must be examined at this juncture is his conception of law, because these is a possibility of "mutual relation between object and method,"[18] that is, Beutel's method of Experimental Jurisprudence may be closely related to what he means by the word "law."

Now the word "law" is being used with a very vague connotation, as readers may already know, not only in the field of jurisprudence but also within the field of sociology of law. The author has once touched briefly upon this point,[19] but Beutel analyzes the meaning of this word by putting it into four categories:[20]

> 1. Law as used in its usual sense refers to a means of social control, a statute, ordinance, court decision, traffic light, etc.; it is in no sense scientific. It may or may not be the result of a scientific process of experimentation, but in essence it is simply a social or governmental phenomenon.
>
> 2. There is also the so-called "Law Behind the Law" or the ideal "Natural Law." This is believed by some to be a collection of rules which all laws as a means of social control should approximate.
>
> 3. Another use of the term can be found in the so-called "Scientific Law," which merely states that under given circum-

[18] RADBRUCH, *RECHTSPHILOSOPIE (FUNFTE AUFLAGE)* § 98 (1956).

[19] Oikawa, *The Conception of "Law" in Sociology of Law and Its Application to a Field Research,* 10 JOURNAL OF LAW AND POLITICS 5 (No. 2, 1959).

[20] See BEUTEL, *op. cit. supra* note 16, at 15-16.

> stances there will be a given sequence of events. For example, an unsupported object will fall to the ground, or perhaps a highly unpopular law cannot be enforced against the will of an active majority.
>
> 4. A fourth meaning inheres in the expression "Jural Law,"[21] which is a statement of a scientific law as it applies to the sequence or pattern of social reactions which actually follow, or which it is predicted will follow, the enactment of a particular law. . . .

It may be seen that what Beutel advocates is a fourth item, jural law, and according to him it is the jural law that indicates the scientific generalities to be derived from the examination of laws in society. With the intention of developing an experimental jurisprudence which possesses those characteristics mentioned above, Beutel takes a critical view toward various older theories of jurisprudence by setting up the following hypothesis:[22]

> For the purpose of developing such a science, it may be tentatively assumed that law is a man-made instrument of social control devised to accomplish the purpose of the lawmaker. It cannot be exclusively characterized as either the inevitable working of history, the immutable will of God, the command of the sovereign, the ultimate embodiment of justice, the will of the governed, the result of uncontrollable forces or the proper adjustment of social interests.[23] Under different conditions and circumstances there is probably an element of truth in each of these explanations given by the various schools of jurisprudence, but none of them can be accepted as the whole truth. Furthermore, little is to be gained by a debate as to which if any of them is the dominant explanation of the phenomena of law. . . .

Beutel, as quoted above, does not become deeply involved in a discussion of the concept of law, but rather concentrates his attention upon how it and the institutions surrounding it function. Just as physicists cannot define electricity, but work constantly

[21] When Friedmann uses the term "legal" in his work, LEGAL THEORY (1953) and when Pound uses "legal order" in contrast to "jural order" in the *Preface* to his SOCIOLOGY OF LAW (1947), they give a broader meaning to "legal" than to "jural." Therefore, it seems reasonable to translate the former "Hoteki" and the latter "Horitsu-teki."

[22] See BEUTEL, *op. cit. supra* note 16, at 17.

[23] Beutel lists the following as describing such matters: MAINE, ANCIENT LAW (4th Am. ed. 1906); CICERO, *DE LEGIBUS* 379-81; BROWN, THE AUSTINIAN THEORY OF LAW (1906); STAMMLER, THE THEORY OF JUSTICE (1925); 5 JEFFERSON, WRITINGS 115-24 (Ford ed. 1899); CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-15 (1921); JHERING, LAW AS A MEANS TO AN END (Husik's transl. 1913); POUND, SOCIAL CONTROL THROUGH LAW 63-80 (1942).

to see what it does, so also the experimental jurist pays far more attention to the effect of law than to its definition. Putting it another way, when the "phenomena surrounding law" are more accurately understood, the definition of law will establish itself. Such is the nature of Experimental Jurisprudence. When we compare this with the theories of sociology of law by Eugene Ehrlich (1862-1922),[24] Gurvitch,[25] Max Weber (1864-1920)[26] and Theodor Geiger (1891-1952)[27] who attempted to establish a magnificent theoretical system upon the footing of a rigid conceptual structure of law, we can see the depth of Beutel's practical interest in Experimental Jurisprudence.

Beutel's methodology seems quite reasonable from the viewpoint of social science or of scientific sociology of law for the reason that the word "law" itself is an abstract concept and is a conceptual tool which is given its meaning by the way in which the word is applied.[28] From such a viewpoint Experimental Juris-

[24] Ehrlich's representative work *GRUNDLEGUNG DES SOZIOLOGIE DES RECHTS* (1913) has been partially translated by Takeyoshi Kawashima (1952). Concerning his theoretical system, see TETSU ISOMURA, EHRLICH'S SOCIOLOGY OF LAW (1953).

[25] Gurvitch's representative work SOCIOLOGY OF LAW (1947) has been translated by Toshitaka and Susato (1956). Concerning his theoretical system, see Tobizawa, *System of Gurvitch's Sociology of Law,* 3 JOURNAL OF LAW AND POLITICS — (1952); and Tobizawa, *System of Gurvitch's Legal Thought,* 6-7 JOURNAL OF LAW AND POLITICS — (1955-56).

[26] Max Weber's representative work *RECHTSSOZIOLOGIE IN WIRTSCHAFT UND GESELLSCHAFT* (1922) has been translated by Yoshihisa Ishio (1957) and Jyo Onogi (1958). Concerning his theoretical system, see Kawamura, *Introduction to Weber's Sociology of Law,* 6 SOCIOLGY OF LAW — (1955).

[27] Concerning Geiger's theoretical system, see his representative book *VORSTUDIEN ZU EINER SOZIOLOGIE DES RECHTS* (1947).

[28] From such a standpoint Takeyoshi Kawashima says, "The question of what people have been calling law ('law' as a social phenomenon) is quite different from the question of how sociology of law as an empirical science should define the concept of law regarding it as an analytical tool. Although the word 'law' has had, in general, two meanings mentioned previously, its meaning has much nuance when applied more specifically and has various interpretations.

"It is, therefore, impossible to use this word as an analytical tool without defining its meaning specifically. However, the concept of law as a means of analysis is something that is formed and defined by scholars for the sake of analysis so that it is useless, at least to empirical science, to argue about the definition of the concept without considering the effectiveness of analysis which is performed by means of the tool concept." 1 SOCIOLOGY OF LAW 86 (1958).

prudence, as a science of law, attempts to define the concept of law through scientific studies of the effect and effectiveness of law as it applies to society without detailed analysis of the nature of law. Consequently, the scientific method of Experimental Jurisprudence must next be considered.

Beutel lists the following six series of activities as scientific methods:[29]

1. Observation, and identification of the sensations.
2. An attempt to explain the activity apparent in the sensations. Such an explanation is commonly called a hypothesis.
3. Further observations to check the accuracy of the hypothesis; in attempting these observations, scientists have invented many mechanical means to increase the accuracy and the penetration of sensory perception, for example, the telescope, the microscope, the camera, the X-ray, and myriad other gadgets and processes, all of which permit observation and checking to an extent far beyond that of the unassisted human senses.
4. When a series of observations offers a vertification[30] or check of the hypothesis, it is taken to be a statement of tentative scientific fact.
5. This statement is then enlarged to include other phenomena similar to the one tested, and if it works there, we sometimes speak of the explanation as a scientific law.
6. Usually when the hypothesis is so extended it soon encounters a situation which it no longer explains. The hypothesis is then remodeled in an attempt to explain this new phenomenon, and the process of observation, checking and verification is again repeated.

Since this scientific method mentioned by Beutel has already been discussed by some realistic American sociologists of law, it cannot exactly be said to be a new method,[31] but we can understand the scientific positivism in his own methodology when we look at his statement, ". . . the progress of science has been marked by the wrecks of hypotheses; far more have been disproved than verified, and none has yet been created which will stand up against all tests and conditions."[32] In the next section we

Furthermore, Geiger points out that as long as we maintain simply the linguistic idiom *(Sprachgebrauch)* or a commonly known daily concept *(alltagsvorstellung)*, we cannot essentially define the concept of law *(Rechtsbegriff)*. GEIGER, *op. cit. supra* note 27, § 9.

29 BEUTEL, *op. cit supra* note 16, at 4-5.

30 The quotation is correct. "Verification" is evidently intended. [Ed.]

31 CARLSTON, *op. cit. supra* note 14, at 53.

32 BEUTEL, *op. cit. supra* note 16, at 5. See also, Oikawa, *The Study of "Law" Phenomena on Empirical Science*, 9 JOURNAL OF LAW AND POLITICS 44 (1959).

shall see how Beutel has introduced scientific method into his Experimental Jurisprudence.

III. THE SOLUTION OF SOME LEGAL PROBLEMS BY APPLICATION OF THE METHOD OF EXPERIMENTAL JURISPRUDENCE

In applying the scientific method just described to Experimental Jurisprudence, Beutel lists the following eight steps:[33]

> 1. The nature of the phenomena which law attempts to regulate should be studied. In particular, the social problem to which a specific law is directed should be carefully isolated and examined.
>
> 2. The rule of law or other method used to regulate the phenomena or intended to solve the social problem should be accurately stated.
>
> 3. The effect on society of adopting the rule should be observed and measured.
>
> 4. There should then be constructed a hypothesis that attempts to explain the reasons for this reaction.
>
> 5. This description, when broadened to apply to other analogous situations, might be considered a jural law that describes or predicts results which would occur on application of a similar regulatory law to similar problems.
>
> 6. If analysis shows that the law is inefficient, there could then be suggested new methods of accomplishing the originally desired result.
>
> 7. The proposed new law could be enacted and the process repeated.
>
> 8. A series of such adoptions of new laws and the study of their results might throw important light upon the usefulness of the underlying purposes behind the enactment, thus effecting a possible alteration in or abandonment of this objective, or in the long run, though this now appears doubtful, even induce a revision of our present scale of social and political ethics.

As clearly seen in Beutel's statement, Experimental Jurisprudence is essentially a study for the purpose of solving problems. Consequently, Experimental Jurisprudence should be employed in detailed observation and analysis or to establish and examine postulates based upon data related to social phenomena. In other words, Experimental Jurisprudence is a science of law whose purpose is to engage itself in problem-solving through careful examination of the factual elements of the phenomena toward which a particular law is directed. The first step in the methodology of scientific jurisprudence, therefore, must be a

[33] BEUTEL, *op. cit. supra* note 16, at 18-19.

careful isolation of relatively simple problems. It naturally follows that in determining the nature of the problem in question as a social phenomenon it often becomes necessary to employ various other sciences. From this standpoint Beutel observes:[34]

> It is obvious that a traffic study involves mechanical knowledge and some psychology, while a juvenile delinquency problem calls for the help of doctors, psychiatrists and psychologists. Similarly, studies of bad checks and rent control will use economic data. In fact, an adequate analysis of any problem will require aid from many of the modern sciences to expose the implications of its basic facts.

Beutel's Experimental Jurisprudence thus attempts the solution of specific problems. Although Beutel has analyzed numerous problems, let us limit our interest to the traffic problem at this time and look at his specific examples under the second step:[35]

> Once the problem is isolated, it may then be easy to discover what legal devices have actually been created for its solution. In the case of a dangerous corner, many are available. To name only a few, there are city ordinances creating stop lights and stop signs, assigning traffic officers for busy hours, designating one-way streets, prohibiting right or left turns or both, and ordering the construction of overhead crossings and bypasses. . . .

Thirdly (as in observation of a particular fact on a particular corner), the patterns of social action caused by the impact of a legal device on the comparatively simple phenomenon of the movement of vehicular and pedestrian traffic at the corner is readily observable. Here mechanical counters, statistics, motion picture cameras and the like are useful in assembling the pattern of traffic before and after a change in the law.

Fourthly, scientific imagination, speculation and intuition begin to assert themselves. The formulation of a hypothesis to explain the pattern of group or individual actions revealed by research may be a simple or complex, but not impossible, task. For example, if a one-way street or an overhead crossing is established, the results are obvious, and the reaction of society to the rule of law can be explained with little difficulty.

As a fifth step, after a hypothesis concerning the effect of the law on a single situation has been constructed, the hypothesis may be capable of enlargement into a proper jural law. Thus it may be determined that under certain conditions traffic lights eliminate a percentage of accidents on busy crossings, while it is

[34] *Id.* at 20.

[35] *Ibid.*

certain that an overhead pass will entirely eliminate traffic accidents caused by collisions at intersections.

The sixth step in Experimental Jurisprudence is reached when, after observations of the reactions of people to a particular law or class of laws have been collected and formalized, it is possible for the jurist to point out inefficiencies in both the administration of the law and its technical structure.

This leads us to the seventh step, in which it becomes possible for the jurist to suggest to statesmen or to other policy-makers changes in the law which might better effectuate the policy for which it was created.[36] However, under our present governmental system the legislative body is an independent organization and is in no way obligated to the jurist. Consequently, there is little hope that the experimental jurist's new reform plan based on his scientific analysis would ever be considered, and if it were enacted, he would be lucky.

Beutel, recognizing this situation, suggests the eighth step as a practical means of overcoming this legislative lag. Beutel subdivides this step into three parts as follows:[37]

The first is delegation by the legislature of rule-making power to officials with authority to change current rules of law. Where the lawmaking power is thus delegated to an official, he is able to experiment with the subject matter under his jurisdiction, to change rules or to invent legal devices.

Second, in the case of the United States, since most of the legal and administrative variations which an experimental jurist might seek to effectuate have already been enacted in legal units of similar structure, it becomes necessary to make comparisons with other states or foreign countries.

Third, the legislative body as it is organized today enacts the "change of law" by itself, thus placing its existence outside the realm of experimental jurists. However, should careful scientific studies indicate a change in direction or policy, they are likely to be the most persuasive argument to all but an emotionally blinded lawmaker.

In line with these eight steps, Beutel, in his chapter titled "Experimental Jurisprudence in Action,"[38] attempts further de-

[36] *Id.* at 29.

[37] *Id.* at 29-32.

[38] *Id.* at 115-38.

tailed studies of the problem of traffic control. His concluding remarks are worthy of attention as being indicative of the general applicability of Experimental Jurisprudence:[39]

> This rapidly developing science points out the direction that can be taken to develop other fields of the law. The many scientifically controlled devices here indicate that it is possible for scientific jurisprudence to create a new legal system which will make our present methods of social control look as obsolete as a country road when compared to a modern *Autobahn.*
>
> Lastly, it should be remembered that this is not merely local, but, like other science, is being applied in engineering projects all over the world.

Although the basic nature of Beutel's method of Experimental Jurisprudence has been revealed, the system does not limit itself to the area described above. It turns further toward the value of the purpose with which legal policy is concerned. Let us now read Beutel's opinion on this matter:[40]

> Philosophers, clerics and students of ethics have devoted much attention to what they call the basic values or purposes for which law and other social regulations exist. These values have been postulated in the form of hedonism, the greatest happiness for the greatest number; materialism, the largest pile of tangible assets; idealism, the development of the things of the spirit; and in other ways too numerous to mention. Or, to state it another way, these lovers of generality may say that the purpose of law is race power, national aggrandizement, spiritual or intellectual advancement, the preservation of freedom, the development of the state, the rule of the proletariat, the perpetuation of the nobility and so on. Legal philosophers like to think that when the lawmaker comes to his ultimate decision, he consciously turns to these ethical sources or else relies on intuition based upon his early conditioning in morals.
>
> In the past there may have been some truth in this theory. Any realist, however, can see that, even without a system of Experimental Jurisprudence which would place the facts at issue before the lawmaker, statements of these ultimate values are often rationalizations which come after decisions which have already been made on much more practical grounds. . . .

As we can see, Beutel refuses to place policy problems upon the footing of either extreme idealism or ethical standards.

Within a dimension divorced from dependence on value, or putting it another way, on the plane of interests which can be measured in terms of number, volume and force, experimental jurists provide the means to resolve the eternal struggle for the

[39] *Id.* at 136.

[40] *Id.* at 32-33.

change of law. Accordingly, Beutel insists that lawmakers and jurists need not be deeply involved with ultimate value. He says:[41]

> It appears then that the term "value" serves no purpose in Experimental Jurisprudence. Its continued use in the language makes it very much like the term "phlogiston" which all physicists once used to describe an element which they believed was necessary for explaining the phenomenon of fire; but, as has been suggested, just as physics now gets along without phlogiston, a descriptive and experimental social science can do without the term "value." All that is necessary is to discover the actual condition of the interests or demands of people in society to expose the need for granting the demands which they make, and to choose the legal devices which will be useful for making possible the fulfillment of the desires represented by the choices, with the least social friction.

As shown in this quotation, Beutel denies the entry of "value" into Experimental Jurisprudence, while he insists that the isolation and examination of the things called "interests" are useful for the creation of law.

As a result, from this viewpoint, Beutel classifies the interests of an individual or group of individuals into three categories according to the degree of intensity with which they affect the law: demand, desire, and needs. Particular emphasis is placed upon needs. The reason, according to Beutel, is that if they are present and effective needs they will cause the individual or society to function with the least friction and more in accord with the natural order.

Thus, Experimental Jurisprudence provides the means of discovering and measuring demand, desire, and needs; indicates the way of deciding which one of them should be fulfilled; and makes possible the creation of a technique of choosing the policy best calculated for enacting the necessary change of law.

Experimental Jurisprudence, thus characterized, should answer at least three questions about law:[42]

> (1) To what extent does it satisfy the demands which brought it into existence? (2) Does it acccomplish the express purposes for which the lawmaker enacted it? (3) How does it affect the needs of the people whom it governs?

Beutel concludes the methodology of Experimental Jurisprudence with the following:[43]

[41] *Id.* at 44.

[42] *Id.* at 53.

[43] *Id.* at 55-56.

> In short, Experimental Jurisprudence, when properly applied, can now be expected only to test the efficiency of a law in attaining the particular ends for which it was adopted and in turn can state the results which will follow various attempts to reach such ends. The data thus accumulated may throw great light on the ultimate usefulness of the objectives and the effectiveness of the means used to attain them. The ethical problem of what, in the abstract, is the ultimate good is not likely ever to come within the ken of Experimental Jurisprudence; it is today too far removed to require consideration.
>
> Jurisprudence as a science of ethical values, norms and the like can have no function, in light of the present state of research techniques, other than that of philosophical speculation. Such speculation may be exceedingly interesting and may result in highly suggestive working hypotheses, but it can never have any true scientific usefulness until it is put to the acid test of practical application by means of social control applied under the careful observation of scientists. In this way pragmatic ethics may become a living reality through the development of the technique of Experimental Jurisprudence.
>
> When a so-called value judgment is approached, the question should be: "Value for the solution of what social problem? "; if the problem is then carefully identified, its factual basis studied and the scientific and jural laws surrounding its phenomena developed, the question of value as a philosophical speculation or political issue will usually be found to have vanished.[44]

Beutel attempts to establish a scientific experimental jurisprudence which has freed itself from dependence on value. Of course it would be safe to say that the problems which Experimental Jurisprudence encounters are various in nature, that the

[44] Concerning this point Masashi Chiba states as follows: "In general, it would be fair to say that sociology of law has developed as it solved the problems created by criticisms and accusations often raised from various fields. However, there is one big problem that has never been turned toward solution since it was raised and that is the methodology of research. Above all else, the question of why it is necessary to conduct research must be explained logically and systematically, starting from the need for the accumulation of scientific data. Furthermore, in order to make research an objective and scientific project instead of a subjective and accidental one, a system of proper research method must be prepared. Concerning the problem of the need for research, there has been no significant discussion even among other sciences which are performing research investigations, but concerning the problem of the method of research, there has been great progress in other sciences, especially in sociology and anthropology in America and Great Britain. At least the question of whether it is necessary to look at these problems for the development of sociology of law as a science has been more or less ignored. We should exert our efforts toward the solution of these problems even today." CHIBA, SOCIOLOGY OF LAW AND THE THEORY OF PROVINCIAL STRUCTURES 78 (1956).

realm of investigation is extensive, and that Experimental Jurisprudence is indeed in the process of formation. Whatever the case may be, it seems important for any Japanese sociology of law to consider critically Beutel's Experimental Jurisprudence, and from this standpoint some discussions on his Experimental Jurisprudence will be developed in the following section.

IV. CRITICAL ANALYSIS OF BEUTEL'S EXPERIMENTAL JURISPRUDENCE FROM THE STANDPOINT OF JAPANESE SOCIOLOGY OF LAW

The author has endeavored to describe Beutel's Experimental Jurisprudence, and, as a result, it should be seen that experimental positivism based upon rigorous practical interest penetrates his methodology. It can be easily pointed out that Beutel's Experimental Jurisprudence—or, in general, realistic jurisprudence as a branch of American sociology of law—places its footing upon pragmatism. In other words, it seems to show that the pragmatism of William James (1842-1910),[45] an experimental positivist who turned from the abstract to facts, was succeeded by that of John Dewey (1859-1952) and Holmes.[46] This in turn was developed by realistic jurists and exerted great influence upon Experimental Jurisprudence. Beutel himself mentions in his Preface that his Experimental Jurisprudence was inspired by such writers as Williams James, John Dewey and Roscoe Pound.[47] From this starting point Beutel's Experimental Jurisprudence is formed.

Now the basic idea that Beutel directs toward the solution of legal problems, as has already been mentioned, is how law or rules of law act, not on a sheet of paper, but upon real social phenomena. Seeking a solution, Beutel turns his attention to various other sciences which study human behavior in society. He then attempts to apply the methods of those sciences to the science of law. Needless to say, this does not mean that a jurist must also be a psychologist or a physicist, but it does mean that there must be departmental cooperation among various sciences. This has often been emphasized in Japanese sociology of law in the past.[48]

[45] JAMES, PRAGMATISM 51 (1925).

[46] See, *e.g.*, PAUL, *op. cit. supra* note 11, at 18.

[47] See BEUTEL, *op. cit. supra* note 16, at vii.

[48] For instance, Takeyoshi Kawashima has pointed this out by saying, "Thus far jurisprudence has maintained an 'Honorable Isolation' . . .

In view of the expectation that with the progress of natural science, Japanese social phenomena may experience rapid change, the idea just described should be kept in mind, not only by Japanese sociology of law, but also by jurisprudence in general.

To mention some critical views next, the first point that may be brought out would be the weakness of historical considerations resulting from heavy emphasis on the solution of realistic problems. In other words, as mentioned previously, Beutel, in studying the law that acts and functions, does not consider the investigation of the social factors which formed the law, but instead concentrates his effort upon the social effect or effectiveness of the law which has been formed. Historical observations—such as how various powers *(Machte)* related to the formation of law *(Rechtsbilding)* influenced the development of the formal nature of law, as once brought up by Max Weber[49]—have been abandoned. Therefore, Beutel's Experimental Jurisprudence cannot avoid the criticism that it is indifferent to historical considerations, while on the other hand, it should not be ignored that his Experimental Jurisprudence has been formed upon the historical social background of the American nation which places reliance upon the "rule of law."

Secondly, attention is called to the fact that Beutel does not discuss[50] groups or organizations as social nuclei which produce the various powers that law creates. Of course, as was mentioned before, the ideology of class harmony directed toward America's strengthening and maintenance of world-wide welfare exists behind Beutel's Experimental Jurisprudence, as revealed in Beutel's own words: "Once the process of Experimental Jurisprudence is adopted and perfected in this and other fields, it is foreseeable that its results can be as startling and useful to human welfare

but the situation is different when it comes to the sociology of law. It approaches the same objective as that of various social sciences—social phenomena as facts—in an equally realistic manner, and it can continue its own study only when it stands on the footing of the research findings of various social sciences, while at the same time its own research findings may make some contribution to the study of social sciences.

"Furthermore, it is such mutual promotion and cooperation that is the duty of sociology of law which owes much to the development of social science." KAWASHIMA, EXISTENTIAL STRUCTURE OF LAW 39 (1950).

[49] WEBER, *op. cit. supra* note 26, § 397.

[50] *But see* BEUTEL, *op cit. supra* note 16, at 48-50 [Ed.].

as have been the fruits of scientific method in other areas."[51] It is, however, doubtful whether it is thus possible to solve various problems in "organizational structure"[52] which have appeared in modern capitalistic society. Especially in the present situation in Japan where labor unions and capitalist groups are set up against each other and various profit organizations exert pressure on legislation, the analysis of reality without consideration of groups or organizations would lead to an inaccurate understanding of social phenomena.

Thirdly, Beutel attempts to establish an experimental jurisprudence free from dependence on value, but there arises a question on this point, for as Talcott Parsons (1902-) maintains[53]—what exists or is believed to exist (existential), what self or others want (desire), and what self or others should want (the desirable)—the existence of three fundamental types of experience is a fact that can be verified by introspection and observation, and value is also revealed in the moral and aesthetic standards clearly indicated by ideas, expressional symbols, and behavioral regularity. Therefore, social science, and also socio-scientific sociology of law cannot but be interested in the problem of value. As in one view,[54] for example, the ultimate value is related to the basic necessary conditions of society such as health, sex, reproduction, authority, dignity, leadership, usefulness, property, knowledge, beauty, ideology, and so forth.

From such a standpoint, the terminologies used by Beutel, namely demand, desire, and need, should be understood in the light of the relationship between value and social actions. Does not Beutel's attempt to erase the problem of value from Experimental Jurisprudence indicate a rather narrow-minded behaviorism?

Thus, three critical points are raised as matters to be considered when Japanese sociology of law deals with Beutel's Experimental Jurisprudence. But even if his Experimental Jurisprudence may have some defects, his methodology based on experimental positivism must be evaluated carefully. Particularly under present conditions where the realistic situations of Japanese

[51] BEUTEL,*op. cit. supra* note 16, at 418.

[52] See CARLSTON, *op. cit. supra* note 14, at 267.

[53] PARSONS & SHILLS, TOWARD A GENERAL THEORY OF ACTION 394 (1952).

[54] Murray, *Toward a Classification of Interaction,* in PARSONS & SHILLS, *Id.* at 463.

society are demanding an experimental science of law based upon a method other than that which has been used by jurisprudence in the past (although sociology of law aims mainly at fulfilling such demand),[55] the author believes that the scientific method Beutel attempted in *Experimental Jurisprudence* should be introduced as a method of resolving the present legal situation in sociology of law in Japan.*

[55] "The sociology of law, in its name and in its essence, cannot be said to have been non-existent before the War, and it certainly is not something that suddenly surfaced after the War. However, the cold, hard fact of the surrender and the rapid movement and changes that followed it in various phases of life stirred up suspicions and criticisms toward rule of law and its logic based on the absolutistic system that had existed, thus resulting in a new and powerful closeup view of the sociology of law as a science that attempts to take a new look at the essence and the function of law." Suekawa, *Sociology of Law as a New Science,* 26 THE QUARTERLY LAW REVIEW 1 (1959).

* The author wishes to add: "Many criticisms have been sent to the author from jurists. Above all, Masashi Chiba gave useful opinions for the author's translation of the American words "legal," "law," etc. F. K. Beutel, who discussed the article on the point of scholarship, commented on two important matters in Part IV. Thus, footnote 50 has been added." (May 2, 1960). [Ed.]