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1985

Book Review of Solutions to Ethical and Legal Problems in Social Research

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Repository Citation
Palmer, Larry I., "Book Review of Solutions to Ethical and Legal Problems in Social Research" (1985). *Faculty Publications*. 527.
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Book Reviews

Robert F. Boruch & Joe S. Cecil, eds., Peter H. Rossi, consulting ed., *Solutions to Ethical and Legal Problems in Social Research.* New York: Academic Press, 1983. Pp. xiv + 335. $31.50.

Reviewed by Larry I. Palmer

With the aid of the National Science Foundation, the editors have put together a collection of papers concerning what they call "social research" to provide strategies for solving the conflicts between the need to collect data and society's legal and ethical values. Thus the editors intended to present researchers, project managers, and institutional review committees, among others, with a series of technical and nontechnical solutions to legal and ethical problems encountered in the course of research on social policy. The solutions proffered range from the use of more sophisticated methods of randomized response in some surveys of individuals to recommendations for modifications in federal legislation that restrict the access to data in certain agency files. Law teachers, however, should read the first and last chapters of this varied collection before deciding whether any papers are germane to their teaching or research.

An immediate difficulty that law teachers will encounter in using this volume is that the table of contents offers no way to find out which of the sixteen chapters might be relevant to a particular research project or course. Perhaps a social science researcher actively engaged in research on social policy might understand the intended organization of the topics, but the collection suffers from the defect of many casebooks: the concepts underlying the selection and sequence of the various cases or problems are not announced. No general introduction to the volume states the thesis of the editors. By reading the first and last chapters, however, a reader can ascertain the underlying conceptual framework, including the editors' approach to law, and can then judge whether and how to use the material in teaching or research.

The last chapter, written by Robert F. Boruch, one of the book's coeditors, reconceptualizes the underlying themes of the various papers.[1] This recapitulation gives the reader three major categories into which the preceding chapters fit. Chapter 2 through 6 deal with solutions to the ethical and legal problems encountered when social-policy research involves the use of randomized treatment in delivery of services or benefits

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1. Chapter 16, Solutions to Legal and Ethical Problems in Applied Social Research: Perspective and Prospectives, at 292-322.

and research findings to predict future behavior.[2] Chapters 7 through 10 discuss two problems related to each other: (1) obtaining the informed consent of participants and (2) the ethical and institutional means of dispensing with it.[3] Chapters 12 through 15 deal with protecting the privacy and confidentiality of data and provide the most explicit recommendations for law reform.[4] Here the coeditor makes clear that the positivist approach to law and social science set forth by Lee E. Teitelbaum of the University of New Mexico School of Law in Chapter 2 is the same perspective on law used in defining the legal problems and their solutions throughout the volume.[5] A clear statement of this method of organization and perspective on law in an introduction would have been helpful to law teachers and other readers.

The first chapter instead sets out the ethical and legal problems of contemporary social-policy research and implies the ethical perspective perhaps. Nowhere in this chapter which is entitled "Solutions to Ethical and Legal Problems in Social Research: An Overview," however, does the author define clearly what is meant by the term "social research."[6] The papers that follow apparently are most concerned with describing the problems encountered by and posing solutions for those engaged in "applied social research," such as evaluating federal programs or conducting random trials on the delivery of services or benefits.[7] The implied ethical perspective is that there must be a balance between the need to know certain information and other interests. An underlying unstated assumption is that social policy is improved by research about social policy and that the paradigms of modern scientific research ought to be applied to social policy making. It is hard to understand why the editors included a chapter entitled "Statistics and Ethics and Surgery and Anesthesia."[8] This inclusion assumes a similarity between the applied social science researcher's randomized experiment and the medical practitioner's clinical trial which is far from obvious.

Despite these drawbacks, some of the papers may be useful to law teachers interested in law and science because of what the volume does and does not do. The volume does represent the prevailing view of those engaged in research about important social policies. Given the importance of social science research in such issues as school desegregation and jury selection, some papers here may provide law teachers and law students insight into the practical legal problems encountered by social science researchers. On the other hand, the law teacher using any of these papers must add all of the

2. *Id.* at 295-306. It is not entirely clear why prediction of future behavior fits with experimentation except that individuals are denied benefits or given a detriment such as criminal punishment in both cases.

3. *Id.* at 306-12.

4. *Id.* at 312-18.

5. Spurious, Tractable, and Intractable Legal Problems: A Positivist Approach to Law and Social Science Research, at 11-48.

6. At 1-9.

7. At 3.

8. At 65-82.

critical questions about law's function in relationship to social science research consciously ignored by the editors. For instance, is the positivist approach to legal problems the appropriate one to use in defining and providing legal solutions? Should federal legislation grant some limited form of immunity from compulsory legal process to confidential data gathered by a researcher? Should such legislation necessarily conform to the expectations of researchers for a wider exemption from compulsory legal process? In this regard, some of the papers might serve as a point of departure for exploring a particular legal and ethical problem encountered in social science research. In general, however, they do not provide the analytical framework associated with the best of law teaching and research.

While this volume has limited general utility in law teaching and research, because it focuses on contemporary problems as defined by those engaged in research on social policy, it will prove more useful to the lawyer providing legal advice to a funding agency or an institutional review committee.

David A. Binder & Paul Bergman, *Fact Investigation From Hypothesis to Proof.* American Casebook Series. St. Paul: West Publishing Company, 1984. Pp. xxxiii + 354. $14.95.

Reviewed by Sarah Betsy Fuller

Because of the appellate perspective of most courses in the typical law school curriculum, the facts are assumed as given and the intellectual skills the student learns pertain exclusively to the manipulation of legal rules. In contrast, in the actual practice of law, a great deal, perhaps the majority, of a lawyer's time and creative effort is devoted to the pretrial stage of a case, which involves investigating, analyzing, organizing, and presenting the facts in the most persuasive way. The intellectual skills necessary to know what facts to look for and to obtain evidence of those facts have been largely ignored. In part the explanation for this incongruity lies in the historic disdain of legal educators for what is viewed as "practical" training, and the failure to recognize that rigorous analytic thinking is as important to the acquisition of lawyering skills as it is to substantive law. The great contribution of so-called clinical educators has been the development of theories and methods for teaching students to analyze lawyering skills issues, to "think like lawyers" in all aspects of lawyering.[1]

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1. See Anthony G. Amsterdam, Clinical Legal Education—A 21st Century Perspective, 34 J. Legal Educ. 612 (1984). Amsterdam identifies the three principal modes of analytic thinking taught in law schools today as the skills of case reading and interpretation, doctrinal analysis and application, and logical conceptualization and criticism. He also articulates several analytic skills that are not taught in the traditional curriculum, but are the subject of clinical instruction, including ends-means thinking, hypothesis formulation and testing in information acquisition, and decision making. *Id.* at 613-15.