

Why “Psychology and Law” does not equal “Law and Psychology”
(and some things we can do about it)

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The Promise and Problems of “Psychology and Law”

The last few years have been promising for the intersection law and psychology. From psychology’s vantage point, the “real law world” has been paying more attention to psychological research: Federal Rules governing line-ups have been changed; several Supreme Court Cases (e.g., *Roper v. Simmons*; *Atkins v. Virginia*) have relied heavily on psychological findings. From the vantage point of the legal academic world, following in the footsteps of the law and economics movement, behavioral research and empirical methods have become more common and viewed as relevant to its concerns.

Yet. When I look at what (most) psychologists think “psychology and law” is versus what I think “law and psychology” could be, I am still very disappointed. At the annual meeting of the American Psychology-Law Society, the research presented is startlingly narrow. From the cognitive and social psychologists comes research on: line-ups, confessions, pre-trial publicity, jury selection, eyewitness testimony, alibis, and jury decision making. From the clinical and community psychologists comes research on sex offenders, juvenile justice, psychopathy, death penalty, and victim’s rights. Most of these topics come straight out of “Law & Order” or “CSI” or their predecessors. And the topics haven’t changed in years. But they could.

I believe that plenty of typical psychology research -- not research coming from psychologists “doing psych and law” but from psychologists doing basic research on a wide variety of topics -- is, in fact, relevant to legal issues. I illustrate below with examples from my lab where we study reasoning, decision making, and memory.

Some Current Research in Psychology and Law from My Laboratory

In my laboratory, my students and I have several lines of research that have started out as “basic” (as opposed to “applied”) empirical research but that have obvious applications to the law. Below are three examples (from more to less complete).

Causal and Counterfactual Reasoning

In the 1990’s, psychologists were stuck on the idea that causal reasoning depended on -- or was identical to -- counterfactual reasoning. That is, if one could imagine that changing an antecedent (e.g., suppose the gun had not been fired) would “undo” the outcome (e.g., then the victim would not have died) then the antecedent *caused* the outcome. Of course, in legal language that type of reasoning reveals “but for” causation.

The question I raised is whether uninstructed lay people (in this case, college students) use a but-for test as a demarcation of what counts as a cause or whether they have a more nuanced view of causation. Several studies demonstrate that:

1) People can list many factors that, if changed, would undo the outcome yet they would not call all of those factors *causes* of the outcome. That is, not all but-for causes are considered *real* causes.

2) Many superficial changes to a story (e.g., the order in which people learn about events) will change what people list as but-for causes but do not change what they call real causes.

3) People understand that in the case of multiple sufficient causes -- when multiple antecedents are each alone sufficient to cause the outcome -- an “undoing” definition of causality doesn’t work but they still believe that each antecedent is a cause. That is, not all *real* causes are but-for causes.

Thus, uninstructed people do not view the but-for test as either sufficient or necessary for attributing causality. Rather they seem to be doing something smart.

It is an empirical question whether jurors actually follow instructions on causation. Several studies suggest that sometimes they do not and, in particular, that they would not when legal instructions clash with their own beliefs about causation. But how bad is that? The rulings and instructions that take but-for causation and limit it to proximate causation are often attempts to capture societal views of fairness in the limitations of liability. Maybe the lay sense of fairness and limitations of responsibility should be guiding how the law attributes causality.

Judgments under Source Uncertainty

After September 11, 2001, and after the subsequent failure to find weapons of mass destruction in Iraq, the National Science Foundation funded research on ways to make intelligence analysis better. One of the tasks for my laboratory was to design ways to study how people use information under different kinds of uncertainty.

One set of experiments uses a “repeated gambles” task from experimental economics to study the effects of potentially deceptive information. In one study, subjects choose between sure thing and risky options (80% correct) presented by (computer) leprechauns. The leprechaun presenting the risky option is described as either deceptive (he laughs when wrong and wants to keep the money for himself) or ignorant (he apologizes when wrong and does his best to help). Relative to subjects dealing with the ignorant leprechaun, subjects dealing with the deceptive leprechaun were more likely to pick the sure thing option than the risky option, *regardless of which option was correct*. In other words, the threat of being deceived makes decision makers more conservative. In subsequent studies we learned that people do not pick up on patterns of deception when a leprechaun always tells the truth about small rewards but lies about large ones.

In another set of experiments, subjects read summaries of fake depositions by conflicting witnesses to a car accident. We examined whether people would prefer information from sources who are highly-confident or from sources who are well-calibrated (i.e., who are sure when accurate and less sure when not). In contrast to the extensive literature finding that confidence is the most important attribute in witness credibility, subjects found the well-calibrated source to be more credible and relied more on his judgment.

The obvious implications of this research are in the courtroom -- where jurors must assess evidence coming from witnesses who may vary in reliability and truthfulness -- and in intelligence analysis -- where experts must assess intelligence coming from various types of sources. However, it is also relevant to interactions in which one party relies on the representations of the other (without independent means of checking all facts), for example, bargaining, contracts, negotiations, and, in particular, situations with repeated interactions.

Disgust and Rights Neglect

How can people justify treating members of stigmatized groups (e.g., Jews during the Holocaust) as less than human? One hypothesis we (Jon Haidt of “Moral Intuitions” and “The

Happiness Hypothesis” and I had is that if people are viewed or portrayed as being *disgusting* (rather than merely bothersome), it becomes “okay” (or, at least, less bad) to trample on their rights. Subjects read two scenarios involving individuals who are either disgusting or not disgusting and whose rights have been violated. In the copyright scenario, a musician writes either disgusting or confusing lyrics that another artist steals. In the neighbor scenario, a neighbor is described as being either disgusting or annoying. A woman in the building, who has often complained to him and about him (to the landlord), calls the police reporting him as a possible terror suspect. He is arrested and treated badly. Subjects judge disgustingness and likeability of the individuals and egregiousness of the rights violations. This research is currently on hold due to “problems” with our Institutional Review Board.

Psychology and Law Non-Empirical Projects

Two projects involve reviews of empirical research with respect to legal issues:

Sentencing (completed; with Paul Robinson): Sentencing decisions are multi-faceted. What does the psychology literature suggest as to who is best suited to make those various decisions? Relevant areas of basic research include: group decision making, expert/novice judgments, and individual differences in reasoning ability.

Conscious and Unconscious Influences on Analogical Reasoning as Precedent: We know that there is a correlation between judges’ attitudes and decisions. Many believe this follows from judges first deciding what outcome they want and then selecting precedents to justify those decisions. Are there cognitive influences on analogical reasoning such that judges might be cleanly following the rule of law but still be more likely to arrive at attitude-consistent decisions?

More Traditional Psychology and Law Projects

I have several other projects that fall more along the lines of “traditional” psychology and law research. These include projects on:

Instructions to Disregard Evidence (Walker-Wilson, Spellman, & York): It is a well-replicated finding that mock jurors do not totally disregard evidence when instructed to do so. Our study suggests that is because when people believe that others are trying to hide evidence, and that evidence is revealed, that evidence increases in value.

Stereotypic Crimes (Skorinko & Spellman): Many published studies have found that mock jurors give longer or harsher sentences to black than white defendants for the same crimes. We show how many of the laboratory studies confound race, violence of crime, and stereotypicality of crime. We found that race didn’t matter by itself; rather, defendants receive harsher punishments (from mock jurors) when they are members of the group for which the crime is “stereotypic” (e.g., hate crimes or ecstasy use for whites; gang crimes or crack cocaine use for blacks).

The potential for interaction between psychological researchers and legal academics is immense. Creating a collaboration to run new studies could be terrific; but there is plenty of psychology research already out there just waiting to be mined by people with sharp picks.