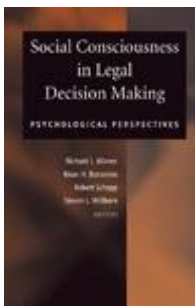


Psychology in the Service of the Law

A review of



Social Consciousness in Legal Decision Making: Psychological Perspectives

by Richard L. Wiener, Brian H. Bornstein, Robert Schopp, and Steven L. Willborn (Eds.)

New York: Springer Science, 2007. 281 pp. ISBN 978-0-3874-6217-2.

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Reviewed by

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There have been many attempts in the last hundred years or so to apply social science research and theory to legal issues. The impact of these attempts on legal practice has been mixed. The courts have often viewed the social sciences with suspicion. With a few exceptions, jurists have been reluctant to use the research findings as a foundation for legal decisions or to guide the decision-making process. For example, attempts to influence trial procedures, using research findings from studies of human decision processes, have not always been viewed kindly (see Saks & Kidd, 1980, for a discussion).

Perhaps the best known example of successfully modifying legal practice on the basis of psychological research has been in the area of eyewitness testimony. There has been a growing concern in legal circles about convictions of demonstrably innocent individuals due to faulty eyewitness identification. Based on a large body of psychological research and theory (e.g., Loftus, 1996), significant changes have been made in how eyewitness testimony

is obtained and used in court. The example might serve as a model of how psychological science can have an impact on the law. The legal community has faced a serious problem, and good research has been available to address that problem.

Social Consciousness in Legal Decision Making: Psychological Perspectives, a report of a conference held at the University of Nebraska, presents a number of legal topics and reviews psychological research and theory related to those topics. In the preface Richard Wiener refers to the approach as “social analytic jurisprudence.” He describes this as “an analysis of legal doctrine,... looking for assumptions that the law makes about human behavior and... a psychological analysis of the law to identify theories, research results, and methodologies that... address empirical issues” (p. ix). Each section identifies a more or less controversial topic in law enforcement or legal theory and generates questions that social scientists should be able to answer. It is most successful where it deals with problems that are raised by some segment of the legal community rather than trying to impose solutions where they may be unwanted.

The topics include racial profiling, affirmative action, sexual harassment in the workplace, and hate crimes. Usually, the first chapter in each unit presents an overview of the legal questions, a second chapter reviews psychological research and theory that might provide answers, and a third chapter presents a commentary or integrative overview. In addition, Wiener has added introductory and concluding chapters on legal decision making.

Racial Profiling

Accusations of racial profiling in law enforcement have enraged some communities and present serious problems for law enforcement officials. Samuel Gross reviews the history of the problem. Tom Tyler and Cynthia Willis-Esqueda, in separate chapters, offer analyses of the issues from a psychologist's point of view.

I found Tyler's chapter, which uses attribution theory to explain the perception of racial profiling, to be especially insightful. When a person is stopped by the police, he or she makes an attribution concerning the fairness of the police officer's actions. Tyler's own research addresses the questions of when these attributions will include a sense of unfairness and how such attributions lead to diminished support for the police. Tyler argues that attributions of racial profiling must be considered separately from any external assessment of whether profiling did occur—“police cannot assume that eliminating the reality of profiling will eliminate the perception of profiling” (p. 72). Communities have demonstrated a growing concern about the issue, and the research by Tyler and others can be very helpful.

Affirmative Action

Mark Killenbeck offers an informative analysis of the complex legal history of affirmative action. This is one area in which social science research has always been central to the legal issue, although it has not always been above criticism. By incorporating this research into the affirmative action debate, the courts have begun “grounding the debate about the value of diversity in its actual impact on all participants in the educational process, rather than admittedly important but nevertheless elusive notions of equality or fairness” (p. 105). The question of impact is exactly the sort of question that psychologists and other social scientists ought to be able to answer.

Faye Crosby and Amy Smith review the social science literature to assess the impact of diversity in an academic setting. These authors use dual processing models to consider how enhancing diversity can enhance mindful thinking in beneficial ways. Unfortunately, I felt that Crosby and Smith's chapter was weakened by an inclination to mix value-oriented questions (for example, what is the relative importance of values such as meritocracy and diversity?) with empirical questions (what is the impact of affirmative action on outcomes such as self-esteem and intergroup animosity?). Good social science research has a lot to say about the empirical questions. The use to be made of those findings is then a matter of social policy.

In a summary chapter, Steven Willborn comments on the general reluctance of the judiciary to use social science evidence, even though it might be directly relevant. He expresses concern for the “weak and relatively unstable” nature of much of the evidence (p. 145). He notes that when social scientists disagree on an issue, it is unwise to assume that the courts can somehow arbitrate these disputes. Willborn makes several points in this chapter that should be taken to heart by psychologists and others who hope their work will be taken seriously by the courts.

Sexual Harassment

In the sexual harassment unit there is no chapter that lays out the legal issues, as there is in other sections. I found that this diminished the overall usefulness of the section, for it is harder then to see what impact the psychological research might have on legal practice.

The central issue in Barbara Gutek's chapter is definition and measurement, undoubtedly important as a first step toward conducting rigorous research but unlikely to settle much in the way of legal arguments. Wiener and Ryan Winter focus on the concept of “totality of the circumstances,” a term that frequently appears in court decisions concerning harassment. They describe a model of perceptions of harassment that, they argue, can define

the concept more precisely. Again, however, it was hard to see how their studies provide information that would be of direct use in a court of law. Brian Bornstein and Meera Adya also address the issue of the totality of circumstances in their final chapter in the section. In all of these chapters, we have potentially useful ideas, but it is research in search of an application rather than a direct response to a need felt by the legal community.

Hate Speech and Hate Crimes

The final unit returns to the format of a legal issues chapter followed by a psychological principles chapter and a summary. Frederick Lawrence provides an overview of the controversy that has surrounded the enactment of hate crime laws. He discusses the conflict between values of free speech and protection from harm, a conflict that probably cannot be resolved by empirical research. Nevertheless, good research is surely germane to the issue. “The rationale behind bias crime is punishing not character or motivation, but intent” (p. 217). When it is expressed this way, one can recognize an issue that psychologists can sink their teeth into.

Lawrence points out how necessary it is to assess harm when enacting hate legislation. “If a legislature determines that there is a greater harm caused when an assault is bias-motivated than when a similar assault is committed without bias, it is appropriate for that legislature to identify those crimes for enhanced punishment” (p. 222). Such a determination can be made, surely, only through careful psychological research.

Margaret Bull Kovera addresses the theoretical issues behind stereotyping and hate crime. She sees the growing literature on the role of automatic and controlled processes as central to an understanding of these phenomena. She summarizes recent research showing that negative beliefs about a minority group do not necessarily lead to discriminatory behavior, thus pointing up the critical need to distinguish beliefs (presumably protected by the First Amendment) and behavior. The role of implicit bias in determining intention is further addressed in a chapter by Jennifer Hunt.

Decision Making

I found Wiener's introductory chapter, which focuses primarily on decision-making processes, to be rather removed from the themes developed in other units. The chapter is a summary of normative and descriptive models of decision making, and reads like an introduction to a different book. Furthermore, the description of the normative model is sometimes misleading. For example, Wiener uses decision trees in which the probabilities of the various branches sum to more than one. The problem, I think, is that an attempt has been

made here to represent complex, multistage decisions as oversimplified single-stage decisions.

The concluding chapter, by Erin Richter and Wiener, attempts to tie the topics of other units into a decision theoretic framework. However, it is still primarily a sketch of ideas that need further development rather than an analysis that might be of direct use to members of the legal profession.

Summary

It may be a matter of taste, but I found the most valuable sections of the book to be those that identify questions that have troubled legal scholars and that might be posed to a psychologist: What is the impact of perceived racial profiling on community support for police? What benefits can be identified as the result of programs designed to enhance diversity? What additional harm can be demonstrated as a result of crimes motivated by hatred for an outgroup? When psychologists can point to well-established theoretical positions and sound empirical research that might answer these questions, the discipline has made an important contribution to the law.

References

- Loftus, E. F. (1996). *Eyewitness testimony*. Cambridge, MA: Harvard University Press.
- Saks, M. J., & Kidd, R. F. (1980). Human information processing and adjudication: Trial by heuristics. *Law and Society Review*, *15*, 123–160.