2001

The Impact of Science on Legal Decisions: What Can Social Science Tell the Courts and Lawyers?

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INTRODUCTION: THE IMPACT OF SCIENCE ON LEGAL DECISIONS: WHAT CAN SOCIAL SCIENCE TELL THE COURTS AND LAWYERS?

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This symposium issue is the result of one of the best things about being a legal academic: informal discussions about ideas that occur between faculty members in the halls, over lunches and coffee, or simply shooting the breeze in a colleague's office. My colleagues, John DiPippa and Erica Beecher-Monas, and I, through informal conversations of this kind, realized that we had something in common. We were all interested in how science and social science could inform the courts and, more generally, the practice of law. What, you might ask, would a scientific evidence scholar (Beecher-Monas), a legal ethics scholar (DiPippa), and an employment discrimination scholar (Beiner) have in common in this regard? While each of us had a different area of interest, we all concluded that social science had a great deal of potential to inform the legal system and lawyers. Professor Beecher-Monas, the real scientist of the bunch, was interested in how and if social scientific evidence would meet the United States Supreme Court's recently pronounced admissibility standards in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] and its progeny.[2] Professor DiPippa's interest was in how psychology might help lawyers better deal with and interact with their clients. My interest surrounded sexual harassment law, and the lower courts' and Supreme Court's precedent that appeared to me inconsistent with how sexual harassment really operates in the workplace. At a certain point, we all decided that we needed to have a formal discussion about these issues with others outside of the University of Arkansas at Little Rock William H. Bowen School of Law. With the generous underwriting of the Ben J. Altheimer Foundation through the gracious intervention of our Deans, Rodney K. Smith and Charles W. Goldner, and the support of the *UALR Law Review* members (especially Symposium Editor Patti Stanley), we had the makings of what we thought would be a very interesting symposium discussing the impact of science on legal decisions. We were correct in our prediction. The result was a three-paneled, day-long symposium, revolving around each

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1. 509 U.S. 579 (1993).

2. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

of our areas of interest, that engaged faculty members from around the country and members of our law school community regarding the impact of science on legal decisions. The results of that discussion are contained in this symposium issue of the *UALR Law Review*.

The first panel, looking at scientific validity and judicial admissibility determinations, resulted in two articles that are in this issue. Professor Beecher-Monas and Professor Edgar Garcia-Rill, Professor of Anatomy and Psychiatry at the University of Arkansas for Medical Sciences, discuss the admissibility and physiology of post traumatic stress disorder (PTSD).[3] After a thorough description of the nature of PTSD, they analyze whether PTSD evidence should be admissible under the Supreme Court's scientific evidence decisions. Their conclusion is an overwhelming yes—that this evidence should be admissible as a valid medical diagnosis in the appropriate case to explain a defendant or victim's behavior. They also suggest situations in which the evidence might be useful in court, thereby providing courts and lawyers with insight into how valuable scientific evidence might be used in the legal system.

Professor Janet C. Hoeffel, Professor at Tulane Law School, argues that other social science evidence—specifically Battered Woman's Syndrome and Rape Trauma Syndrome—are not deserving of the judicial deference they are currently given in the courts under *Daubert*.[4] Instead, these syndromes do not meet the Supreme Court's admissibility standards. Professor Hoeffel is all the more suspicious of the admissibility of this evidence because syndrome evidence that would help the less powerful—poor criminal defendants—is not given the same judicial deference as these syndromes. Thus, she argues that what is good for one group should be good for the other: either syndrome evidence should be admissible for all persons in our criminal justice system or for none. Both of these articles contribute significantly to understanding how the courts treat psychological and sociological evidence and where they are going wrong.

The result of the second panel, on using social science to understand lawyers' professional obligations, is a paper contained in this issue by my colleague Professor John DiPippa.[5] Professor DiPippa takes an

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3. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9 (2001).

4. Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 U. ARK. LITTLE ROCK L. REV. 41 (2001).

5. John M.A. DiPippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81 (2001).

entirely different approach to the use of social science in the legal system. By looking at current models of decision-making theory as provided by social scientists, he suggests that the lawyer-client decision-making process lawyers currently rely on may have some flaws. Criticizing rational choice models of client and lawyer behavior, Professor DiPippa suggests that instead of making rational decisions about the course of their cases, clients instead use perceptual shortcuts and "irrational" factors in making decisions. Termed by theorists as "prospect theory," this model suggests that lawyers should take a different approach to client decision making. Building on this theory, Professor DiPippa suggests that the legal counseling that all lawyers do should be less ideological and more pragmatic. His article provides valuable information about decision making theory and how lawyers could incorporate this theory into their everyday practice to more effectively meet their clients' needs.

The final panel, discussing the implications of social science on sexual harassment law, resulted in three papers contained in this issue. First, Professor Susan Bisom-Rapp, of Thomas Jefferson School of Law, and I took issue with different aspects of the newly created defense for supervisor sexual harassment coming out of the Supreme Court's decisions in *Faragher v. City of Boca Raton*[6] and *Burlington Industries v. Ellerth*.[7] In these cases, the Supreme Court, while creating an affirmative defense for employers in cases of supervisory harassment, not only increased its reliance on employer prevention and training efforts, making these part of the defense, but also increased the burden on victims of harassment to report such behavior.

Professor Bisom-Rapp questions the Court's continued reliance on employer training and prevention.[8] As Professor Bisom-Rapp explains, social science provides little to no support for the Court's underlying assumption in crediting such "prevention" efforts: that they do in fact lessen or eliminate sexual harassment in the workplace. Professor Bisom-Rapp suggests that sociologist Lauren Edelman's legal endogeneity theory provides an explanation for the Court's continued valuing of employer prevention and training. Edelman's theory is that the "content and meaning of law is determined [by the organizations it]

6. 524 U.S. 775 (1998).
7. 524 U.S. 742 (1998).
8. Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147 (2001).

is designed to regulate."[9] Professor Bisom-Rapp explains how this theory applies to the Court's decision to embrace employer training and prevention efforts to satisfy the first element of the *Ellerth/Faragher* affirmative defense for supervisory sexual harassment.

My article picks up on Professor Bisom-Rapp's theme of skepticism with respect to the affirmative defense, and suggests that the second element of the defense likewise does not reflect the reality of sexual harassment in the workplace.[10] Specifically, I suggest that the courts' continued insistence that victims of sexual harassment report the harassment early and in the manner specified by the employer is out of synch with how victims of harassment behave. How do I know this? Because study after study by social scientists shows that reporting harassment is the least likely response a victim will make. Instead, victims engage in coping strategies—i.e., ignore the behavior in the hope it will go away or avoid the harasser. Thus, the courts, at the insistence of the United States Supreme Court, have placed an unrealistic burden on the victims of harassment and one that they routinely do not meet. Instead, I suggest, the standard should take into account the manner in which victims of harassment actually behave.

Professor Linda Hamilton Krieger, of the University of California at Berkeley, Boalt Hall School of Law, critiques the articles written by Professor Bisom-Rapp and myself, suggesting that the manner in which the courts approach the *Ellerth/Faragher* affirmative defense depends on what account of sexual harassment the courts wish to credit: a normative, descriptive, or doctrinal account.[11] She argues that the approach of both Professor Bisom-Rapp and myself is an endorsement of a "descriptive account," i.e., that the manner in which sexual harassment law is interpreted should be based on the manner in which actual victims and harassers behave. She questions whether this is the best solution to the difficult issue of workplace harassment. Competing accounts are provided by normative or doctrinal approaches. For example, the courts might provide that a victim of harassment must respond in a certain way (a doctrinal account) or that a victim of harassment should respond in a certain way (a normative account). While acknowledging that the

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9. Lauren B. Edelman et al., *The Endogeneity of Legal Regulations: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407 (1999).

10. Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001).

11. Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169 (2001).

descriptive account the courts use does not mesh with current understandings of how victims respond to sexual harassment or of how effective training and prevention programs are, Professor Krieger probes how to think about the law of sexual harassment while giving some credit to other functions of law aside from merely accounting for human behavior as it is. For example, perhaps sexual harassment law should incorporate a standard that makes victims be more assertive. By questioning the reliance of Professor Bisom-Rapp and myself on the descriptive account, Professor Krieger shows that law is more complex than a simple recitation of human behavior. All three articles provide insight into and examples of how social science might inform legal rules and affect legal decision making.

In reading all the articles in this issue and attending the live symposium, I was struck by the heartfelt desire of all participants to improve the legal system and make it more just for parties in both criminal and civil cases, as well as the clients lawyers serve. That science can help lawyers, judges, and jurors in this endeavor is a theme that permeates all the articles. Each paper contributes to legal thought about the intersection of science and law. In the end, I believe that we accomplished more than we set out to do with the symposium. While we intended to have a meaningful dialogue among academics about the impact of science on legal decisions, it is my belief that this issue provides valuable information that will help both lawyers and judges better understand the impact science could have on legal decisions.