How Common-Sense Psychology Can Inform Law and Psycholegal Research

Richard E. Redding
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RICHARD E. REDDING†

I. Introduction

Over the last twenty years, the legal system has seen a variety of psycholegal research studies and advocacy efforts aimed at informing the law about legally relevant psychological issues.1 Cognitive psychologists have examined the accuracy of eyewitness testimony,2 social psychologists have studied jury decision-making,3 forensic psychologists have examined predictions of dangerousness and competency to stand trial,4 and developmental psy-

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chologists have examined children's competency and the accuracy of children's testimony. Psycholegal researchers have been involved in public interest litigation, legislative decision-making, criminal justice interventions, and United States Supreme Court advocacy. The American Psychological Association ("APA") has submitted amicus curiae briefs on a wide variety of issues, including adolescent competence to consent to abortion and special procedural protections for child witnesses testifying against their alleged abuser. The APA has also been an advocate in state trial and appellate courts, as have professional organizations like the American Academy of Child and Adolescent Psychiatry and the National Association of Social Workers.

While the impact of social science on law at times is substantial and occasionally even decisive, relevant research often is ignored or dismissed as irrelevant to the legal question. One example is research and a book by the Society for Research in Child Development on children's competence in legal contexts. The need to determine a child's psychological competence to provide legally valid consent provides an ideal opportunity for social science to

Developments in Research and Practice (de Gruyter 1996).


7. See Wursten and Sales, 16 Am J Community Psychol (cited in note 1).


12. See, for example, Ballew v Georgia, 433 US 223, 239 (1978); Maryland v Craig, 110 S Ct 3157, 3161 (1986).

13. See, for example, Lockhart v McCree, 476 US 162, 168-173 (1986); McClesky v Kemp, 107 S Ct 1756, 1760-64 (1987); Parham v J.R., 442 US 584, 609-13 (1979). It may be too much to expect that research will have direct and immediate effects on public policy. Rather, what may be important is that the research has an impact in shaping policy debates generally. See Victor G. Rosenblum, On Law's Responsiveness to Social Scientists' Findings: An Intelligible Nexus, 2 Psychol Pub Pol & L 620, 633 (1996) ("whether social scientists' findings or opinions have entered and been accorded due considerations in law's marketplace of ideas should serve as the principal test of impact"); Carol H. Weiss, The Diffusion of Social Science Research to Policymakers: An Overview in Melton, ed, Reforming 71-73 (cited in note 1) (arguing particular research findings have little impact but that research shapes policy views through an incremental process of "knowledge creep").

shape legal policy. Nevertheless, the book’s impact on law was “less than overwhelming” as measured by its frequency of citation in legal opinions.¹⁵

Other examples are found in recent court cases in which “a great deal of expert testimony and scientific data was presented to counter myths about homosexuality, [and] courts still have found reasons to doubt the credibility of this evidence.”¹⁶ Finally, examples of disregarded social science research abound in the 92 trial procedure cases decided by the Supreme Court between 1977 and 1988 in which directly relevant social science research was brought to the Court’s attention. Despite over 70 studies of mock juror behavior and over 120 books and articles on the psychology of trial practice, only one majority opinion relied on the research.¹⁷ In 12 recent cases where there was strong scientific evidence on trial procedure, the Court decided 10 cases directly contrary to that evidence and indicated in the other two that it was not relying on the research in its holding.¹⁸

Thus, efforts to influence law by presenting research findings to courts have not been widely successful, at least not as successful as social scientists had hoped.¹⁹ Though social science has had a significant impact on legal scholarship,²⁰ “scholars have noticed that courts seem particularly averse to

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¹⁷. Tanford, 66 Ind L J at 142 (cited in note 3).

¹⁸. Id.


social science, displaying hostility toward it . . . and rejecting science as no more reliable than intuition.”

When research findings are cited in court opinions, they may only serve as a makeweight for the desired result. Although it has been written that “judicial decision-making represents social science in action,” that decision-making often seems somewhat impervious to psychological research.

This Article outlines specific research, methodological, and legal advocacy implications of a “common-sense psychology” approach to psycholegal research and advocacy. Advocates of an empirically grounded jurisprudence call for “social science in law,” but the thesis of this Article is that psycholegal researchers must also use “law in social science,” by considering the common-sense psychology (“CS-psychology”)—the lay knowledge of human behavior—inherent in law. Much of law is a codification of various CS-psychologies, and social science research typically will be ignored when it fails to take into account the CS-psychology already embodied in law. The use of CS-psychology in psycholegal research and advocacy should improve the prospects for psycholegal research to influence law. As discussed in this Article, CS-psychology is a valid source of empirical data that provides fertile ground for conceptualizing, evaluating, and using psycholegal research. First, it is instructive to review briefly the troubled relationship between law and psycholegal research.


24. This Article focuses on social science research evidence. However, the law is often equally (if not more) skeptical of expert testimony providing clinical opinion, as illustrated by the following proposed amendment to a New Mexico Senate bill on licensing requirements for psychiatrists and psychologists:

When a psychologist or psychiatrist testifies during a defendant’s competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall. The surface of the hat shall be imprinted with stars and lightning bolts. Additionally, a psychologist or psychiatrist shall be required to don a white beard that is not less than eighteen inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding the defendant’s competency, the bailiff shall dim the courtroom lights and administer two strikes to a Chinese gong.


II. The “Conflict-Ridden Ambivalent Affair” Between Law and Psychology

“Statistics are an elusive thing at best, and it is a truism that almost anything can be proved by them.”

Science and law are rather different cultures with somewhat incompatible mores and modes of reasoning, so it is not surprising that the relationship between law and psychology has been described as a “highly neurotic, conflict-ridden ambivalent affair.” Yet, since the first use of “social science” by the Supreme Court in Muller v Oregon, social scientists and lawyers alike have found that social science is useful in legal decision-making. A prominent law professor of the time went so far as to assert that judges would come to rely on social science. Yale Law School, gaining distinction for its “scientific investigation” of the law, undertook ambitious empirical studies of how the law works and what kind of effects it has. Dean Charles Clark conducted a large five-year study on court procedures, with the results refuting the common wisdom that the courts were logjammed with long trials and procedural delays. From the very beginning of law’s relationship with social science, segments of the legal community resisted social science research; when faced with the counterintuitive findings of Clark’s study, prominent legal scholars criticized the social science approach, particularly the reliance on “mass statistics.” Judge Learned Hand said he was “silent before the authority of

29. The social science cited in the case was not systematic empirical research but popular media surveys of public opinion.
30. 208 US 412 (1908).
32. Id at 81-146; see also John Henry Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buff L Rev 459 (1979).
33. Schlegel, American Legal Realism at 81-146 (cited in note 31).
statisticians, those modern magicians, who would enslave us all."34 Despite the study's tremendous scope, examining 70,000 criminal cases in 13 federal district courts across the country, Harvard Professor and future Supreme Court Justice Felix Frankfurter declared it useless.35 "[T]he fact that Clark's fact gathering was a scientific enterprise made no difference . . . [F]act gathering that did not fit their model of how the world was structured was 'an irrelevant jumble of figures.'"36

Oliver Wendell Holmes's prediction that "the black letter [sic] man may be the man of the present, but the man of the future is the man of statistics"37 did not come to pass, and the problem illustrated by the reaction to Clark's study continues today. When confronted with research that conflicts with common-sense assumptions, lawyers and judges frequently reject the empirical evidence. In fact, they often may consider social science research "no more reliable than their own intuition and experience."38 For example, the Supreme Court announced that "proving broad sociological propositions by statistics is a dubious business."39 Justice Powell compared social science to the supernatural, commenting that the Court should avoid "heavy reliance on numerology derived from statistical studies."40 Justice Thomas commented that social science evidence can be "unnecessary and misleading."41 Justice Breyer opined that there are social scientists on each side of every issue.42

Suspicions about the validity and reliability of social science research are also evident in the results from a recent multistate survey of 163 state trial and appellate court judges and 220 law school students.43 Participants in this

34. Schlegel, 28 Buff L Rev at 513 n 266 (cited in note 32).
35. Id at 513-15.
36. Id at 519.
37. Oliver Wendell Holmes, The Path of the Law, 10 Harv L Rev 457, 469 (1897).
38. Tanford, 66 Ind L J at 148 (cited in note 3). However, Supreme Court Justices have also embraced social science at times. See Gregg v Georgia, 428 US 153, 228 (1976) (the law should look to "the scientific approach to an understanding of the motive forces of human conduct") (Brennan dissenting) (quoting Furman v Georgia, 408 US 238, 296 (1972) (Brennan concurring).
42. See Saks and Baron, Use/Nonuse/Misuse at 75 (cited in note 19).
study were asked to evaluate and comment on the legal relevance, admissibility, and dispositive weight of social science research evidence introduced in actual court cases. A common sentiment was that it is possible to find an expert to support any theory, that experts and researchers are biased as a function of their own beliefs or who is paying them to testify, and that statistics and social science are inherently unreliable. Typical comments by study participants include: “[The research studies are] merely academic bull . . . . Statistics can be made to say anything,” and “Statistical studies can easily be manipulated according to the factors used and the weight given each factor. [You] can always get a statistical study to give you a result you want.”

Nor do juries give great credence to social science evidence, whether admitted in the form of testimony about research findings or as clinical expert opinion. Again, scientific testimony tends to be discounted when it conflicts with jurors’ common-sense notions of human behavior. For example, jurors have reported that they found research showing the relative unreliability of eyewitness identification to be unpersuasive and insulting because it means that “you can’t trust your own perceptions.” Jurors perceive the research evidence, which paints a very different picture of eyewitness reliability than our common-sense assumptions do, as a purely academic construction unconnected to their real-world experience.

In sum, the legal system frequently does not have high confidence in social science. Research findings are seen as malleable and unreliable, not reflective of the reality and complexity of the real world, subject to differing interpretations, or confounded by the researcher’s own preconceptions and biases. When research refutes common-sense psychology, it is often dismissed as invalid. When the research supports common-sense psychology, it is often dismissed as unnecessary because it merely confirms common sense.

44. Id. On the other hand, other participants made positive comments about the value of social science research evidence.
45. Sundby, 83 Va L Rev at 1133 (cited in note 24) (reporting on juror reaction to expert testimony). Another juror referred to an expert witness on eyewitness reliability as a “charlatan” because “in testifying about how people misperceive events, the expert ‘obviously . . . was talking about us . . . I don’t think they should have done it.’” Id.
46. Id at 1134 n 63 (citing studies).
47. Id at 1139.
48. For a striking example of how the same data can be interpreted very differently by researchers with distinct perspectives on the public policy issues informed by the research, see Neil Gilbert, Examining the Facts: Advocacy Research Overstates the Incidence of Date and Acquaintance Rape, in Richard J. Gelles and Donileen R. Loseke, eds, Current Controversies in Family Violence 120 (Sage 1993); Mary P. Koss and Sarah L. Cook, Facing the Facts: Date and Acquaintance Rape are Significant Problems for Women, in Gelles and Loseke, Current Controversies at 104.

For an exposé of how scientific data and statistics are routinely distorted in the public policy arena, see generally Cynthia Crossen, Tainted Truth: The Manipulation of Fact in America (Simon & Schuster 1994).
III. Why Do Courts Ignore Social Science Research?

"The life of the law has not been logic; it has been experience." 49

"The closer [research] studies come to plain logic, or horse sense, the more accepted they are." 50

"The most persuasive arguments are not necessarily those that contain the most empirical data. They are not necessarily the ones that employ the tightest syllogisms or that use the most complicated forms of analysis. The most compelling arguments are those that connect best with the imagination . . . ." 51

Donald Bersoff asks, "[W]hy have the courts treated the work of psychologists and other scientists so condescendingly and cavalierly?" 52 J. Alexander Tanford reviews various theories suggested over the years: judges are conservative while social scientists are liberal; judges are egocentric and believe they do not need help from social science; judges are threatened by social science; judges do not understand social science; it is human nature to think unscientifically; and law and social science have competing systems of reasoning. 53

There may be another reason: the law ignores social science when social science fails to consider adequately the common-sense psychology inherent in law. Like everyone, lawyers and judges make implicit assumptions about human behavior. Based on a shared corpus of common experience this CS-psychology, also called ethnopsychology, naive psychology, and indigenous psychology, 54 is the "commonsense empirical generalizations about human behavior which we accept on the culture's authority plus introspection plus anecdotal evidence from ordinary life." 55 Much of law is a codification of various CS-psychologies, and social science research typically will be ignored

50. Redding and Reppucci, Effects (cited in note 43) (reporting one judge's comment about social science research evidence introduced in court cases).
51. D. Don Welch, Ruling with the Heart: Emotion-Based Public Policy, 6 S Cal Interdisc L J 55 (1997).
52. Bersoff, 10 L & Human Beh at 156 (cited in note 28).
53. Tanford, 66 Ind L J at 152-56 (cited in note 3).
when it fails to take into account the CS-psychology inherent in law. In *Parham v J.R.*, for example, the Supreme Court based its decision on "the pages of human experience" and "common human experience," though those assumptions were directly contrary to then-existing social science research and clinical experience.

Law is all about storytelling, and the stories found in the "pages of human experience" are more compelling for law than the ANOVAs, correlations, and effect sizes of research studies. Consider hermeneutics—knowledge gained from practical, experiential understanding. For the legal system, the difference between scientific empiricism and hermeneutics (or CS-psychology) is like "the difference between a map of a city and an account of that city by someone who lives in it and walks its streets."

In often failing to consider fully the CS-psychology embodied in law as a starting point, psycholegal research and advocacy has not been truly interdisciplinary. Nonetheless, the degree to which law is receptive to empirical psycholegal research will always be somewhat limited because law is chiefly a profession rather than an academic discipline and because lawyers are not trained researchers.

Law professor Pierre Schrag notes that the law's "internal perspective" rejects critical analyses not within the doctrines and principles of law itself. "There is a recurrent sameness to American legal thought . . . from saying over and over again what the law is and saying it,

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60. See Welch, 6 S Cal Interdisc L J at 60-62, 74 (cited in note 51) (providing examples where emotionally powerful stories—the powerful anecdotes—of individual suffering drove legislative decisions, and arguing that individual stories do and should engage the emotions and moral judgment in a way empirical data never can). See also George S. Howard, *Culture Tales: A Narrative Approach to Thinking, Cross-Cultural Psychology, and Psychotherapy*, 46 Am Psychologist 187 (1991).


63. J.M. Balkin, *Interdisciplinary as Colonization*, 53 Wash & Lee L Rev 949, 952 (1996). See also Schlegel, *American Legal Realism* at 80, 256-57 (cited in note 31) (suggesting that use of empirical social science in law threatens law professors' professional identity by making them just another type of social scientist; concern over professional identity will prevent the legal academy from fully embracing social science in law).
of course, in a way that conforms with the law itself." Unlike law, academic research psychology is enamored with new ideas:

Although [the law] indulges purely theoretical debate (primarily in law schools), its orientation is pragmatic and applied—thus narrowing the range of topics lawyers will allow themselves to think about . . . . The operational nature of the legal profession makes lawyers more pragmatic, more accustomed to making do with what is available, and being comfortable with the “quick and dirty.” Academic psychologists are attracted to things that are new and “interesting,” lawyers to things that work. “Old” ideas may be obvious and boring, but they may also be operative and controlling in many contexts.

Lawyers and judges tend to view academic work skeptically, even within legal scholarship itself. For example, Judge Edwards comments, “Too many law professors are ivory tower dilettantes.” Indeed, there is a huge disconnect between the practice of law and legal scholarship; seldom do lawyers or judges consult the law review journals, for example.

66. By contrast, practicing psychologists (who probably also read few academic journals) have had significant research experience as part of their doctoral training.
68. See Thomas Grisso and Gary B. Melton, Getting Child Development Research to Legal Practitioners: Which Way to the Trenchest?, in Reforming at 146, 159-61 (cited in note 1) (reporting survey of 40 family court judges finding that only 33% read at least one article in their state university’s law review and only 10% read at least one article in any other law reviews; most read state bar and popular journals); Hafemeister and Melton, Impact of Social Science Research at 27, 37-43 (cited in note 15) (reporting data showing appellate courts rarely cite law review articles in court opinions). Indeed, one of the jokes at the appellate court where I clerked was that a sure sign of desperation was having to repair to the law reviews for legal authority.
See also Victor L. Streib, Academic Research and Advocacy Research, 36 Clev St L Rev 253, 256 (1988) (“The research limitations on the lawyer advocate are often severe. . . . Beckoning sidestrips must be shunned, and background reading of law review articles is an extravagant luxury. Trial judges, and even appellate courts, give little encouragement for the Brandeis Brief or even exposition of the argument beyond the primary statutes and case holdings.”) Weiss, Diffusion of Social Science Research at 63, 69-75 (cited in note 13) (reporting policy-makers are far too busy to read scholarly research or even short summary documents or policy briefings, relying instead on word of mouth and popular media reports).
IV. Psychology’s Critique of Law’s CS-Psychology

“The indefiniteness of much detail in common sense, its contradictions, its lack of established grounds, drive thought to seek definiteness, consistency and reasons. Thought finds these in the criticized and refined knowledge of mathematics, science, and philosophy, only to discover that these tend to thin out into arbitrary definitions, pointer readings, and tentative hypotheses. Astounded at the thinness and hollowness of these cumulating achievements of conscientiously responsible cognition, thought seeks matter for its definitions, significance for its pointer readings, and support for its wobbling hypotheses. But where shall it turn? It does, in fact, turn back to common sense, that indefinite and irresponsible source which it so lately scorned. But it does so, generally, with a bad grace. After filling its empty definitions and pointer readings and hypotheses with meanings out of the rich confusion of common sense, it generally turns its head away, shuts its eyes to what it has been doing, and affirms dogmatically the self-evidence and certainty of the common-sense significance it has drawn into its concepts.”

When psychologists and psycholegal scholars critique the law’s lack of empirical foundation, they implicitly challenge the CS-psychology foundation of law. Some have done so explicitly. Scholars have even characterized reliance on CS psychology as an error of reasoning: “The opinions of Supreme Court justices reflect the same reasoning errors and the same unconscious reification of [ordinary common sense] principles.” Psychologists have roundly criticized Supreme Court cases such as Parham v. J.R. for relying on “common experience.” In Parham, common experience dictated that minors lack the maturity to make treatment decisions and that parents act in their

72. 442 US 584 (1979) (upholding civil commitment of minors without judicial review).
best interests, whereas psychological studies and the clinical experience of mental health professionals indicated to the contrary. "Ignoring methodologically sound social science research, the Court has based its opinions on such unreliable sources as 'the pages of human experience.'"

Indeed, psychologists have long viewed common sense with great skepticism. "The difficulty with common sense is that it lulls us into the false security of believing that we already understand people, whereas psychology raises questions about what we really do understand and goes beyond common-sense formulations." While scientific inquiry inevitably is influenced by scientists' life experiences and common sense, for the most part, psychologists do not take CS-psychology very seriously. Instead, they argue that "[t]he great problem with a reliance on common sense as evidence of psychological truths is that these truths are so defective . . . ." However, it is obviously in psychology's self-interest to cast CS-psychology as the illegitimate stepchild of scientific psychology, for doing so preserves psychologists' unique expertise. "The view of common sense as a (faulty) theory remains the preferred basis for its relation to psychology, and the psychologist's role of authority is saved." 

V. The Law's Imperviousness to Scientific Psychology

Privileged to live in the "heavenly city of the eighteenth century [Enlightenment] philosophers," psychologists often say to the law: you are not as rational or as enlightened as we because you rely on nothing more than everyday common sense. Empirical psychological science has the answers,
and when our studies contradict your common sense, as they often do, you should forsake the common wisdom for the superior rationality of our science. "We reject a positivistic approach . . . but we adhere to a belief in empiricism." The scientific method is superior to your "fireside inductions" and is more reliable than the data gathered through your everyday experiences, the common wisdom, and the lessons of history.

What might be the response of the common law, not privileged to live in the "heavenly city" of academic psychology? Should law abandon its traditional common sense in favor of social science statistics? Paul E. Meehl, a "hard-headed, dustbowl-empiricist," best known for his arguments against individualized clinical judgment in favor of statistically based predictions of behavior, puts it aptly:

A shrewd lawyer, even though he might not know enough philosophy, logic of science, experimental method, or technical statistics to recognize just what is wrong with a particular scientific refutation of the fireside inductions, may nevertheless be right in holding to what he learned at his grandmother's knee or through practical experience, rather than abandoning it because, say, "Fisbee's definitive experiment on social conformity" allegedly shows the contrary . . . . Social scientists tend to denigrate non-experimental sources of knowledge (such as clinical experience, analysis of documents, file data, or the fireside inductions). Then, by equating "experimental" with "empirical" with "scientific," they often imply that any knowledge source other than experimental is methodologically worthless (armchair speculation, appeal to authority, metaphysics, folklore, and the like). But the fireside inductions are empirical. No logician would hesitate to say this. Their subject matter is the domain of empirical phenomena, and one who invokes a fireside induction will, when pressed to defend it, appeal to some kind of experience which he expects the critic will share with him, whether personally or vicariously.

82. Science often rejects other forms of knowing, even when supported by "data." See Brent D. Slife and Richard N. Williams, Toward a Theoretical Psychology: Should a Subdiscipline Be Formally Recognized?, 52 Am Psychologist 117, 120 (1997) (arguing that some psychological ideas are rejected "[not] because they are unsupported by the data" but because they were not arrived at through scientific method).
86. Meehl, 27 J Soc Issues at 67-68, 78 (cited in note 55). See also Derksen, 7 Theory & Psychol at 444 (cited in note 78) (arguing everyone is a psychologist—we are all conducting psychological experiments in everyday life); Robert Formaini, The Myth of Scientific Public Policy 97-98 (Transaction 1990) ("People need not hold advanced degrees or be experts in natural or social science in order to assess accurately whether existing policy is good or bad, effective or counterproductive, useless or outdated. Their beliefs about the policies they live with are important, no matter how irrational they might appear to be to experts. Those beliefs will have to be dealt with in any event, so there is little reason for policy elites to ridicule them. Such attitudes are examples of the very
Meehl provides several then-current examples in which psychologists' advocacy was driven more by ideology than solid research. The research was insufficient to support the policy position advocated, usually because it was far less ecologically valid and generalizable than the CS-psychology it supposedly refuted.

Two contemporary examples illustrate well how psycholegal researchers and advocates ignore the law's CS-psychology at their peril.

**Example 1: Medical Decision-Making Rights for Adolescents.** Much of juvenile law rests on the common-sense assumption that juveniles lack adult-like maturity of judgment, with the Supreme Court repeatedly relying on this assumption to deny adolescents certain decision-making rights. The Court's assumption reflects historical tradition and common experience. “[T]he experience of mankind, as well as the long history of our law” suggests that adolescents lack the “maturity, experience and capacity for judgment required for making life's difficult decisions.”

Yet, psychologists who advocate for the expansion of adolescents' self-determination rights fail adequately to address and to credit the law's CS-psychology assumption that adolescents do not possess sufficient maturity to make legally important decisions. In its *amicus* briefs to the Supreme Court in three cases, the APA on argued that psychological research on adolescent cognitive development strongly supported the conclusion that adolescents age 14 and older are sufficiently “competent” to make abortion decisions. Recently, however, researchers have begun to question the strength and legal relevance of the research. “The briefs overstated what is known about the unscientific mindset that experts so often deplore in other people, for they explicitly ignore reality by positing a world where perfectly-informed elites enact correct policies for the good of all, whether or not such policies are publicly supported.”


development of decision-making skills." The advocacy was based on a few studies having small numbers of subjects that did not investigate all facets of real-world decision-making. The research failed to consider important social maturity variables (like resistance to peer and parental pressure and attitudes toward risk) highly relevant to adolescent medico-legal decision-making. Recent studies examining these variables have found significant differences between adolescents and adults, revealing the fragile empirical base upon which the advocacy was based.

This example demonstrates four important points about why psycholegal researchers and advocates should not ignore CS-psychology inherent in law. First, the law's CS-psychology can usefully inform the course of scientific research. Had psychologists credited the law's assumption of adolescent immaturity enough to investigate the empirical basis of that assumption, they would have investigated maturity variables from the outset rather than belatedly "discovering" their importance. Second, the law's CS-psychology can inform researchers about the legally relevant, real-world variables of interest. Legal advocacy may have been more successful had psycholegal researchers addressed the maturity issue directly. Third, the law's CS-psychology can provide a useful historical and social context against which to evaluate the strength and generalizability of scientific research. Those advocating legal policies based on a small number of studies probably should have been more circumspect about the weight and ecological validity of that empirical evidence, given the many "pages of human experience" suggesting that adolescents lack maturity of judgment. Fourth, the law's CS-psychology often is no less empirically objective or value-laden than scientific research. While researchers and advocates attacked the normative, value-laden nature of the law's assumptions about adolescent maturity, they failed to consider the possible impact of their own values on their interpretation of the data. Researchers' belief that

93. Gardner, Scherer, and Tester, 44 Am Psychologist at 897 (cited in note 92).
94. Id.
97. Woolard, Reppucci, and Redding suggest that the law of informed consent, which emphasizes cognitive decision-making capacity, is perhaps one reason psychologists neglected maturity variables to focus on cognitive variables. See Woolard, Reppucci, and Redding, 20 L & Human Beh at 227 (cited in note 5). However, the "appreciation" requirement found in many consent statutes and related case law generally encompasses issues of maturity. See Monahan and Loftus, 33 Ann Rev Psychol at 443-44 (cited in note 96). Furthermore, Supreme Court opinions explicitly and repeatedly mention adolescents' lack of maturity as a primary reason for denying them decision-making rights. The Court has even specified the relevant maturity variables, including adolescents' impulsivity and lack of self discipline. See Eddings v Oklahoma, 455 US 104, 115-16 (1982).
98. See Melton, 38 Am Psychologist 99 (cited in note 90).
adolescents should be empowered to make life decisions may have biased their study designs and interpretations in ways that favored finding adolescents competent by ignoring the maturity variables that differentiate adolescents from adults. Research constructs reflect implicit ideologies that constrain research questions. Here, researchers chose the construct “competence” rather than “maturity” or “judgment,” and it likely affected their research and legal advocacy agendas.

Example 2: Detention and Sentencing Decisions Based on Predictions of Violence. In upholding the constitutionality of detention or sentencing decisions based on expert predictions that a defendant will or will not commit future violent crimes, the Supreme Court “especially rejected . . . sociological data . . . [suggesting] ‘that it is impossible to predict future behavior and that the question is so vague as to be meaningless.’” Psycholegal scholars and advocates at the time vehemently disagreed with and criticized the Court, pointing to research showing that mental health professionals’ predictions of future dangerousness were no better than chance. “Rarely has research been so uncritically accepted and so facilely generalized by both mental health professionals and lawyers.” However, a re-analysis of 44 studies on violence prediction along with second-generation research using better methodologies, indicates that clinicians’ predictions are significantly better than chance. Thus, the law’s original, consistent common-sense assumption that clinicians should have some expertise in predicting violence has been shown to have scientific validity.

Of course, the changing nature of science is not an indictment of research-based advocacy; CS-psychology changes over time as scientific knowledge does, albeit less so. But the above examples illustrate the risks in dismissing CS-psychology too quickly and uncritically relying on an uncertain body of

99. Id.
100. See Bevan and Kessel, 44 Am Psychologist at 506 (cited in note 76); Paul Feyerabend, Against Method (Verso rev ed 1988).
scientific research. These risks are serious for law because the principle of \textit{stare decisis} makes it difficult for law to change with shifting research findings.\textsuperscript{107}

The next section discusses the importance of ecological (real-world) validity in psycholegal research and how, unfortunately, that research often has failed to maintain the level of ecological validity necessary for its successful incorporation into law, particularly when compared to the real-world empiricism of CS-psychology.

\section*{VI. The (Lack of) Ecological Validity in Psycholegal Research}

Historically, psychology has been a discipline of theoretically based laboratory research asking “questions suited to scientific method rather than those suggested by social problems.”\textsuperscript{108} When psychology discarded philosophical reasoning (or “armchair inductions”) in favor of scientific method at around the turn of the century, it “had arrived” as a science.\textsuperscript{109} Use of the scientific method is a signifier “not only for purposes of arriving at truth but as a criterion for membership in the fraternity.”\textsuperscript{110} In psychology, there is a tendency to emphasize counterintuitive research findings, arrived at through scientific method, that challenge real-world assumptions and CS-psychology.\textsuperscript{111} Much like obtaining null results in a research study, that which ap-
pears only to explicate and better define CS-psychology is seen as less valuable. Psychologists may fear their findings will only explicate the obvious—what everyone's grandmother knows:

In its reaction to the charge that it was "bubba psychology," in the early 1960's social psychology developed a strong theme—one might say an ethos—of "demonstrating the non-obvious," so much so that it developed "various implicit strategies for lending the appearance of non-obviousness to research (e.g., by imputing false or oversimple beliefs to "common sense" in order to provide a straw man that the research can then demolish, or by creating gaps between the conceptualization of the work (cast in non-obvious terms) and its operationalization (rather obvious when stripped of its technical jargon))."

The need to demonstrate the non-obvious produced a reductionist, laboratory-based psychology in "the quest for a result that will surprise Bubba," producing internally valid studies that often lacked ecological validity with a rigid, cult-like adherence to empirical method.

By contrast, psychology in specific real-world contexts is the only psychological concern of the law; "the law is an operational discipline—its concerns are those of the real world." The law needs situationally specific research, not "abstracted empiricism," and the law often has found social science research too "academic," or artificial, for use in legal decision-making.

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113. The same criticism has been made of other empirically-oriented social sciences. See, for example, Peter Bauer, *The Disregard of Reality*, 7 Cato J 29, 33-34 (1987) ("Economics has become little more than a branch of applied mathematics and one that can be successfully pursued with little reference to real-life phenomena . . . . [S]tudies based on direct observation or detailed examination of slices of history are apt to be dismissed as anecdotal, unscholarly, or unscientific, even if they are informative.").


example, in *Lockhart v McCree* the Supreme Court rejected many of the empirical studies, complaining that, *inter alia*, they did not include actual jurors as participants and that most did not simulate the jury deliberation process.\textsuperscript{119} Similarly, research on juror decision-making in rape cases over the last twenty years may have been ignored by courts because of its highly artificial conditions. Typically, studies present college students, rather than an actual cross-section of potential jurors, with case vignettes describing a stranger rape case in which the defendant is probably guilty.\textsuperscript{120} By presenting very limited case scenarios that test the effects of specific variables, the research has been so highly reductionist that it has obscured the larger picture produced by the complex, contextual interaction among variables.\textsuperscript{121}

Thus, it is still the case that much psycholegal research uses artificial laboratory tasks and situations, with volunteers or a convenient sample of college students who may not have the same characteristics as the general population.\textsuperscript{122} Compared to problems constructed in the laboratory, real-world problems exist in a far larger and more complex context involving complicated interactions between variables, contexts, and tasks that are difficult to isolate, quantify, and control.\textsuperscript{123} It was Freud who pointed out years ago that laboratory experiments often cannot adequately reproduce the ecological context of the real world.\textsuperscript{124} This premise holds particularly true for the unique context of the courtroom: “[Y]ou will never be able to reproduce in your experiments the same psychological situation as in the examination of a guilty person in the criminal court.”\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{119} *Lockhart v McCree*, 476 US 162, 168-73 (1986) (upholding the “death qualification” of jurors in capital cases).
\item \textsuperscript{121} Id at 404-20.
\item \textsuperscript{122} See Ralph L. Rosnow and Robert Rosenthal, *People Studying People: Artifacts and Ethics in Behavioral Research* 73, 98-99 (Freeman 1997) (documenting that most psychological research studies use college students as participants and reviewing research showing that volunteers tend to be better educated and more intelligent, tend to come from higher socioeconomic classes, and are less conventional and conforming).
\item \textsuperscript{123} Peter Suefeld and Philip E. Tetlock, *Psychologists as Policy Advocates: The Roots of Controversy*, in Peter Suefeld and Philip E. Tetlock, eds, *Psychology and Social Policy* 12-13 (Hemisphere 1992). See also Olsen-Fulero and Fulero, 3 Psychol Pub Pol & L at 418 (cited in note 120) (suggesting that “the inconsistent and confusing results of rape-responsibility research to this point are due largely to the attempt of researchers to fragmentize a highly complex phenomenon without a clear picture of the whole. Although scores of studies show effects of juror, victim, defendant, and situational factors on judgments of guilt and blame for rape, the interaction effects of these variables are often larger than the main effects. . . ”).
\item \textsuperscript{124} See Bersoff, 10 L & Human Beh at 151-52 (cited in note 28).
\end{itemize}
Moreover, researchers tend to use the norms of science when judging the validity of the CS-psychology inherent in law, failing to consider the real-world exigencies with which the law concerns itself. Consider Saks's and Kidd's criticisms of jury selection jurisprudence:

They gleefully attempt to rebut a Supreme Court decision which concluded that juries of 6 people are as likely to represent a reasonable cross-section of a community as juries of 12 people. Their argument rests on calculations showing that stratified random samples of size 12 are more likely to contain members of minority groups than samples of size 6. Unfortunately, however, in their haste to find legal illustrations of biased judgment, these legal experts forget the simple fact (which they well know) that juries are neither in practice nor in principle intended to be selected at random.126

Consider also Kahneman's and Tversky's seminal and oft-cited research showing the error-prone and biased nature of lay people's decision-making.127 Much of this research lacks ecological validity—that is, studies using college student volunteers who probably have little motivation to perform the artificial laboratory decision tasks. Laypersons' decision-making is evaluated against the norms of scientific decision-making (that is, probability theory and statistics) without accounting for the decision-making goal of the layperson, which is not to arrive at scientific "truth" but to satisfy the practical exigencies of everyday life.128

In contrast to much of research psychology, a CS-psychology approach to psycholegal research and advocacy seeks to maximize ecological validity by attending to context and history. It means looking to law as a source of data about human behavior, particularly data about the rules of social conduct.129


127. Id at 67 (noting that the research has been widely cited and accepted in psychology as well as in other disciplines) ("Human incompetence is presented as a fact, like gravity."). Researchers have emphasized results showing human error rather than those showing accuracy. Id at 66-67, 76-78 ("Their slogan could well be: When better decisions are made, decision researchers will make them. . . . The idea that people-are-irrational-and-science-has-proved-it is useful propaganda for anyone who has rationality to sell."). See also Peter White, *A Model of the Layperson as Pragmatist*, 10 Personality & Soc Psychol Bull 333, 334, 337 (1984). For a colloquy between Kahneman and Tversky and a prominent critic of their research, see Daniel Kahneman and Amos Tversky, *On the Reality of Cognitive Illusions*, 103 Psychol Rev 582 (1996); Gerd Gigerenzer, *On Narrow Norms and Vague Heuristics: A Reply to Kahneman and Tversky*, 103 Psychol Rev 592 (1996).


VII. Some Cautions About Common-Sense Psychology

Since it derives directly from “the pages of human experience,” CS-psychology is the most ecological psychology available. However, this does not mean that CS-psychology is without its own set of problems. It comes with some baggage as well.

A. Concerns About CS-Psychology’s Validity and Reliability

1. CS-Psychology is Not Always Valid. Many times it will be partially or wholly incorrect. For example, CS-psychology may be susceptible to a variety of cognitive and perceptual biases such as illusory correlation, availability, and representativeness.

2. CS-Psychology May Be Contradictory. Assumptions in CS-psychology sometimes conflict with one another in whole or in part.

3. CS-Psychology is Not Always Reliable (Consistent). There may be multiple, competing versions of the common wisdom regarding particular behavioral or social phenomena, with CS-psychology varying among individuals and cultures.

B. Concerns About CS-Psychology Embodied in Law

1. Which CS-Psychology? Courts may disagree about what constitutes CS-psychology, as evidenced by split decisions and conflicting legal doctrines between or even within jurisdictions.

2. Law’s CS-Psychology May Conflict with True CS-Psychology. Law may conflict with CS-psychology when law represents only the values of the powerful in society or popular prejudices, when law is just a convenient legal fiction designed to support a particular legal result, or when law is simply out-of-date or out-of-step with prevailing community sentiment. To the extent that the judiciary is not diverse enough to represent sufficiently the views of the larger society, the likelihood that law will be out-of-step with CS-psychology increases.

132. See Paul L. Biderman, Of Vulcans and Values: Judicial Decision-Making and Implications for Judicial Education, 47 Juv & Fam Ct J 61, 69, 78-79 (1996); Craig Haney, Commonsense Justice and Capital Punishment: Problematising the “Will of the People,” 3 Psychol Pub Pol & L 303, 309-10 (1997) (“Legal commonsense—the received wisdom of the ages, at least as understood largely by judges and legislators who share ethnicity, social class, educational background, and many other biographical and social-historical similarities—is the view of the world that happens to have been enshrined in our law . . . [which] privilege[s] one set of values and a particular view of the world over others.”)
C. CONCERNS ABOUT USING CS-PSYCHOLOGY IN PSYCHOLEGAL ADVOCACY

1. CS-Psychology May Not Be Very Informative or Useful to Law. Since psycholegal research is perhaps more informative when it challenges or contradicts the law's status quo assumptions, lawyers and judges may have little use for research that only confirms or better defines common knowledge.

2. Which Should Be Controlling When CS-Psychology and Scientific Research Conflict? If a compelling body of psycholegal research conflicts with equally compelling CS-psychology, which should control law and advocacy? Like its scientific counterpart, CS-psychology is not without shortcomings; there are not easy answers to the foregoing questions. The use of CS-psychology in psycholegal research and advocacy, however, should improve the prospects for psycholegal research to influence law.

The next Section provides recommendations for dealing with many of the concerns about CS-psychology outlined above, including a research agenda for assessing the validity and reliability of CS-psychology and guidelines for deciding when to use research findings in advocacy and legal decision-making.

VIII. Implications of CS-Psychology for Psycholegal Research and Advocacy

A CS-psychology approach to psycholegal research and advocacy implies an expansion of the research and advocacy perspective, a research agenda and methodologies to study CS-psychology, and perhaps a more measured and restrained use of empirical social science in law.

A. A COMMON-SENSE PSYCHOLOGY PERSPECTIVE ON RESEARCH AND ADVOCACY

1. Take CS-Psychology Seriously as a Legitimate Form of Empirical Knowledge. The assumptions underlying law have much to offer us in explaining human behavior. While advocates of an empirically grounded jurisprudence often use the phrase "social science in law," psycholegal researchers must also use "law in social science." The law's "armchair inductions" do have an empirical foundation, and it is a mistake for psycholegal researchers to ignore or minimize the value of law's CS-psychology because it is "normative" rather than "scientific." Scientific psychology and CS-psychology are mutual-

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133. See Monahan and Loftus, 33 Ann Rev Psychol 446 (cited in note 96).
136. See Howard, 46 Am Psychologist at 189 (cited in note 60) (arguing we should not adopt the Enlightenment view "that scientific insights are superior to the humanities. ... The insights of scientific psychology and various humanistic disciplines both represent refined insights into human nature that are of the same genus (i.e., storytelling), but are of different species (i.e., science and the humanities).")
ly complementary forms of empirical knowledge. "Common sense continually demands the responsible criticism of refined knowledge, and refined knowledge sooner or later requires the security of common-sense support." 

We should adopt a pluralistic methodology that integrates experience, the non-empirical social sciences, and naturalistic research methods in addition to traditional experimental methods. Although not commonly used in psychological research, historical analysis is a particularly important tool. In identifying the antecedents and consequences of social phenomena, historical analysis provides the context and time perspective needed for social understanding. An excellent example is the scholarship of Heider, who drew on economics and other social sciences in creating his influential work on the psychology of interpersonal relations. Increasingly, psychologists are recognizing the limitations of scientific method and the potential of other knowledge sources and methodologies for advancing our understanding of human behavior. "Among philosophers of science, everyone now seems to agree that the role of empirical research in scientific progress was vastly overestimated by the logical positivists of the previous generation."


139. See generally Donald T. Campbell, Reforms as Experiments, 24 Am Psychologist 409 (1969); James G. Kelly, Changing Contexts in the Field of Community Psychology, 18 Am J Community Psychol 769, 776-80 (1990); Jean A. Linney and N. Dickon Reppucci, Research Designs and Methods in Community Psychology, in Philip C. Kendall and James N. Butcher, eds, Handbook of Research Methods in Clinical Psychology 535, 536-38 (Wiley 1982) (arguing that many issues of concern to the legal system "are typically not within the realm of experimental control . . . for a variety of practical, legal, political, and ethical reasons. In these areas community researchers need to rely on alternative methods for research, that is, quasi-experimental models and descriptive, naturalistic observation methods, naturally occurring changes or interventions such as legislation and policy changes, and naturally occurring contrast groups."); Sarason, 30 Am Psychologist 1072 (cited in note 80).


141. See, for example, Slife and Williams, 52 Am Psychologist at 199-200 (cited in note 82) (suggesting qualitative methods may be better suited to the social sciences).

142. Andre Kukla, Nonempirical Issues in Psychology, 44 Am Psychologist 785 (1989). See also Slife and Williams, 52 Am Psychologist at 120 (cited in note 82) (arguing that "[p]ositivism's success in psychology is, at the very least, a matter of considerable debate . . . there are few established laws to point to."). Some argue that the validity of scientific method is shown by its success—that the proof is in the pudding. See, for example, Paul E. Meehl, Credentialed Persons, Credentialed Knowledge, 4 Clin Psychol: Sci & Practice 91, 96 (1997) (arguing that the debate over the validity of logical positivism is a red herring, because what is relevant are the results—what reliably works versus what
Scientific method may be insufficient for social understanding, which “depends upon telling relevant stories . . . deriving from past experience a narrative which interprets the events as they unfold.”143 If the stories of CS-psychology survive critical scrutiny for relevance and “truthfulness,” they provide data relevant to formulating public policy.144 In fact, to ignore these stories by excessively relying on scientific data is to “disregard reality,” by “refus[ing] to accept the plain evidence of one’s senses” and the power of logical (deductive and inductive) reasoning to discern reality.145

2. Use CS-Psychology as a Starting Point for Hypothesis Generation and Theory Development in Psycholegal Research. CS-psychology should be the starting point for theory development and hypothesis generation in psycholegal research. Recall the research and advocacy on adolescent medico-legal decision-making, for example, which failed to consider maturity factors relevant in assessing the validity of law’s assumption that adolescents lack mature judgment. The research could not be generalized to real-world decision-making, it did not influence law, and more recent research suggests there was wisdom in the law’s common-sense assumptions.

Importantly, because ethical, funding, or operational constraints often do not allow researchers to investigate certain aspects of socio-legal problems, CS-psychology can fill gaps in our knowledge. CS-psychology can be used successfully as a source for hypotheses and theory development. For example, Weiner recently developed a theory of responsibility that was based on studies of people’s opinions about when actors should be held responsible for their behavior.146 Almost all of the results correlated with common sense, but the “phenotypically diverse phenomena” were fit together to form a theoretical framework that is informative well beyond CS-psychology.147 Similarly, by analyzing lay conceptions of intelligence, creativity, and wisdom, Sternberg has...
identified practical, real-world aspects of intelligence that had not been included in existing psychological theories and tests.\footnote{148} But will research findings mirroring or explicating CS-psychology have any cachet in legal advocacy and reform efforts? Do lawyers and judges have any need for research findings which only confirm or better explicate common knowledge? Given the storehouse of knowledge found in CS-psychology, psychology may often be “a science that specializes not in discovery but rediscovery.”\footnote{149} But this is not a shortcoming. On the contrary, psycholegal research has a valuable role to play in identifying, defining, systematizing, quantifying, and testing CS-psychology. Through explication and systematization, scientific research can clarify and substantially enhance our understanding of “the pages of human experience.” “The level of detailed observation and assembly of information necessary for developing integrative frameworks and precise quantitative formulations is what sets the scientific-psychology enterprise apart from everyday experience and enables scientific-psychology to begin with but then rise above CS-psychology.”\footnote{150} Psycholegal research thus contributes to the “spiral” of intellectual history, the “recurrence of older conceptions but at a more advanced level of complexity and sophistication.”\footnote{152}

Perhaps as psychology further matures as a science, it will increasingly reify and refine the assumptions of CS-psychology.\footnote{153} Science is now coming around to accept some of the CS-psychology it initially dismissed. Consider the CS-psychology principle that people “learn by imitation,” which was apparently debunked by Thorndike’s experiments until later studies actually supported the imitation principle.\footnote{154} Consider also the ongoing debate in personality psychol-


\footnote{150. Kelley, 43 Ann Rev Psychol at 20 (cited in note 54) (emphasis added).}

\footnote{151. See Bersoff, 10 L & Human Beh at 151 (cited in note 28) (quoting R. Crutchfield and David Krech, \textit{Some Guides to the Understanding of the History of Psychology}, in Leo Joseph Postman, ed, \textit{Psychology in the Making} 3, 10 (Knopf 1962)).}

\footnote{152. Id.}

\footnote{153. See Billig, \textit{Rhetoric of Social Psychology} (cited in note 111).}

\footnote{154. As Meehl says, “A lawyer in 1930 may have lost a cocktail party debate with an
ogy as to whether individuals demonstrate trait-like consistency in their behavior over time. There is a "sharp discrepancy between our intuitions, which tell us that people do in fact display pervasive cross-situational consistencies in their behavior, and the vast empirical literature which tells us that they do not. Intuitions or research? One of them must be wrong." Recent research suggests that our intuitions may not be wrong after all: personality traits and gross-level behaviors are consistent even though specific behaviors may not be. Once again, CS-psychology acts as a springboard from which scientific psychology can work to understand human behavior further.

B. AN AGENDA FOR PSYCHELICAL RESEARCH

1. Identify the CS-Psychology Inherent in Law. Psycholegal researchers and advocates should, as a first step, identify the implicit and explicit psychological assumptions underlying legal doctrine. Since courts may explicitly disagree about what constitutes CS-psychology, as evidenced in split decisions and conflicting legal doctrines between or even within jurisdictions, it is important to sample the range of CS-psychology in law. Researchers should consult generally accepted legal doctrines and assumptions (such as those found in legal treatises like the Restatements of Law) as well as the majority and minority rules across jurisdictions. Once the range of CS-psychology has been defined, researchers can construct a typology based on the commonalities and differences between the CS-psychologies underlying a particular legal issue.

Implicit CS-psychology assumptions can be uncovered through a variety of qualitative and archival research techniques and through interdisciplinary research. Interviews and focus groups with lawyers and judges, ethnographic research, and the analysis of judicial opinions, legislative histories, and treatises can illuminate and make explicit the CS-psychology implicit in legal doctrine. More generally, history, sociology, and political science can inform us about the common assumptions of our culture and its laws. Historical and psychohistorical analysis, providing insights from earlier generations, also is useful in identifying psychological assumptions underlying law and the social context of behavior.

animal psychologist, but the lawyer would have been closer to the truth." Meehl, 27 J Soc Issues at 87 (cited in note 55).


156. See, for example, Woolard, Reppucci, and Redding, 20 L & Human Beh at 225 (cited in note 5) (suggesting one goal for psycholegal research on children's capacities is to identify the assumptions about children's development inherent in legal policies).

157. See the methods listed in subsection VIII.B.2.


2. Identify the Content and Structure of CS-Psychology and Assess Its Validity. Once we have identified the CS-psychology implicit in law, we must explicate it. What are its structure, definitions, principles, and parameters? Consider the law's CS-psychology that adolescents are not mature decision-makers. What is meant by "maturity?" What are its components? How do people define "maturity" and what do they understand it to include and exclude? The following is a brief analysis of a variety of specific methods that are useful in analyzing the validity of a particular CS-psychology assumption underlying law.

a) Opinion surveys are useful in identifying and defining the CS-psychology implicit in legally relevant community standards and attitudes. Additionally, people's self-reports about their behavior and their predictions or beliefs about how people would respond in certain situations, also may reflect CS-psychology.\textsuperscript{160} It is important, however, that surveys and questionnaires be constructed with sufficient detail and psychometric validity to capture the subtleties and variability in public opinion. Sensitive measures of public opinion call for using multiple vignettes or questions and then aggregating responses.\textsuperscript{161} Otherwise, surveys may give a misleading or oversimplified portrayal of CS-psychology. For example, surveys asking in general terms how violent juvenile offenders should be handled reveal the CS-psychology assumption that juveniles are psychologically culpable for their crimes and should be punished like adults.\textsuperscript{162} However, surveys providing more specific information about the characteristics of the offender reveal that CS-psychology is not so monolithic: juveniles having certain characteristics are seen as culpable; juveniles having other characteristics are seen as not culpable or less so.\textsuperscript{163} Similar discrepancies have been found between people's general opinions about criminal sentencing and their judgments in individual cases presented with unique facts and a variety of sentencing options.\textsuperscript{164}

\textsuperscript{160} See Kelley, 43 Ann Rev Psychol at 5 (cited in note 54).
b) Concept analysis and concept mapping are useful methods in hypothesis generation and theory construction. They help identify the meaning of CS-psychology concepts, how they are applied, the distinctions between concepts, and the interrelationships between concepts and sub-concepts. Conceptual graph analysis develops concept maps through a complementary analysis of documents, open-ended interviews, structured interviews, and observation or induction. Analysis of the causal networks and causal implications of CS-psychology can reveal the causal connections and theorems implicit in CS-psychology. Many psychological theories really are "explications of conceptual relationships imbedded in ordinary language (common sense)." For example, Weiner developed his responsibility attribution theory from a systematic and explicit analysis of the causal network of CS-psychology concepts.

c) Case studies, particularly systematic qualitative research based on multiple case studies, are useful in distilling general patterns of CS-psychology as well as the conditions under which there are exceptions to the CS-psychology. CS-psychology can be difficult to study because often it is implicit, "part of the unconscious infrastructure of the mind." Experimental methods used in cognitive and personality psychology are useful for unpacking and explicating CS-psychology.

d) Protocol analysis is useful for identifying and categorizing the CS-psychology assumptions inherent in problem-solving or decision-making. It involves making inferences about thought processes through the systematic analysis of individuals' think-aloud verbalizations while solving a problem or performing a task.


168. See Kelley, 43 Ann Rev Psychol at 18-19 (cited in note 54).

169. Smedslund, 7 Theory & Psychol at 1 (cited in note 110).

170. See Kelley, 43 Ann Rev Psychol at 21 (cited in note 54).


172. Fletcher, 39 Am Psychologist at 212 (cited in note 166).

e) Prototype analysis is useful for determining the horizontal and vertical structure of a conceptual category. For example, Sternberg used prototype analysis in his studies of lay conceptions of intelligence.

f) Psychological scaling is useful for determining subtle and implicit psychological distinctions among concepts and principles. It involves the analysis of how people sort, recall, rate and rank concepts or principles. A matrix of proximity values is derived from this data and then submitted to statistical analyses to provide a spatial representation of conceptual distinctions and interrelationships.

Before CS-psychology theorems are tested empirically they should be scrutinized like any scientific theory by examining their logical coherence and the necessary truths they imply. Then, ecologically appropriate validation research is needed.

3. Identify When CS-Psychology is Most Likely to be Valid and Reliable, and Specify Where the Law Diverges from CS-Psychology. We should systematically assess and compare the validity of CS-psychology with that of scientific psychology, to identify differences in validity and reliability between the taxonomic levels of CS-psychology. Much more research is needed to develop and validate taxonomies of CS-psychology. Fletcher identifies three general categories of CS-psychology: shared fundamental assumptions about the world that are universal across cultures, shared beliefs common to a culture, and a shared way of thinking. Kelley also categorizes CS-psychology along three dimensions: level (macrolevel, mesolevel, and microlevel), familiarity, and personal involvement. Kelley argues persuasively that CS-psychology is most likely to be valid (and extensive) at the middle (mesolevel) of generality, which is the most commonly experienced and personally familiar. In contrast, CS-psychology tends to be less valid concerning molecular aspects of behavior, events occurring over long time spans, or group behavior.

Additionally, because assumptions in CS-psychology often conflict (for example, “birds of a feather flock together” versus “opposites attract”), we must

177. See Kukla, 44 Am Psychologist 785 (cited in note 142).
178. Compare Rosnow and Rosenthal, People Studying People at 72-73 (most research studies use college students as participants) (cited in note 122).
180. See Fletcher, 39 Am Psychologist at 204-07 (cited in note 166).
181. Kelley, 43 Ann Rev Psychol at 6-7 (cited in note 54).
182. See also Meehl, 4 Clin Psychol: Sci & Practice at 94 (cited in note 142) (suggesting we should be especially skeptical about knowledge gained from experience regarding “such things as large and variable time lag between allegedly correlated events, frequency of spontaneous change, a long list of variables with different weights and interactions, and inferred inner states and unobservable events such as past history.”)
identify the conditions under which each assumption holds and the interactions between conditions. Importantly, we need to determine when legal assumptions run contrary to CS-psychology. Law may conflict with CS-psychology when law represents only the values of the powerful in society, when a convenient legal fiction not reflective of veridical reality, or when dated or out-of-step with prevailing community sentiment.

4. Identify the Circumstances Under Which Psychological Science Reverts to CS-Psychology and Investigate How CS-Psychology Influences Behavior, Science, and Law. We should examine the circumstances under which scientific psychology has reverted to CS-psychology, when CS-psychology has ultimately debunked psychology's counterintuitive findings. If there are certain domains or methodologies in psychology where this occurs more frequently, we may be able to predict when a reversion to CS-psychology is most likely to occur. We should be more circumspect about psycholegal research findings in circumstances where we know that a certain methodology or subject matter may yield less valid findings than CS-psychology.

It also is important to identify how and when CS-psychology influences our behavior, our science, and our law. Because the way people think about behavior affects behavior, and thus the law, we should be conscious of the effects of both CS-psychology and scientific psychology. Legal change often occurs through a process of natural selection whereby social and psychological forces help determine which laws are litigated, challenged, and changed.

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183. See Kelley, 43 Ann Rev Psychol at 15 (cited in note 54).
186. See, for example, Norman J. Finkel, Commonsense Justice: Jurors' Notions of the Law (Harvard 1995) (demonstrating that law often conflicts with people's commonsense views of justice); Id at 2 ("there is mounting and persuasive evidence that the 'law on the books' may be at odds with commonsense justice, in many areas."). But see Haney, 3 Psychol Pub Pol & L at 305 (cited in note 70) (suggesting CS-psychology is intertwined with law, each affecting the other).
188. See Kenneth J. Gergen, The Saturated Self: Dilemmas of Identity in Contemporary Life 146 (Basic 1991) (asking how our constructions of reality influence our behavior and perceptions).
189. CS-psychology has influenced scientific psychology, and vice versa, both for the better and for the worse. See Kelley, 43 Ann Rev Psychol at 8-21 (cited in note 54). Likewise, law often influences the course of scientific progress. See Mike Redmayne, Expert Evidence and Scientific Disagreement, 30 UC Davis L Rev 1027, 1071-75 (1997) (providing legal examples showing how litigation involving scientific issues prompts additional scientific research and controversy).
190. Id.
C. IMPLICATIONS FOR THE USE OF PSYCHOLEGAL RESEARCH IN LAW

1. Unveil the Values Inherent in Psycholegal Research. Psycholegal researchers should heed Judge Bazelon's clarion call to "unveil [their] values" and "acknowledge the existence of alternative hypotheses and explanations" when deciding whether to disseminate research to the legal system. Had they done so before advocating the position that adolescents are as competent as adults to make medical treatment decisions, they might have been aware that their values favoring adolescent autonomy may have blinded them to the highly relevant issue of adolescent maturity.

The important role that values play in science is now widely acknowledged. Psycholegal research and advocacy can never be a value-free endeavor because the questions researchers ask, how they interpret their results, and the methods they use are influenced by their values and worldviews. Like anyone else, researchers are likely to interpret research results in a manner consistent with their own socio-political beliefs. There is ample evidence showing the influence socio-political values and cultural norms can have on scientific inquiry. For example, one study gave psychology undergraduates synopses of two

193. See generally George S. Howard, The Role of Values in the Science of Psychology, 40 Am Psychologist 255 (1985); Jasanoff, 77 Judicature at 77-78 (cited in note 27) (discussing how science is socially constructed, contingent upon prevailing scientific conventions, subjectively interpreted, and constrained by professional boundaries).
194. Scientists are by no means immune from being swayed by their own passions and personal and political agendas. Michael Rein asserts:

The scientist is often saliently illogical in his work, particularly when he is defending a preferred view or attacking a rival one; [i]n his experimental research, he is often selective, expedient, and not immune to distorting the data; [t]he scientist is probably the most passionate of the professionals; his theoretical and personal biases often color his alleged "openness" to the data. He is not the paragon of humility or disinterest but is, instead, often a selfish, ambitious, and petulant defender of personal recognition and territoriality; [f]ar from being a "suspender of judgment," the scientist is often an impetuous truth spinner who rushes to hypotheses and theories long before the data would warrant. Rein, Social Science at 6 (cited in note 143). These assertions are supported by the following observations of scientists at work:

A senior investigator insists that her assistants use theory X rather than theory Y to interpret their findings. . . . Investigators demonstrate the weaknesses in theory and method of all those who oppose their position, but do not admit their own shortcomings. Investigators cite favorably those who were likely to review their work for publication, hoping to increase the chances that their own work will be published—that is, viewed as "accepted truth."

196. See generally S. Begley, The Science Wars, Newsweek 54 (Apr 21, 1997); W. Herbert, Politics of Biology, US News & World Rpt 72 (Apr 21, 1997); Helen E. Longino, Science As Social Knowledge: Values and Objectivity in Scientific Inquiry (Princeton 1990);
studies on the deterrence effect of capital punishment and asked them to rate each study's persuasiveness and methodological soundness. Those favoring capital punishment rated higher the study finding a deterrence effect, whereas those against capital punishment rated higher the study finding no deterrence effect.\textsuperscript{197} Also, scientific peer reviewers' judgments about the methodological soundness and publishability of research has been found to vary significantly according to whether the research matches the reviewers' own theoretical perspective.\textsuperscript{198} A National Institute of Education study found that even the results of statistical meta-analyses conducted on the same group of studies differed according to the analyst's ideological orientation.\textsuperscript{199} Scientists also tend to overlook obvious and serious methodological flaws (for example, nonrandom assignment to conditions, no control group) in studies where they perceived the topic to be socially important, whereas they generally detect those flaws in research they considered less important.\textsuperscript{200}

Thus, since the same empirical data often can be used to support rival positions,\textsuperscript{201} our "values organize [the] facts."\textsuperscript{202} It is significant that psycholegal researchers and advocates are (like most social scientists) overwhelmingly politically liberal as a group,\textsuperscript{203} particularly in comparison with


201. See, for example, Rosenblum, 2 Psychol Pub Pol & L at 624 (cited in note 13) (questioning how law should handle variety of disparate findings and theories produced by eminent social scientists on intelligence/vocational testing and discrimination law). See also Longino, \textit{Science as Social Knowledge} (cited in note 196) (arguing "history of science repeatedly reveals that apparently inconsistent theories seem nevertheless adequately supported by the data they are intended to explain").


203. See MacCoum, 19 Ann Rev Psychol at 260 (cited in note 195); Richard E.
lawyers, judges, and the law itself which is rooted so heavily in tradition and precedent. Psycholegal advocacy of liberal socio-political policies often flows more from social scientists’ political views than from reliable scientific research findings. One federal judge wrote that the opinions expressed by the expert psychologist-witnesses in a school testing bias case were “more the result of a doctrinaire commitment to a preconceived idea than they are the result of scientific inquiry.” The survey studies cited in Brown v Board of Education, for example, were later criticized for using a biased sample—surveying the opinions of “liberal scientists studying race relations,” thus ensuring that those surveyed found segregation harmful.

When psycholegal advocacy is based on socio-political values rather than strong and directly relevant empirical data, it is not likely to be influential. This may be another reason why psychologists’ efforts to influence law have not been more successful. “Judges may believe that the results of empirical research are unreliable, because they have been distorted by the scientists’ liberal values.”

As Senator Hatch observed, “the findings of [social scientists’] research are now almost perfectly predictable from their political views.”

Redding, Toward Greater Political Diversity for the Science and Profession of Psychology (unpub manuscript, on file with author); Philip E. Tetlock and Gregory Mitchell, Liberal and Conservative Approach to Justice: Conflicting Psychological Portraits, in Barbara A. Mellers and Jonathan Baron, eds, Psychological Perspectives on Justice: Theory and Applications 234, 249-50 (Cambridge 1993) (“As a group, psychologists are disproportionately (if not overwhelmingly) liberal and appear drawn to flattering portraits of liberal and unflattering ones of conservatives. This intellectual attraction is understandable but has unfortunate consequences. Researchers have explored the empirical implications of some psycho-political portraits much more thoroughly than others. . . . What one finds in psychological research often hinges on what one is looking for and how hard one looks.”)

204. See, for example, Richard E. Redding, Empirical Psychology Meets the Politics of Family Values, 42 Contemp Psychol 1092 (1997). See generally Ellen Herman, The Romance of American Psychology: Political Culture in the Age of Experts (California 1995) (analyzing history of psychologists’ influence on public policy and culture between 1945 and 1970, and finding that much of their work and advocacy was heavily influenced by political ideology and that many social problems were unduly “psychologized” as a result). See also Tana Dineen, Manufacturing Victims: What the Psychology Industry is Doing to People (R. Davies 1996).


207. Bersoff and Glass, 2 U Chi L Sch Roundtable at 295 n 1 (cited in note 19).


Indeed, it is tempting and all too easy to advocate political views under the veil of social science, with little more than the fact that there is "something psychological to say about it." Deciding when research is ready for dissemination to the legal system is a judgment call (it can always be argued that the research is incomplete) that should not be driven by researchers' advocacy agenda. This was unfortunately the case in the American Psychological Association's amicus briefs on adolescent abortion submitted in three Supreme Court cases. Though the studies cited in the briefs were all consistent in showing that adolescents and adults are generally equivalent in their decision-making capacities, the studies were insufficient in number, lacking in ecological validity, and insufficiently relevant to warrant advocacy urging that the law was incorrect in assuming that adolescents lack maturity to make adult decisions.

Just as lawyers have a duty to inform the tribunal of controlling adverse authority, psycholegal researchers and advocates have an ethical obligation to fairly represent contrary research findings. Saks provides guidelines for ensuring that legal briefs fairly present a body of research: the brief should provide a survey of representative expert scientific opinion on the issue and/or provide a meta-analysis (an analysis and statistical summation of the results in existing research studies) of the research literature in the context of the theoretical alternatives supported by the data. Methodologies based on signal detection theory and judgment analysis are available for identifying and separating inherent value judgments from scientific judgments, as well as for integrating value judgments with scientific findings to inform policy. Additionally, there are methods for assessing the level of uncertainty inherent in a body of research findings.

2. Do Not Base Law on Psycholegal Research Unless the Research is Sizeable, Compelling, and Ecologically Valid, Particularly When Research Findings Apparently Refute CS-Psychology. Psycholegal advocacy has been

211. See generally Lois A. Weithorn, Professional Responsibility in the Dissemination of Psychological Research in Legal Contexts, in Melton, ed, Reforming 253 (cited in note 1).
213. See Gardner, Scherer, and Tester, 44 Am Psychologist 895 (cited in note 92).
214. See id; Scott, Reppucci, and Woolard, 19 L & Human Beh at 224-26 (cited in note 92).
215. See Saks, 17 L & Human Beh at 239 n 5 (cited in note 210) (arguing that since social science research evidence often functions much the same way as legal authority, lawyers have ethical obligation to inform the tribunal of contrary research findings).
216. Id at 241.
criticized for relying on research that was insufficiently complete and reliable, and/or politically biased, in a number of areas: for example, eyewitness reliability, battered woman syndrome, gender discrimination, gay and lesbian parenting, and adolescent competence. The most famous examples are Clark’s doll studies used as evidence in the desegregation case of Brown v Board of Education. The studies have since been roundly criticized by social scientists for their serious methodological flaws and probably invalid conclusions. Of course, the changing nature of science is not an indictment of research-based advocacy; CS-psychology also changes over time, albeit less so. But there are real risks in challenging CS-psychology too quickly and uncritically based on an uncertain body of scientific research. These risks are particularly great for law given the principle of stare decisis, which makes it difficult for law to change with shifting research findings.

We should not urge the law to set aside long-held principles and assumptions unless we are confident about the strength and ecological validity of the psycholegal research upon which the advocacy is based. We should be circumspect about the ecological validity of research findings that conflict with CS-psychology assumptions that “ring true,” in cases where “hardly anyone entertains serious doubts about the fireside induction” and “there is a consensus of the fireside that cuts across demographic variables such as education, occupation, social class, religious belief, ethnic background, and the like.” In other words, we should hesitate to alter law’s CS-psychology assumptions when they are consistent with our own experience, since “the plausibility of the con-

221. Gerald V. Barrett and Scott B. Morris, The American Psychological Association’s Amicus Curiae Brief in Price Waterhouse v. Hopkins: The Values of Social Science Versus the Values of Law, 17 L & Human Beh 201 (1993) (arguing that the American Psychological Association’s amicus curiae brief presented a highly biased and misleading interpretation of the scientific evidence on gender discrimination, because the brief selectively presented research findings, presented arguments not supported by the scientific literature, failed to acknowledge contrary research findings, and presented inconclusive research findings as conclusive). But see Susan T. Fiske, et al, What Constitutes a Scientific Review?: A Majority Retort to Barrett and Morris, 17 L & Human Beh 217 (1993) (refuting Barrett’s and Morris’s claims that the amicus brief was misleading).
223. See Gardner, Scherer, and Tester, 44 Am Psychologist 895 (cited in note 92).
224. 347 US 483.
225. See Bersoff, 10 L & Human Beh at 154 (cited in note 28).
Common sense and intuition serve as “warning signals” about the likely validity or invalidity of particular research findings and policy arguments.

On the other hand, when sufficient in number, generally consistent in their results, ecologically valid, and legally relevant, research findings generally should prevail over the assumptions of CS-psychology. In these circumstances, legal advocacy based on particular research findings is not only appropriate but highly desirable.

IX. Conclusion

It has been said that law is “policy analysis without benefit of data.” Psychological science is in a position to change this state of affairs. The relationship between psychology and law may be a “highly neurotic, conflict-ridden ambivalent affair,” but psycholegal researchers and advocates can have an impact on law if they consider CS-psychology as understood through “the pages of human experience.” Psycholegal researchers should use CS-psychology to inform their research, and lawyers and judges relying on social science research should evaluate it against the ecological context provided by the CS-psychology inherent in law. To do otherwise ignores a fertile source of hypotheses and knowledge about human behavior, and is perilous because the arbiters of law (judges, juries, and legislatures) sympathize with the pages of human experience, not with ANOVAs, correlations, and effect sizes. The former is its natural bedfellow; the latter, only an occasional mistress. Of course, we also should view CS-psychology with healthy scientific skepticism.

We are well advised to heed Alfred North Whitehead’s advice:

Science is rooted in . . . commonsense thought. This is the datum from which it starts, and to which it must recur . . . . You may polish up common sense, you may contradict it in detail, you may surprise it. But ultimately your whole task is to satisfy it.

228. See Lee J. Cronbach, Designing Evaluations of Educational and Social Programs (Jossey-Bass 1982). See, for example, Smedslund, 7 Theory & Psychol 529 (cited in note 110) (demonstrating some psychological theories and principles do not require empirical proof, but are logically and necessarily self-evident).
229. Welch, 6 S Cal Interdisc L J at 68, 73 (cited in note 51).
230. Of course, scientific evidence is more likely to be admitted when a consensus exists in the scientific community. See Rosenblum, 2 Psychol Pub Pol & L at 632 (cited in note 13). This is true notwithstanding the fact that Daubert does not require “general acceptance” for admissibility. Daubert v Merrell Dow Pharmaceuticals, 509 US 579, 589 (1993). One caveat is necessary: the adversary process may tend to portray greater controversy in the scientific community than actually exists. See Jasanoff, 77 Judicature at 80 (cited in note 27).
233. See Martin E.P. Seligman, Learned Optimism 73 (Knopf 1990) (quoting Alfred N. Whitehead).