Using Psychology to Control Law

From Deceptive Advertising to Criminal Sentencing*

Shari Seidman Diamond†

Legal decision makers often fail to make use of relevant psychological research. In two areas, deceptive advertising and criminal sentencing, legal decision makers have welcomed social science research. In each, the research provided has been substantially flawed. Using a commercial that several courts evaluated for deception, I illustrate how the typical study that purports to measure deception produces results that are unnecessarily ambiguous. Then, based on research that looks closely at public responses to criminal cases, I show that the frequently cited survey measures of public preference reflect sentencing preferences for unrepresentative stereotypic criminal offenders. The weaknesses demonstrated in these examples suggest that psychologists can present legal decision makers with a more accurate picture of human perceptions and preferences. If researchers present legal decision makers with informative research when the relevance of research is acknowledged, legal decision makers are likely to become more receptive and more knowledgeable when a new question warrants the application of social science evidence.

Psychologists increasingly appear on the witness stand, in legal briefs, and in legislative hearings to offer their research to the legal system (Melton, 1987). These efforts to use psychological research to influence legal decisions do not always meet with wild enthusiasm or even thoughtful consideration (see, e.g., Lockhart v. McCree, 1986). Although researchers on law often conduct research that has no obvious and indeed no expected legal or policy implications, they are

* An earlier version of this paper was delivered as the presidential address for Division 41, the American Psychology—Law Society, at the 1988 American Psychological Association meetings in Atlanta, Georgia. All requests for reprints should be sent to the author at the Department of Psychology, University of Illinois at Chicago, Box 4348, Chicago, IL 60680.
† University of Illinois at Chicago/American Bar Foundation.
1 476 U.S. 162 (1986).
understandably disappointed when courts reject or ignore crucial empirical research that bears directly on the legal question being decided.²

My focus here is on research findings from two areas in which the legal system has been responsive to behavioral research, but in which courts have mistakenly relied on research that has been misleading. In both areas, I will argue, behavioral research has presented legal decision makers with an inaccurate picture of the way people understand and evaluate. I will suggest that if psychologists will apply their available methodological tools and theoretical perspectives to these legal questions, they can provide valuable and better data about the behavior of law and a more complete understanding of issues that concern legal actors struggling to reach tough decisions. And because these areas present “trouble cases” for the legal system in which legal doctrine does not provide clear direction, the legal system is likely to be more receptive to the research than when it is asked to evaluate psychological research that raises an apparently settled legal question.³

The two areas I will examine are deceptive advertising and public attitudes towards criminal sentencing. These examples represent two strands of work on psychology and law: The first comes from civil law, that vast portion of the law on which psychologists have only recently focused their attention. The second is derived from criminal law, the sector of the law that traditionally captured and still attracts the attention of much research on psychology and law. They both represent areas in which behavioral research has painted an inaccurate picture of how people understand and evaluate. Psychologists can, I think, do better.

DECEPTIVE ADVERTISING

I became interested in deceptive advertising from the vantage point of a psychologist engaged in the practice of law. The relevance of psychology to the regulation of advertising emerged as I encountered case after case that involved consumer perception data. If an advertiser makes a deceptive claim about his or her product, a competitor can bring a civil action in federal court to enjoin that deceptive advertising.⁴ Administrative agencies as well as courts have the power to curb false advertising. Both the Federal Trade Commission⁵ and the Federal Drug Administration⁶ can enjoin deceptive advertisements. The two executives from Beechnut who sold apple juice for infants that did not contain any apples received fines and prison sentences as the result of a prosecution by the Federal Drug Administration for deceptive advertising. Self-regulation also influences the content of national advertising: The television networks each require substantia-

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² For an example of such research, see the articles in Law and Human Behavior, 8(1,2) (1984), documenting the conviction proneness of the death-qualified jury.

³ See, for example, Barefoot v. Estelle (1983), in which the Supreme Court rejected the substantial evidence that predictions of violence cannot be made with certainty.

