Experimental jurisprudence
Psychologists probe lay understandings of legal constructs

By Roseanna Sommers

Historically, the role psychology has played in the legal system has been confined to discrete domains that lawyers and judges tend to recognize as psychological. For example, in trademark disputes, litigants seeking to establish “consumer confusion” often hire experts to collect survey data showing that consumers are apt to mistake one brand for another. This is a textbook example of “law and psychology”: bringing methodological rigor to traditional legal analyses. Recently, however, a growing number of “experimental jurisprudence” scholars have been studying the law from the outside— theorizing what its doctrines are doing, criticizing its doctrines for what they are not doing—rather than from the inside, helping to sharpen traditional legal analyses (1–2). These empiricists, moreover, have trained their sights on legal constructs that might not strike one as particularly psychological, such as causation, consent, reasonableness, ownership, punishment, contract, and even law itself (e.g., what makes the law the law as opposed to some other kind of social arrangement) (3–10). This new approach departs from traditional law and psychology in both its scope and ambition: Beyond providing narrow expertise on matters that lawyers readily recognize as psychological (e.g., confusion, memory, insanity), experimental jurisprudence aims to advance legal theory broadly.

Experimental jurisprudence examines how core legal concepts are understood by laypeople who know little about the law. Researchers then compare laypeople’s ordinary concepts against their legal counterparts (1–3). For example, using survey experiments, psychologists have discovered that laypeople’s causal judgments are affected by counterfactual reasoning, which is in turn influenced by whether an agent behaved immorally (11). When an agent violates a moral norm, it increases the relevance of a counterfactual in which the agent behaved in a norm-abiding manner.

Scholars have taken this insight and deployed it to rethink tort law’s doctrine of proximate cause, which determines when an intervening event will “break the causal chain” between an original negligent act and a subsequent injury, such that the original wrongdoer is relieved from liability (3). For instance, a classic causal supersession case involves a service station that negligently leaves car keys in an unlocked vehicle and a thief who steals the car and negligently injures a plaintiff in a collision. Should the service station be held liable for the plaintiff’s damages? Although this case may seem unusual, it is hardly exotic: Judges are often called upon to determine whether negligent actors are the “proximate” causes of—and ultimately liable for—injuries occurring far down the causal chain. When they do so, they rely on cases like these as precedents.

The hitch is that prior cases have taken inconsistent stances on the question of causal supersession. Several influential legal theorists have argued that the best way to explain the twists and turns of the case law is to recognize that judges simply decide which party is ultimately morally blameworthy and assign proximate causation accordingly. Skeptics in this camp contend that proximate cause represents nothing more than judicial anonymity: Judges engage in outcome-driven reasoning, which they dress up, post hoc, in the language of causality (3).

But others have argued that given experimental research, legal causation is not as maddening or mysterious as it seems, with the doctrine of causal supersession best theorized not as judicial lawlessness but as roughly following the commonsense understanding of proximate cause (3). This ordinary concept embeds judgments about the relevance of various counterfactual alternatives and therefore bakes in judgments about moral norms, which may be why it appears as if judges’ causal determinations are influenced by considerations of blameworthiness. By this view, the doctrine’s relationship to causation is not complete confabulation, contrary to the skeptics’ complaint. Instead, judges’ seemingly inconsistent decisions may reflect the ordinary folk notion of causation.

Recent experimental work uncovers that laypeople intuit that another key legal concept, consent, is compatible with certain forms of deception (5). For example, most American research participants believe that a patient consents when he agrees to a medical procedure as the result of his doctor’s false statements. The same is true when a civilian allows police officers into her home because they lie about what they are searching for. Laypeople tend to report that the deceived targets have autonomously authorized invasions into their bodies and properties. This diverges from the standard autonomy-based understanding of consent, which holds that consent must be sufficiently knowing and informed to be valid. A court long ago concluded, for example, that a defendant could be held liable for kidnapping when he tricked a young woman into sailing to Panama on the promise that a job as a government awaited, when his true intention was to employ her in a brothel. Her consent to board the ship was negated by her employer’s deceit just as if she had been held at gunpoint.

Published by AAAS
Yet the law has often been inconsistent, occasionally departing from the maxim that deception invalidates consent. Just 2 years after the would-be Panamanian governor was deemed to have been kidnapped, a notably similar case arising in the same jurisdiction reached the opposite result. A man was tricked into boarding a ship to Mexico on the understanding that he would be employed as a railroad worker at a rate of 35 dollars per month in US currency; in fact, the job would pay only 1 dollar per month in Mexican currency. The court concluded that he was not kidnapped, because the false promise of his wages was “a shabby trick, but not a crime” (5).

The classic doctrinal explanation for this discrepancy insists that there are two kinds of fraud: fraud in the factum, which pertains to the essence of the transaction (e.g., lying about what job one is being recruited for), and fraud in the inducement, which pertains to a mere “inducement” (e.g., lying about how much a job will pay). In several instances, the common law treats only fraud in the factum as nullifying consent, even though both kinds of fraud may be upsetting to the individual who is deceived.

Experimental jurisprudential research can illuminate puzzling doctrinal quirks such as these. In one experiment using consent-by-deception scenarios that roughly corresponded to the two kinds of common-law fraud, participants read about a consumer who wanted to make a purchase so that he could earn credit card reward points that would enable him to book a free flight. In one version of the scenario, the store clerk lied to the consumer about what item he was ordering. In the other version, the clerk lied about whether the purchase qualified for reward points. Participants observed that the consumer personally cared more about the points than about what item he was buying, but they simultaneously regarded his consent as more undermined when the clerk lied to him about what product he was purchasing. They could discern what mattered most to the individual, but their judgments of consent tracked something else entirely: whether he was misled about something that went to the essence of the transaction. Their consent intuitions thus mirrored the peculiar factum versus inducement distinction found in the common law.

This line of research carries implications for the contemporary legal controversy over the so-called “riddle of rape-by-deception”—why Anglo-American law refuses to treat fraudulently procured consent to sex as rape, except under extreme circumstances, such as when a doctor misrepresents sex as a medical procedure or when one person impersonates another, leading to sex with the wrong person. Prevaling explanations for this puzzle have rested on ideas about gender, suggesting that the law is punishing women who are seen as unchaste, by declaring that they have consented despite being deceived. This new research suggests that something more general may be going on. In a variety of domains, lay participants endorse the intuition that only essential fraud (“fraud in the factum”) defeats consent; their judgments follow this pattern not just for consent to sex but also for consent to medical procedures, tattoos, and contracts for sale (5).

This experimental approach to legal scholarship has raised some controversy (12). Some question why it makes any difference what laypeople think; legal theory, they object, cannot be crowdsourced. What is more, although subtle and surprising features of legal concepts are often shared by folk intuition (2), at other times experimental jurisprudence research has uncovered stark divergences between ordinary concepts and legal concepts (5, 12). For example, recent work on the ordinary concept of contract shows that laypeople intuit that agreements must be in writing to be legally valid and that contractual terms will invariably be enforced as written, even when they are unenforceable or result from material, bad-faith fraud (13). It would be a mistake to insist that where ordinary concepts and legal concepts diverge, the law has been refuted. Most legal constructs are not like obscenity, which is explicitly defined by reference to community standards. Although courts have shown some openness to considering public opinion polling when it comes to defining obscene speech, that does not mean that surveys to set the definitions of all legal concepts should be used. A more defensible approach would recognize that there may be good reason for the law in some areas not to look just the way people believe, expect, or prefer it to look. Thus, although it is a welcome development that psychologists are venturing beyond their historical confines and pushing into new territory not recognized as distinctly psychological, they must acknowledge the limits of their approach. Experiments cannot settle deep, contested, normative questions about what the law should be.

Still, folk intuitions are worth studying. As a practical matter, in many jurisdictions ordinary people are empowered to determine what counts as causation or consent in legal cases. These are “questions of fact,” routinely decided by juries. Of course, research using hypothetical scenarios is limited in what it reveals about how people are likely to behave (14). Nonetheless, vignette studies are relatively well suited to investigating how people are likely to evaluate strangers whose situations they have no personal stake in—the task presented to jurors. Experimental jurisprudence studies often ask participants to evaluate scenarios that are based on real legal cases, rather than probing intuitions about fantastical thought experiments.

Beyond illuminating jury decision-making, experimental jurisprudence research can offer new insights into why the law is the way it is (1–3). And because experimental jurisprudence bears on broad legal concepts like causation, reasonableness, contract, and consent, it has the potential to take the field of law and psychology beyond its limited historical role and to establish it as a more central player in contemporary jurisprudential debates.

Looking to the future, experimental jurisprudence scholars are expected to use a growing set of methodologies: neuroimaging, computational and corpus linguistics, cross-cultural studies, and developmental work with participants from across the age spectrum (1, 7–8, 10, 15). As experimental jurisprudence gains traction, it may someday come to be an influential methodology that informs legal scholarship and practice, taking its place alongside economics, history, sociology, critical theory, and philosophy. ■

REFERENCES AND NOTES
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Science 373 (6553), 394-395.
DOI: 10.1126/science.abf0711