

Psychology and Legal Change

The Impact of a Decade*

Craig Haney

This article takes stock of one aspect of psychologically based empirical jurisprudence—its role in legal change over the last decade. It assesses the ways in which the increased involvement of psychology in the legal process has influenced and affected the nature and direction of legal change. While acknowledging very real and tangible successes, it also identifies several problem areas, ones whose significance may grow in light of an increasingly unsympathetic, conservative judiciary. The direction of psychology and law, as an applied academic discipline, and the future of empirically based legal change are also examined.

The stimulus for this article was an invitation from the American Psychology-Law Society (APLS) to give an address reflecting on the decade that had passed since *Law and Human Behavior* published an article of mine on “psychology and legal change” (Haney, 1980). I was grateful for the opportunity to reflect publicly on something that I wrote a decade ago, and I hope that the address, and this article, can contribute to a continuing dialogue about the direction of our discipline. By assessing the meaning and significance of where we have been over the last decade, I hope we can begin to think systematically about where psychology and law should be by the end of the next one.¹ But I also recognize that I approach the

* This article is based on an Invited Address to Division 41, APA Annual Convention, New Orleans, August, 1989. Requests for reprints should be sent to Professor Craig Haney, Stevenson College, University of California, Santa Cruz, CA 95064.

¹ Of course, others have thought systematically about these issues. For perspectives and conclusions that differ somewhat from my own, see Diamond (1982), Monahan and Loftus (1982), Grisso (1987), Melton (1987; 1988), Tremper (1987), Monahan and Walker (1988), and Saks (1989) among others.

issue of legal change somewhat differently from many others who work in psychology and law. Whatever else has happened to this discipline over the last decade, the professional interests of its practitioners have become more complex and diverse. Although we espouse a common set of professional interests, there are profound differences in the professional activities by which we pursue them. Indeed, those differences bring me directly to a caveat that I want to make about the comments that follow. Over the last decade, most of the time that I have spent working directly in the legal system has been focused on the death penalty and on prison conditions litigation. Neither of these activities—especially over the last decade—is likely to provide the basis for much optimism and enthusiasm about the future of legal change. Therefore, I am not sure how representative my views are, shaped undoubtedly by these admittedly unusual experiences, compared to the concerns and experiences of other members of APLS. Dostoevsky once observed that the full measure of humanity in any civilization could be seen in the way it treated its least favored, least powerful citizens—its prisoners. Perhaps an analogous point—that the measure of a discipline like ours can be taken in the way it addresses the plight of these same least favored subjects—is also well taken. But, whether it is or not, my experiences with these unpopular issues that involve our society's least favored and least powerful subjects color the words that follow.

So, the starting point for my comments and observations is the article I wrote, now more than 10 years ago, on the role of factual jurisprudence in producing legal change. The article was filled with hopeful expectation. To be sure, parts of it were cautious, guarded, and qualified, as scholarly pieces almost always are, but the overall tone and message was optimistic. I concluded that

law must not be allowed to retreat farther from the empirical world . . . Legal fictions have never been created or maintained in the interests of the powerless or disenfranchised. But a factual jurisprudence (with us as the providers of those facts) can function as a restraining edge for equity and fairness. (Haney, 1980, p. 73)

That was the vision that I believe many of us had—that psychology and other data-based social sciences could be used to close the gap between psychological reality and legal fiction, and could do so in the name of equity and fairness. I also wrote in the article that “law represents a powerful and entrenched structure and that psychological methods and data are for the most part assimilated into it . . . [But] psychologists [must] press for the accommodation of the legal structure itself to the psychological data that are brought to it” (p. 54). That, too, was part of the vision: that the law would be changed, in an important, structural sense, that it would do things differently as a result of our insights, and that the change would be meaningful.

In some ways, those sentiments, hopes, and expectations have been borne out over the last decade. There *are* many instances of psychologically initiated and inspired—or, at least, aided and abetted—legal change. To take just a few examples: Eyewitness identification testimony is handled differently in many jurisdictions, as a matter of law, because of research and expert opinion offered by

practitioners of psychology and law.² The same thing can be said about testimony from hypnotized witnesses, which, in some jurisdictions, is now more carefully limited if not actually prohibited.³ Predictions of dangerousness, both in civil commitment proceedings and certain criminal contexts are handled more carefully and critically because of the efforts of many psychologists.⁴ Some states have modified their jury instructions to incorporate more effective procedures recommended by empirical researchers in psychology and law.⁵ I would like to think that, despite what the United States Supreme Court has said, jury selection in capital cases proceeded in a somewhat fairer way for at least part of the past decade,⁶ and that at least some prison systems in the country are run just a little bit better because the work of psychological researchers and reformers has informed courts in various prison conditions lawsuits.⁷ The legal status and rights of

² For example, Buckhout (1974), Loftus (1979; 1991a), Penrod, Loftus, and Winkler (1982). Compare the insights and opinions offered in this writing with, for example, *State v. Chapple* (1983), *People v. McDonald* (1984), and *United States v. Stevens* (1991), each holding that it was error for a trial court not to admit expert testimony on the unreliability of eyewitness identifications. In addition, even some cases holding that a trial judge's refusal to admit such testimony did *not* constitute an abuse of discretion have included reasonably thoughtful and at least partially informed discussions of the psychological issues (e.g., *United States v. Moore*, 1986; *United States v. Smith*, 1984; and *United States v. Downing*, 1985).

³ For example, see Orne (1979; 1984). Compare Orne's analysis with *People v. Shirley* (1982) (testimony of a witness who has undergone hypnosis for purposes of restoring memory of the events at issue is inadmissible on all matters relating to those events), and *Little v. Armontrout* (1987) (admission of victim's posthypnotic identification testimony violated defendant's due process rights).

⁴ See, for example, Monahan (1981). Compare this work with, e.g., *People v. Murtishaw* (1981) (precluding unreliable predictions of future dangerousness), or *State v. Davis* (1984) (allowing for evidence of potential for rehabilitation in the penalty phase of capital case). In addition, see the dissent in *State v. Huntley* (1986), which obviously had been informed by relevant psycholegal research in formulating its concerns about the ability of the courts to predict dangerousness as part of the state of Oregon's "dangerous offender" statute.

⁵ For example, Elwork, Sales, and Alfini (1982); Severance and Loftus (1982); and Cruse and Browne (1987). Compare Tanford (1990a) who documented the way in which rule-making commissions in Florida, Pennsylvania, and Vermont modified their states' jury instructions at least in part as a result of research conducted in psychology and law (pp. 161-164). See, also, the dissent in *People v. Gonzales* (1980), which reviewed much of the published literature on the incomprehensibility of jury instructions and concluded that "until current studies in the area of juror comprehension are much further advanced, evaluations as to comprehensibility by members of the bench and bar will continue to suffer from the general lack of knowledge of what terminology, syntax and concepts create difficulties for jurors" (p. 659).

⁶ See Haney (1984); Ellsworth (1991). A detailed discussion of and partial reliance on this work is found in *Hovey v. Superior Court* (1980) (individual, sequestered voir dire is required in capital jury selection to minimize the biasing effects of the death qualification process). Compare, also, *Keeton v. Garrison* (1984a) (death qualification unconstitutional because it produces juries that are conviction-prone and not representative cross-sections of the community) and *Grigsby v. Mabry* (1983) (death qualification violates the Sixth Amendment rights of capital defendants) with *Keeton v. Garrison* (1984b) (4th Circuit's reversal and rejection of the social science evidence on this issue) and *Grigsby v. Mabry* (1985) (8th Circuit's affirmation and acceptance of essentially the same social science record).

⁷ See, for example, Sommer (1971); Haney and Zimbardo (1977); Clements (1979; 1982); Cox, Paulus, and McCain (1984); Paulus (1988); and Toch (1992a; 1992b). Compare *Toussaint v. Rushen* (1983)

children have been transformed, to a degree, because of what people in APLS have learned, written about, and testified to,⁸ and much of the progress that has been made in affording legal recognition to post-traumatic stress disorder (PTSD)⁹ and battered spouse syndromes¹⁰ as legal defenses is attributable to the work of many specialists in psychology and law. This listing is neither exhaustive nor representative, but draws only on examples from the specific areas that I know well because they touch directly upon my own work. But even this skewed sample makes clear that, by the measure of appellate court references—itsself only a

(subjecting numerous conditions of confinement in "lockup" units in California prisons to Eighth Amendment analysis); *Pugh v. Locke* (1976), *aff'd sub nom. Newman v. Alabama* (1977), *rev'd in part sub nom. Alabama v. Pugh* (1978) (numerous conditions in Alabama prisons violate Eighth Amendment); and perhaps the most sweeping analysis of unconstitutional conditions of confinement to date, *Ruiz v. Estelle* (1980) (holding that the entire Texas prison system was cruel and unusual). For a fascinating look at how the federal judge in the *Ruiz* case intervened to avoid a "judicial career presiding over hearings that had the trappings of due process, but that were void of meaning," see Justice, 1990 (p. 9). For an equally fascinating account of the role of psychologists Stanley Brodsky, Carl Clements, and Raymond Fowler in the Alabama prison conditions litigation, see Yackle (1989).

⁸ For example, see Grisso (1980); Melton (1981; 1985; 1988). Compare this work with *Commonwealth v. A Juvenile* (1983) (state has heavy burden to demonstrate that statement made by juvenile was obtained after knowing and intelligent waiver), *State v. Nicholas S.* (1982) (special factors must be considered in determination of whether juvenile made voluntary waiver of Fifth Amendment rights). Cf., also, *State v. R. W.* (1986) (failure to order psychiatric examination of 3½-year-old solely on grounds of her age was not abuse of discretion), *State v. James* (1989) (trial court properly refused to instruct jury on special considerations applicable to credibility of child witnesses), and *Maryland v. Craig* (1990) (defendant's Sixth Amendment right to confront witnesses at trial could yield to state's interest in protecting child witnesses from trauma of testifying in child abuse case).

⁹ For example, see Note (1981); Ford (1983); Wilson and Zigelbaum (1983); and Erlinder (1984). Compare with *People v. Galvan* (1984) (remanding case for consideration of whether placement in federal PTSD treatment program was preferable to state prison commitment), and *State v. Bilke* (1989) (petitioner's posttrial PTSD diagnosis constituted colorable claim of newly discovered evidence that might have affected his sentence and, therefore, compelled a reversal). Even *Funchess v. Wainwright* (1986) (although petitioner was suffering from PTSD that might have supported his claim of incompetency, it should have been raised in earlier appeals) recognized the existence of the disorder and seemed somewhat informed about its legitimacy and significance. Interestingly, many of the appellate cases that involve PTSD focus on whether it is properly used in rape trials as probative of whether or not a traumatic sexual assault has actually occurred, see, for example, *State v. Hall* (1990) (expert testimony about PTSD admissible on the issue of whether a rape occurred). See Frazier and Borgida (1985) and Massaro (1985) for discussions of the psycholegal status of "rape trauma syndrome" evidence in court.

¹⁰ See, for example, Browne (1987); Sonkin (1987); Walker (1979; 1989). Compare the writing of these authors with *State v. Koss* (1990) (battered woman syndrome has gained substantial enough scientific acceptance to warrant admissibility into evidence) and *State v. Hodges* (1986) (because expert testimony on battered woman syndrome addresses issues beyond the understanding of the average juror and is based upon generally accepted scientific theory and method, it was improperly excluded by the trial court). But see, also, *Tourlakis v. Morris* (1990) (trial court's exclusion of expert testimony on battered woman syndrome did not result in an error of federal constitutional magnitude) which, despite the result, contained a useful list of scholarly and legal references (see pages 1132–1134), and *United States v. Gordon* (1986) (defendant's psychological problems, including battered woman's syndrome, did not render her waiver of Miranda rights or subsequent statements involuntary). See, generally, Note (1985) (judicial discretion this and other syndrome testimony is exercised in an irrational manner because of fears and myths surrounding the usefulness of psychological profile and syndrome evidence at trial).

partial indexing¹¹—psychological theories and data *have* helped shape the law over the last decade.

Moreover, there is a broader context to this positive reading of recent history in our discipline. I believe that psychology and law can be seen as one of the great success stories in applied psychology. Despite its intellectual birth in the early part of this century—Munsterberg, the Brandeis brief, and so on—and its rejuvenation in the 1950s—that one shining moment in the sun compliments of a *Brown v. Board of Education* (1954) footnote¹²—this discipline got its real force and momentum, as well as much of its direction and inspiration in the 1960s and 1970s in the civil rights struggles of many disenfranchised groups who, along with their lawyers, turned to social science for help.¹³ It was neither accident nor coincidence that it was Thurgood Marshall and the NAACP Legal Defense Fund who relied so heavily upon social science and pioneered a style of litigation in which social facts (and the social scientists who studied them) were not just politely acknowledged or employed as intellectual makeweights in appellate briefs but integrated into the heart of the litigation itself. The perspectives of psychology and other social sciences were useful in defining, establishing, and validating alternative ways of viewing social reality, ways that would challenge and transform a prevailing “judicial common sense” that had been used to keep the disenfranchised down so long. Psychology during this period—especially my discipline, social psychology, which was in the midst of an intellectual “crisis” that included profound self-doubts about its own “relevance”—was fertile ground for these invitations to go into the world, to be relevant, and to make a difference. And

¹¹ I agree with Siegelman and Donohue (1990) that “one of the few uncontested truths produced by the application of social science to law is that only a tiny part of the ‘action’ in the legal system is revealed in appellate cases” (p. 1133). Yet, here is where access to the broadest, if not entirely representative, sample of such “action” is most feasible. Jury selection is one area where appellate court decisions really do not adequately reflect the contributions of psychologists to legal change efforts. An entire industry as well as a professional association (many of whose members are psychologists) have grown up over the last 10 years, focusing on jury-related trial issues. This work is sometimes called “scientific jury selection” (e.g., Cutler, 1990), although some of its most important contributions are based less on the application of rigorous scientific methods than the general insights and thoughtful observations of people who either have formal social scientific training or are immersed in its orientation. Pioneering work by the National Jury Project (e.g., National Jury Project, 1983) and people like Cathy Bennett (1977) has both transformed many aspects of legal trial practice and relied heavily upon psychology to do so. Indeed, many psychologists have followed in the wake of their significant contributions. Yet, little of this work is acknowledged in appellate case law.

¹² Footnote 11 contained a number of explicit references to social science research in support of the proposition that so-called separate but equal schooling had harmful, stigmatizing effects on Black children. It has become a commonplace in writing about psychology and law (my own included) to suggest that—in addition to its profound sociopolitical effects—*Brown* represented the culmination of several decades of American legal realism and provided a window of opportunity for social scientists to contribute to the translation of realist premises into legal doctrine. Indirectly, I suppose, my thesis in the pages that follow is that realism’s limitations have become our own.

¹³ The definitive history of this important period has yet to be written. For an interesting look at one part of that history—the use of social scientists in desegregation cases—see Chesler, Sanders, and Kalmus (1988). See, also, Rosenberg (1991), whose reading of the consequences of that history is far less optimistic than most others.

many psychologists did. Thus, Loftus (1991b) recently could write, admittedly with a bit of rhetorical exaggeration: "Where have all the social psychologists gone? They've gone to legal arenas everywhere" (p. 1046).

Yes, psychology and law is one of the professional success stories to come out of the turbulent 1960s. Perhaps along with health psychology, it is one of the very few of these new areas or specialties in applied psychology to "stick." We now have joint programs, special journals, our own APA division, and so on. And psychology and law is still one of the very few areas in psychology where academics *can* be relevant. It is truly an applied discipline, and those of us who practice it continually touch up against some of the most important decisions and most dramatic events that occur in this society.¹⁴ To affect the outcome of a trial, to have one's testimony or research cited as the basis of a judicial opinion, to contribute to changing conditions in a criminal justice institution or influence legal policy can feel profoundly useful. Indeed, it can really make a difference (albeit, I think, in fewer cases than it *feels* like it does, but I get ahead of myself).

Yet, despite evidence of success and many instances of real world impact, I believe there is reason for grave concern. Thus, the rest of my comments are less optimistic than the record of the last 10 years might seem to justify. There are two broad bases for this concern. First, for the first time since the Civil Rights Movement breathed life into psychology and law, we are beginning to suffer a significant number of important setbacks and outright failures in legal arenas, especially at the hands of the U.S. Supreme Court. To be sure, this fate has befallen civil rights advocates generally. There is no evidence that psychology and law has been singled out for special abuse, but neither has the discipline been spared the Court's harsh conservative backhand.

Thus, I would be remiss in my discussion of psychology's impact on appellate court decisions if I did not note that, with the exception of a very few issues, the discipline of psychology has been cited approvingly by members of the Supreme Court more often in dissent than in majority opinions, when it has been cited at all.¹⁵ Anyone who thought that data alone could carry the day in constitutional

¹⁴ For example, here is how one commentator, herself critical of the trend, describes the last 20 years of development of law and social science:

Legal opinions refer to social scientific research. Social scientists testify as expert witnesses in court. Lawyers rely on social science consultants in jury selection. Law students take courses on quantitative methods. Law journals publish articles on econometrics in the courtroom. And social scientists and lawyers, deploring the misuse and abuse of social science research in the courtroom, explain how to improve legal use of social science. (Constable, 1991, p. 354)

Although I think this is a bit too generous a view of the current status of psychology and other social sciences in the legal system, there can be little doubt that things are done differently now than even 10 years ago in many areas of law and that the contributions that psychologists have made to legal change are partly the reason.

¹⁵ For example, on eyewitness issues, see *Watkins v. Sowders* (1981) or *Arizona v. Youngblood* (1988). See, also, the conservative dissent in *Rock v. Arkansas* (1987), where a number of psychological references were cited to support the proposition that a rule prohibiting all hypnotically refreshed testimony did not infringe on a criminal defendant's right to testify on her own behalf (pp. 60-65). With respect to the psychological effects of conditions of prison confinement, when the Court in

jurisprudence, or that the last 10 years of psycholegal reform had educated the Court about social science and won us a hard fought, grudging respect among the Justices need only look at *Lockhart v. McCree* (1986), where the Court expressed “serious doubts about the value” of the social science research to predict actual behavior in the legal system (p. 171),¹⁶ despite virtual unanimity in the social science community about the biasing effects of death qualification. Or, look carefully at *McCleskey v. Kemp* (1987), where the Court rejected a veritable mountain of data documenting the discriminatory impact of capital punishment because the data were, in essence, not perfect and because the Court changed the applicable legal standard in such a way as to make social science data rarely if ever relevant to this issue in the future. This hostility was foreshadowed in a 1978 off-handed reference by some members of the Court to “reliance on numerology” (*Ballew v. Georgia*, 1978),¹⁷ and it now haunts us with a vengeance. Although our “numer-

Rhodes v. Chapman (1981) approved the widespread use of double-celling, only Justice Marshall, in dissent, acknowledged in any serious way the potential value of psychological research on conditions of confinement issues. More recently, when the Court in *Wilson v. Seiter* (1991) required that prisoners show a “culpable state of mind” on the part of prison officials to prevail under the Eighth Amendment, it seemed to narrow even further the potential relevance of psychological research, and it did so without benefit of a single citation to the relevant literature. In the Court’s most detailed opinion on dangerousness, *Barefoot v. Estelle* (1983), the majority supported the use of highly questionable psychiatric predictions of dangerousness in capital cases and ignored most current psychological thinking on the issue. Much of the relevant psychological literature was cited and discussed in the dissent, which noted that “neither the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right” (p. 921). In *Washington v. Harper* (1990), which concerned the circumstances under which a prisoner may be involuntarily administered psychotropic drugs, the Court was, as Justice Blackmun noted in his concurrence, “pull[ed] . . . in opposite directions” (p. 236) by the American Psychiatric Association and the American Psychological Association. The majority sided with the psychiatrists. In *Wainwright v. Witt* (1985), as the Court liberalized the standard of death qualification by which potential jurors opposed to the death penalty were excluded from participation in capital trials, the majority ignored existing psychological research on the biasing effects of the process itself—research that it explicitly would criticize and reject a year later in *Lockhart v. McCree* (1986). However, the *Witt* dissent cited this research as part of the basis for its conclusion that such a liberalized standard would increase the problem of guilt-prone juries in capital cases: “Instead of recognizing that the process of death qualification creates serious risks . . . this Court abandons any limits on the process and thereby enhances the possibility of erroneous convictions as well as erroneous sentences” (p. 460, n. 11). More generally, see Tanford’s (1990b) study of the more than 90 Supreme Court opinions on the law of trials decided between 1970 and 1988 and his conclusion that, despite an “explosion” of relevant psychological research during this period, “not a single Supreme Court majority opinion has relied even partly on the psychology of jury behavior to justify a decision about the proper way to conduct a trial” (p. 139).

¹⁶ See, also, Bersoff (1987) for an interesting discussion of APA’s role in this litigation, as well as, in the pages that follow Bersoff’s article, a reprint of the amicus brief filed by APA in *Lockhart*, and Thompson (1989) for an especially thoughtful discussion of current death qualification issues. The majority opinion in *Lockhart* was authored by Chief Justice Rehnquist, whose hostility to the use of social science in constitutional decision making is apparently longstanding. See Tushnet and Lezin’s (1991) discussion of the role that Rehnquist played when *Brown* was first argued in 1952. As a law clerk to Justice Robert Jackson, he drafted memoranda to assist the Justice in arguing that the Court “should not read ‘sociological views into constitutional law’ ” (p. 1900).

¹⁷ *Ballew* concerned the issue of whether criminal juries could be reduced in size to less than six

ology” has become more sophisticated and more often directed to precise legal points, there is now far less reliance, with every indication that the future will bring even less. Judicial hostility, much more than corporate tax credits, has a way of trickling down, especially when it emanates from the Supreme Court. The recent hostile trends in Supreme Court decision making, along with the nature of appointments to the Court over the last decade, suggest that the optimistic social science jurisprudence of *Brown* has ended. Many of the hopeful expectations of civil rights groups working in courtrooms across the country on behalf of the disenfranchised have been dashed and, perhaps along with them, much hope for continued, effective use of social science as a counter to unquestioned judicial common sense. We appear to be rapidly regressing back to a time when courts automatically weighed the status quo as per se more legitimate than any alternative. The more “what is,” as opposed to what should or might be, is seen as in need of little or no justification, it becomes increasingly impervious to critical analysis. If we continue this backward trend, “discrete and insular minorities”¹⁸ will need to look elsewhere for voice, and increasing numbers of lawyers and social scientists will need to seek strategies beyond litigation with which to effect legal and social change. In this regard, the next decade promises to be very different from the last, and I wonder if we are ready and what will be the shape of our discipline when it is over. An enduring factual jurisprudence that can serve as an important catalyst for meaningful legal change ought to be able to survive such shifts in the political winds. It seems increasingly clear that ours has not.¹⁹

The second basis of my concern is far more speculative but, if valid, much more problematic. I believe we are beginning to lose a sense of shared purpose in psychology and law. I speak about a sense of the waning of collective effort, a loss of common goals, and an abandoning of a sense of mission—the mission of legal

persons. Justice Blackmun, who has emerged as one of the more sympathetic and sophisticated users of social science data on the Court, cited a number of empirical studies on the effects of reductions from 12 to 6 (p. 231, Footnote 10), and argued that the studies raised “significant questions about the wisdom and constitutionality of a reduction below six” (p. 232). In a very short concurring opinion, Justices Powell (joined by Chief Justice Burger and Justice Rehnquist) questioned “the wisdom—as well as the necessity” of reliance on social science studies (pp. 245–246).

¹⁸ The phrase comes from *United States v. Carolene Products Co.* (1938) and is one component of the definition of a “suspect classification,” which requires that the highest level of Supreme Court scrutiny—“strict scrutiny”—be applied to statutes that discriminate against persons so classified.

¹⁹ Little more than decade ago, Morton Horwitz (1979), one of the founders of Critical Legal Studies, observed that *Brown’s* jurisprudential consequence was to upset a 50-year-old liberal consensus born of the fear that an activist Court would repeat the sins of *Lochner v. New York* (1905) (the case in which Justice Holmes accused the majority of enacting Herbert Spencer’s social Darwinist ideology into law). In this earlier, pre-*Brown* era, the “rallying focus” of liberal jurisprudence had become the belief that “courts should ordinarily defer to the policies of the legislature” (p. 600). By dramatically demonstrating the progressive possibilities of an activist court, *Brown* changed all that. Horwitz noted: “In some sense, all of American constitutional law for the past twenty-five years has revolved around trying to justify the judicial role in *Brown* while trying simultaneously to show that such a course will not lead to another *Lochner* era” (p. 602). I think it is fair to say that we appear to be entering (or are in the midst of) another *Lochnerian* era. The jurisprudential implications of *Brown*, as well as its implications for the use of social science to effect progressive legal change, must be examined anew.

change. Ironically, but perhaps inevitably, the shared purpose or vision seems to be eroding in the midst of increased professional activity, some real as well as apparent success, and, until recently, unprecedented legal recognition and respect. As I say, some of this loss of shared purpose is inevitable. As a discipline increases in size, its members come with increasingly different concerns and agendas. Some loss of shared vision, too, comes from the blurring of perspective that attends involvement in the details and particulars of legal work, even legal reform. It is easy to get caught up in the immediate, intense focus on one's own narrowly applied research topic, the excitement of individual courtroom successes, an effective piece of legislative analysis or lobbying, or an opportunity to shape policy within a legal institution, while at the same time losing sight of the larger goals or overall directions to which our actions contribute. Yet, I wonder whether we do not sometimes think we are doing good, behaving as socially responsible applied psychologists dedicated to legal change, when in fact we are at best irrelevant to the real business of this system and, at worst, it accomplices.

Some of this loss of commitment to legal change seems conceptual, and therefore subject to intellectual analysis, debate and, perhaps resolution. Toward this end, let me suggest that there are several unresolved core issues and conceptual stress points that remain at the very heart of psychology and law and that seem to me central to the question of legal change. That is, I believe that the unsettled, unresolved status of these core issues, in the spirit of my earlier article, greatly limits our ability to produce meaningful legal change. I think their resolution will influence the shape and direction of the discipline for years to come.

The Problem of Values

Psychology and law has continued to operate without a shared conception of, or commitment to, justice. We have no clearly articulated theory of value and, therefore, no overarching vision with which to address and reform the legal system.²⁰ For the most part, we work piecemeal, with no overall sense of how the pieces do or should fit into the larger whole. I am not suggesting that there is or

²⁰ In this point and the one that follows, I have not overlooked some of the very interesting work done by psychologists on perceptions of justice and the relationship of procedural to distributive conceptions of fairness (e.g., Tyler & McGraw, 1986; Rasinski, 1987; Tyler & Rasinski, 1991). No one can now doubt, for example, that people are concerned about fair procedure, that people prefer fair procedures to unfair ones, or that citizens are more likely to regard institutions of justice as more legitimate if they believe them to operate fairly. However, I mean to make a different point that this work does not seem to address. We are still much more comfortable measuring our subjects' definitions of "justice" (often by having them select between a series of forced-choice, culturally bound, and highly conventional alternatives) than in conceptualizing independent definitions that might "make sense" from a psychological perspective. There is, I think, a tendency to overlook the ways in which the value attached to procedural justice is the product of a legal culture in which procedure is regularly substituted for substance and a corresponding tendency to ignore the injustice that comes about as a result (cf. Haney, 1991). Perhaps quite inadvertently, much of the work on procedural fairness perpetuates the belief that dimensions of fairness and justice are only ever "found" and never created and that the job of psychology and law is merely to uncover rather than to suggest or create possibilities and alternatives.

should be a single or *unitary* conception. Clearly, there must be *competing* conceptions that will be evaluated, compared, and debated. But we have yet to define a single vision, let alone to debate alternatives. When I first went to law school, I used to marvel at how infrequently the word *justice* was used in classroom discourse (less frequently than the words *artichoke* or *kryptonite*, I kidded with friends). It was not that lawyers were not supposed to have values, mind you—indeed, it was assumed that they did. Or, at least, it was assumed that their clients certainly had values and that the lawyer's job was to further them. But the prospect of talking too openly about our values, and therefore ultimately about our conceptions of justice, was risky and might prove ultimately disadvantageous. Indeed, it might compromise our ability to attract clients, to advance the interests of those clients for whom we worked, or, ultimately, to succeed in a legal system whose values might be at odds with our own. To be sure, there *was* an overarching vision, so implicit and widely shared that it could go unspoken. The values of the status quo were implicitly defended and advanced, typically without debate. And the safest, recommended course of action was to embrace those values enthusiastically and wholeheartedly in our work. Certainly the prospect of having a *progressive* vision, values oriented around notions of equal justice and the idea of a good and fair society—and the use of law to advance those notions—was viewed as not only too risky but hopelessly naive as well.²¹ Karl Llewellyn (1930) told law students that the “hardest job” of the first-year law school was “to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you” (p. 101), but he also quickly conceded that

law thrusts, law clubs, not merely for the maintenance of order, but for the maintenance of that very order which may be cracking. Law and lawyers must therefore stand to observation at the very point where society has come to press upon the weak, the helpless, the obscure, the wretched. At that very point they stand eternally and struggle for what is old, for what may be outworn, against the claims of anything that may be new and human and appealing. (p. 144)

In psychology, the problem is a little different. Psychologists are easily embarrassed by or made to feel guilty about having *any* values—we are still burdened with a 19th-century positivistic model of science in which we are supposed to be “value-neutral” (whatever that means). I do not happen to believe this model of science is *ever* workable in psychology, but I know it is not workable in psychology and law. Having to ignore values or pretend that we have none leaves us with no coherent framework around which to organize our research, and it robs us of our potential to transform rather than tinker (cf. Haney, 1980, pp. 153–158). Moreover, it has obviated the need for open discussion and debate about con-

²¹ A legal anthropologist, Michael Lowy, and I once wrote a short essay about this issue in which we said that law students “are chided to ‘unpack’ the overstuffed conceptual baggage of ‘justice’ and ‘fairness.’ Apparently, terms like ‘economic efficiency’ come neatly packed in luggage whose design is so compact that it cannot be improved upon. Whatever cannot be quantified (or perceived by the largely upper- or middle-class students in a tangible way) cannot become part of the cost-benefit analysis urged upon them. Intangibles like ‘justice’ and ‘truth’ are quickly dismissed as irrelevant concerns, too imponderable to become part of any ‘bottom-line’ calculation” (Lowy & Haney, 1980, p. 41).

tending points of view, conflicting values, and alternative visions of the good and the just. If we are not supposed to have values, we certainly cannot debate them. I think some of the most interesting and important debates that have arisen in this field recently are really about values, yet they are consistently couched in terms of data (e.g., Loftus, 1983a, 1983b vs. McCloskey & Egeth, 1983a, 1983b; Ewing, 1990 vs. Morse, 1990; Bonta & Gendreau, 1990, and Gendreau & Bonta, 1991 vs. Roberts & Jackson, 1991; and Elliott, 1991a, 1991b vs. Ellsworth, 1991).

The Elevation of Process over Substance

In a much-related vein, I believe that we have failed to move beyond the study of process to any meaningful examination of substantive ends in the law. That is, we still focus too much of our attention on procedure to the relative exclusion of outcomes. Thus, most of our research is directed at the creation of fair or better legal procedures, regardless of the ends to which those procedures are put. In part, this is because American law historically has sought to translate matters of substance into matters of procedure—due process concerns are more easily litigated and disposed of than those of equal protection (e.g., Haney, 1991). I believe it also stems from this fear of expressing personal values and our refusal to conceptualize an explicit model of justice. Thus, we seem doomed endlessly to fine tuning procedures rather than ever grappling with the fairness of the outcomes they produce.²²

Indeed, in criminal justice research, we tend to look most frequently and with the greatest care at psycholegal procedures that come to play in the *middle* part of the criminal process—primarily trial-related events and decisions—and we essentially ignore the end points—pretrial and postconviction—in comparison. Yet, what may be the most pressing and profound issues in criminal justice are presented at the end points—the causes of crime, the inextricable links between crime, race, and poverty (on the one end), and the utterly deplorable institutions of legal punishment that prevail throughout the country and the wider social, economic, and moral costs that these institutions extract from our society (on the other). We are at risk of creating a perfect justice machine that grinds up the victims of societal dysfunction and disarray and deposits them into the legally sanctioned sea of oppression and human misery that is our prison system. Even if all our due process dreams came true in psychology and law, and this mythical justice machine ground away with perfect procedural precision and accuracy, much substantive injustice would still remain. I hope you will agree with me that the creation of such a machine—although no modest accomplishment—would not be good enough. Yet, the current fixation with due process (a noble end in itself) provides this unspoken limit to our vision, one that ensures we will ignore other, perhaps even nobler, dreams. Tribe (1989) is surely right that “it is the most

²² This seems jurisprudentially consistent with the legal process or “process jurisprudence” school that most legal scholars agree supplanted legal realism as the dominant paradigm in American legal education. In the words of G. Edward White, the “central thrust” of process jurisprudence has been “to convert all inquiries into one: have the proper ‘legal processes’ been employed?” (quoted in Kalman, 1986, p. 231).

vulnerable, the most forgotten, whose perspective is least akin to that of the lawmaker or judge or bureaucrat and whose fate is most forcefully determined by the law's overall design" (p. 13), but I think we now too infrequently examine that overall design with the perspective of the most vulnerable and most forgotten in mind. It is what allows us to examine this "overall design" in almost aesthetic terms, and to accept procedure as a poor substitute for substance.

Methodological Conservatism

We have yet to come to terms in psychology and law with the special methodological challenges posed by our uniquely applied discipline. Instead, we increasingly reflect the methodological narrowness and rigidity of our parent discipline—empirical psychology. I'm afraid we ask too many little questions—because our methods are best suited for them—while big, important questions (like the causes of crime, the creation of substantive justice, the nature and consequences of discrimination, how to ease the pains of imprisonment, the nature of the urge to punish and sometimes to punish to death) continue to elude us in psychology and law. (There *is* social science research on these important psychological topics, but very little of it by psychologists and almost none of it conducted in psychology and law.) In its early years, psychology and law was a discipline whose nontraditional focus permitted a broader, more flexible definition of what constituted social knowledge, and, for many of us, it offered the promise that we would in this discipline begin to move beyond the methodological confines of narrow experimentalism and help to define a new contextual empiricism that was both intellectually sound and socially useful. Instead, there are continuing signs of insecurity, perhaps the reflection of a kind of scientific inferiority complex. I worry that we will continue to repeat the sins of psychology's past, and frequently to elevate methodological over substantive concerns. Ironically, we do so at a time when our parent disciplines are moving in the opposite direction, beginning to travel in uncharted epistemological waters, struggling with new and revolutionary definitions of truth and knowledge (e.g., Fiske & Shweder, 1986; Gergen, 1991).

Not too long ago, a *Contemporary Psychology* review declared, "Positivism is history" (Hogan, 1988). But I sometimes get the feeling from reading the pages of *Law and Human Behavior* that we in psychology and law seek only more and better positivism; that many of us feel that we had too little of it in our history, so we will make it our future. Thus, the observation that Tribe (1989) has recently offered to lawyers and judges might be taken with equal seriousness by those of us who work in psychology and law: "To look to the natural sciences for authority—that is, for certainty—is to look for what is not there" (p. 2, footnote omitted).²³ We have not only looked to the natural sciences for authority, but we have

²³ Cf. Diamond (1992) to the effect that the study of law "in its natural habitat . . . is a difficult and messy business. Use of the pristine environment and maximum control of the laboratory is purchased at the potential cost of low external validity. Researchers who choose to conduct sociolegal research and consumers who attempt to learn about the legal system from that research are engaged in a Bayesian activity in which certainty is never achieved" (p. 122).

failed to take advantage of opportunities to be methodologically creative and to embrace, apply, or even evaluate new ideas in psychology in a legal context. For example, the legal system is an excellent place to understand and apply "social constructivism"—the notion that truth is the socially negotiated interpretation of commonly experienced events (e.g., Gergen, 1985). If law represents a system of power mediated through language, as I believe it does, then what better place in which to study the ways in which "meanings are historically situated and constructed and reconstructed through the medium of language" (Hare-Mustin & Marecek, 1988), as both social constructivism and deconstruction attempt to do? What better arena in which to study how interpretations of reality are socially negotiated than in legal arenas and exchanges? Or, the interaction of power, gender, and race in the construction of meaning and difference—*whose* common experiences provide the platform on which legal truth is erected, by what socially constructed rules, and to whose advantage? Despite many such interesting and uniquely appropriate questions, we continue to pursue at best "modernist" issues rather than, as in more adventurous disciplines, exploring "postmodern" themes. Thus, psychology and law has proceeded untouched by much of the discourse in Critical Legal Studies (e.g., Kelman, 1987; Unger, 1975)²⁴ and feminist jurisprudence (e.g., MacKinnon, 1987; 1989; Williams, 1990), despite the fact that both discourses have had an important impact on perhaps our closest companion discipline—law and society studies.²⁵ I think we shy away from these issues largely out of the fear that someone (probably someone in the legal system) will challenge our scientific bona fides.²⁶ But if my belief that we avoid these issues for reasons of methodological conservatism is correct, then it is a tradition that no longer

²⁴ Indeed, Critical Legal Studies may come and go before many practitioners of psychology and law acknowledge its existence. (For an interesting commentary on the rise and putative fall of the CLS movement, see Blum, 1990, and the articles reviewed therein.) The same can be said for lesser-known but innovative perspectives like "critical empiricism" (Trubek & Esser, 1989) and the intellectual debates that they have sparked (e.g., Harrington & Yngvesson, 1990; Villmoare, 1990; Sarat, 1990; and, Esser & Trubek, 1990).

²⁵ For example, see Menkel-Meadow and Diamond's (1991) special issue on *Gender and Sociolegal Studies*, and Levine's (1990) comments on the importance of feminist scholarship to future directions in sociolegal studies. In this context, it is useful to consider Abrams' (1991) observation that "Feminist lawyers have been assisted in glimpsing (the connection between a dominant group perspective and seemingly neutral definitions of valid legal method) by the critique of objectivity which has emerged in feminist legal theory as well as in the social and physical sciences" (p. 402, footnote omitted). This is a critique whose implications would help illuminate similar connections in our own discipline.

²⁶ One of the very worst things that any self-respecting psychologist can be accused of is conducting, or relying upon, "soft" as opposed to "hard" science. (cf. Morse, 1990.) Although this criticism should lose much of its sting when levied by lawyers or law professors who have practiced neither, I believe fear of this kind of criticism still serves as a needless guide for much of the methodological decision making in psychology and law. More generally, however, I hope that this dichotomy (and the implicit hierarchy it contains) will soon be seen as an outmoded remnant of a narrow brand of positivistic thinking, one that we should be in the process of moving beyond in this discipline. (Indeed, my colleague, Aida Hurtado, has suggested to me that the "hard" versus "soft" dichotomy is not only narrowly positivistic but phallogocentric as well. She has assured me that rephrasing the dichotomy in terms of "wet" versus "dry" would have immediate salutary effects.)

serves us well. And, in any event, I think we could be much more sanguine about the long-term future of psychology and legal change if at least some of us had begun to incorporate this kind of work into our discipline.

Legalism

At times it seems to me that we have become increasingly content—even complacent—to serve as technicians and tinkerers in the law rather than aspiring to the role of transformers, system shakers who risk alienation but seek real substantive change. There is a delicate balance here, one with several dimensions to it whose weight threatens to tilt us away from the goals of legal change. At what point does small, incremental change cease to be change at all and become nothing more than system maintenance? At what point does acceptance and integration into the system in order to enhance our ability to change and improve it become mere cooptation? Is there an inherent contradiction in the concept of an applied intellectual discipline, such that the roles of intellectual critic—the classic mission of academic enterprise—and of applied operative or participant are simply incompatible? These are old questions—perhaps even tiresome old questions—about working within the system versus outside of it, but I believe they are ones that we now ask ourselves far too infrequently.

In the early years of psychology and law, we were appropriately concerned with the issue of whether or not our research and theory were sufficiently legally sophisticated to be relevant or useful to law (e.g., Vidmar, 1979). Now I wonder whether we are not threatened by the opposite problem—the tendency to take the paradigms handed to us by the legal system too uncritically and to work only around the edges of these issues without developing a critical perspective on their center. We too infrequently begin with an intellectual or moral challenge, translate it into empirical research, and then contribute to the pursuit of its implications in the form of a legal or policy change. Thus, the cooptation is as much intellectual as it is behavioral. I suspect that one of the reasons that we are failing more regularly to stand up to this system, to confront and challenge its injustices, is that we have become preoccupied with the goal of securing favorable legal reactions to our work.²⁷ We have begun to overlook the fact that legal audiences, and the

²⁷ In my 1980 article, I pointed to the law's inherent conservatism, based in part upon the fact that it is heavily bound by precedent at the expense of innovation, as one of the significant differences between it and the discipline of psychology. Grisso (1987) has made an interesting observation that connects that point to the one I am making here. Commenting about private-sector psychologists in forensic clinical practice—professionals whose numbers now dominate Division 41—he noted that “these psychologists must rely on their past assessment and courtroom performances to maintain a reputation that will ensure requests from local attorneys in future cases” (p. 836). Moreover, it is judges even more than local attorneys who serve as the professional gatekeepers here. But Grisso also observed that judges “are accustomed to following precedent and tradition when evaluating the admissibility and usefulness of expert testimony. . . . Moreover, the judge’s attention to precedent produces a disincentive for using new methods, because new methods will engender uncertainty and require more intensive judicial scrutiny in the absence of precedent. Judicial influence, therefore, is not likely to reward innovation in forensic assessments” (ibid.). Although less obvious and direct, similar forces are at work to blunt the edges of many psychologically inspired legal change efforts.

standards they use for validating and legitimizing knowledge and points of view, are often part of the problem. Indeed, they are often *the* problem. You cannot change a system from which you seek acceptance, and the costs of making our work palatable to an inherently (and increasingly) conservative legal system may simply be too high. I remember writing in 1980 that “structural change implicates lawyers in the redesign of a system that has served them well” (p. 55). I wonder if the same thing cannot now be said of many of us.

For example, although many psychologists testify in educational and employment discrimination cases and present evidence about important issues like disparate impact and the validity of standardized educational and employment tests (e.g., Bersoff, 1979; Schwartz & Goodman, 1992), I confess to having very mixed feelings about the legal change potential of this work, however crucial it may be for the fair resolution of individual cases. Organized psychology has a uneven record on the role of standardized testing in both employment and educational discrimination, in part because of the longstanding, inherent tension between the nature of the issues presented and the opposing professional interests of many psychologists in their resolution (e.g., Brown, 1992). On the one hand, psychologists have pioneered in the development of concepts of modern racism that are implemented in much employment discrimination litigation (Pettigrew & Taylor, 1992; Tomkins & Pfeifer, 1992), many have contributed directly to the courts’ understanding of appropriate testing standards, and sometimes those standards have been indirectly incorporated into legal decisions. Yet, in my opinion, at least, the American Psychological Association has been reticent about the nature and scope of discriminatory testing practices and reluctant to advocate (much less require) the kind of rigorous testing standards and regulation of test use that would reduce such discriminatory practices, perhaps in part because the livelihood of many members depends so heavily on the use of standardized tests whose widespread use often produces discriminatory results. Although there is much the profession could do to alleviate these problems (and much we may be forced to do in response to the increasing political pressures that will flow from the changing nature of the American workforce), there is little reason to expect these inherent tensions in the discipline soon to be resolved (cf. Haney, 1982; Haney & Hurtado, 1993).²⁸

But I certainly do not mean to personalize this part of my analysis. There are structural reasons for this dilemma that need to be analyzed and transcended. There are those who argue that the historical incorporation of intellectuals into the university has undermined their ability to offer truly incisive critiques of society (e.g., Jacoby, 1987). Historical analyses of the development of the social sciences as academic and professional disciplines—the transition from social “advocates” to “objective” purveyors of supposedly value-neutral truth—trace another dimension to this problem (Furner, 1975; Haskell, 1977).²⁹ The production of knowl-

²⁸ But see *Price Waterhouse v. Hopkins* (1989), Fiske et al. (1991), and, in the pages following the Fiske article, the APA’s amicus brief filed in the case.

²⁹ Furner (1977) concluded her study of the tension between advocacy and objectivity by arguing that it had transformed the original mission of social science, the mission that had fostered its profes-

edge, even in traditional academic enterprises, takes place within an institutional context that is far from "pure." Add now to that, in psychology and law, the burden of surviving—with one's ideas and presumably one's career intact—in a legal world that makes no pretense about neutrality or the free marketplace of ideas, and the problems are multiplied manifold. Yet, we must begin to develop some mechanisms for maintaining a critical perspective on the legal issues that we study, having an independent enough view to form the basis of transformation and reform, yet operate sufficiently close to the legal system to at least sometimes succeed at it. No one who seeks to apply his or her work in the legal system can ignore the fact that if that work is not recognized as valid by the legal system or accepted by legal decision makers, then the capacity to effect immediate legal change will be profoundly limited. The dialectic between theory and practice is operating here, along with the tendency for a powerful legal system—in which practice is all that matters—to drive theoretical and empirical issues and activity.

The Nature of Application

Conversely, we have yet to generate an epistemology and a technology of application. I think there is a unique perspective that so-called applied disciplines like ours can offer to social science generally. Rather than forcing a compromise in standards, the mandate of application offers us genuine possibility, the prospect of advance over more traditional approaches to the discipline of psychology. Thus, it is much simpler in our applied discipline to see the ways in which data collection is situationally specific and context-bound, and *that* insight represents—to my mind, at least—a great advantage over work done from a purely theoretical or exclusively laboratory-oriented perspective. Rather than serving to limit the nature of our knowledge, the applied nature of our work should expand definitions and extend the boundaries of meaningful social knowledge and its production. In a related way, the techniques of applying that knowledge can be refined with more precision and intention. My colleague Brewster Smith (1982) once wrote that personality and social psychology "have to attend to the cultural and historical context if they are to be faithful to their scientific task" (p. 52). I would argue that both disciplines do it too infrequently. Smith went on to discuss the distinction between a natural sciences model (built around the task of causal explanation) and a human and cultural studies model (built around the task of meaningful interpretation and understanding)—a distinction that is sometimes referred to as the difference between causes and reasons. He then observed:

The applied areas linked to personality and social psychology—clinical, counseling, industrial, and so on—are inextricably committed to the causal framework since their practitioners trade in bringing about desired changes, and (except for the strong counter-current of behavior modification, with its investments in the former world view of positivism) the applied areas are mostly committed by their human focus to strategies of interpretation as well. (p. 52)

sionalization in the first place: "Only rarely did professional social scientists do what no one else was better qualified to do: bring expert skill and knowledge to bear on cosmic questions pertaining to the society as a whole" (p. 324).

As another one of the "applied areas," psychology and law also seems well positioned to contribute to a bridging of these two models, perhaps by legitimizing, emphasizing, and broadening our "strategies of interpretation." Yet, my impression is that interpretive work is given less, rather than more, credence in psychology and law than in ostensibly more traditional disciplines of personality and social psychology, and what might be fairly characterized as "interpretive psycholegal research" is really nowhere to be found in our journals (cf. Harrington & Yngvesson, 1990).

In a related vein, a better conceptual rendering of what it means to be an applied social scientific discipline may lead to an improved technology of application, one in which ideas are applied more faithfully and forcefully toward desired ends. This issue—how to ensure that our work is applied in ways that are consistent with our intentions, values, and purposes—is one from which we are regularly excluded (or voluntarily flee) after our intellectual contribution has been made. Somehow we must learn to transcend this problem of legal change foundering on the shores of application. Legal victories that dissolve as they are translated from courtroom to real-world setting produce little meaningful impact (e.g., Haney & Pettigrew, 1986).³⁰ Yet, there is little work in psychology and law that directly addresses this topic.

Hoshmand and Polkinghorne (1992) have recently argued for a more "interdependent relationship between science and practice" in psychology, one in which there is a "better articulation of the epistemology of practice, and greater emphasis on practice-based professional inquiry" (p. 55). I could not agree more. But this, and the points made in the preceding several pages, are a call for neither methodological anarchy nor anomie. James Clifford has observed that "to recognize the poetic dimension of . . . [social science] does not require one to give up facts and accurate account for the supposed free play of poetry" (quoted in Van Maanen, 1988, p. 101). Part of the challenge posed by new paradigms of knowledge that supplant old hierarchies is that we must struggle to develop new ways of evaluating truth. We have done little of this kind of thinking in psychology and law.

Diversity

Psychology and law reflects the biases of the professions from which its practitioners are drawn. That is obvious; I wrote about it at some length 10 years ago, and many other scholars in psychology and law wrote more eloquently about it before and after that. Yet, there is an equally obvious but little acknowledged dimension to this observation. We reflect our parent disciplines demographically (and, therefore, attitudinally and in terms of implicit and unstated values) as well as in terms of the intellectual traditions that we bring to bear on our work. Put

³⁰ Thomas Pettigrew and I (Haney & Pettigrew, 1986) once touted the Southern school desegregation cases as a successful counterexample to what we argued was the much more typical pattern of legal victories failing to produce meaningful or effective institutional change. In light of recent history, we may have been too charitable. In a recent book, Rosenberg (1991) has forcefully challenged even that singular success story.

bluntly, psychology and law is an almost universally white and still largely male discipline. Kathryn Abrams (1991) has written that “feminist lawyers are law reformers: They seek not simply to secure sound outcomes under the existing law, but to correct the law in favor of its own incompletely expressed aspirations or a set of externally generated norms” (p. 376). Feminist practitioners of psychology and law like Lenore Walker and Angela Browne have brought a similar reformist perspective to our discipline, but we could use much more of it. In addition, the *racial* underrepresentation is particularly disabling to a profession like ours whose members often study a criminal justice system in which subjects—real defendants—are almost always poor and predominantly persons of color.³¹

Thus, I worry that our research agendas are badly skewed and our problem definitions are extremely limited by these demographic facts.³² It seems to me that there is still more research on “attractiveness” than racism in jury decision making in our discipline and that we would still rather study the fairness of legal procedures than the unfairness of harsh criminal justice realities in which criminals are created by inequitable social conditions and dispensed with by warehouse prisons. And I suspect there are many other important, unarticulated examples, ones that—given the implicit operation of these biases in my own case—are simply impossible for me to contemplate.

To this demographic disparity add relational distance—distance created by the fact that many of us are not directly touched by the issues we study, and, indeed, do not even *know* anybody who is touched by them. This distance encourages many of us to do legal reform without really being engaged by the struggles of those most touched by it, getting down and dirty in what is often a filthy system, being close to the concerns and heartaches of the people who are soiled by it on a daily basis. As remarkable as it may seem, there are still many academic practitioners of psychology and law who have never talked at length to a criminal defendant, carefully inspected a violent crime scene or a prison cell, or

³¹ To take just one example of the matter-of-factness with which we have come to regard this issue, I note the recently reported and very interesting research done by Abram and Teplin (Abram, 1990; Abram & Teplin, 1991) on co-occurring disorders (severe mental disorder, substance abuse, and antisocial personality disorders) among jail inmates. Describing the sample from which the incidence rates were derived, Abram (1990) reported that “because virtually no detainee was a priori ruled ineligible for participation in the research, the sample was unbiased with respect to the characteristics of the larger jail population” and that this careful sampling produced a sample with “demographic characteristics . . . similar to urban jails nationwide” (p. 336). The sample itself was composed of 80.8% African American and 6.5% Hispanic male detainees. I suppose it was perfectly appropriate for the researchers not to comment on this remarkable fact—after all, even their discussion of the policy implications of their overall findings addressed a different, and important, topic. But I only wish we had as much to say in psychology and law about the social conditions and the operation of a criminal justice system that produce a population of urban jail detainees approximately 86.3% of whom are persons of color, and the associated policy implications, as we do about the psychological disorders from which they may suffer.

³² The fact that we are not alone among psychologists in this deficiency—see Riger (1992) and Graham (1992) for recent, related analyses—is no consolation. The mandate for representativeness and the representation of minority points of view is, or should be, far more compelling in psychology and law.

sat through an entire felony trial. As academics, we continue to try to keep it clean, but sometimes real legal change, especially criminal justice reform, is a dirty business. I am not suggesting that every one of us should wallow in these harsh realities or that our work can or should constantly focus on them; I am only suggesting that change-oriented psycholegal reform must at least be informed by such experiences to be effective.

Knowledge as Politics

Finally, I have become increasingly convinced that the process of legal change, of translating social knowledge into social policy, is inherently a matter of politics, much more than my earlier writing or thinking on this topic envisioned.³³ The most frustrating side of this work lies in the political ineffectiveness with which we are saddled, rather than in a lack of knowledge or wisdom. As academics, we know how to handle ignorance, but political impotence is another matter entirely. Yet, oddly enough, here is where events of the last several years may lead to some optimism. The solution to this problem—the political nature of legal change—of course, is not for all of us to become politicians or to enter political frays instead of doing research and policy analysis. Rather, however appropriate that may be for some, the more general solution lies in doing something that is much more akin to our traditional role and original purpose as scholars—education. I believe one of the reasons we have suffered this conservative counterrevolution in law and the eroding of civil rights generally in this society is that too little attention has been paid over the last decade or so to elevating the level of popular discourse and understanding about these issues.³⁴ Elites—whether they are legal decision makers or academic change agents—ignore the public at their peril. When they do so, as I believe they have over the last decade and a half, then the public can be counted upon to reverse whatever changes have been effected in their absence or without their consent. This is certainly true of criminal justice policy, where, both historically and structurally, there is a vitally important popular dimension to change and reform. On issues of criminal justice, it matters what “the people” think. Indeed, it matters even if they are incorrect in their beliefs. One of the lessons of the recent history of legal attempts to abolish the death penalty, I think, is that even a reasonably “informed” judiciary can be made responsive to a largely “uninformed” public.³⁵ Their power is vested firmly in the

³³ Compare Kalman's (1986) sobering historical analysis of the failure of legal realism to produce significant intellectual, pedagogical, or legal change and to become “essentially a conservative movement” (p. 230). She concluded with the observation that the contemporary school of “process jurisprudence” into which realism developed “denied realism's most important message, a message so arresting that even the realists never dared face it—that all law is politics” (p. 231).

³⁴ Cf. Jacoby (1987): “Fifties intellectuals were *publicists*; they wrote to and for the educated public. The following generation surrendered the vernacular, sacrificing a public identity” (p. 26). Very little that is done in psychology and law is adequately communicated to the educated public. However, I believe increasing numbers of us must, from time to time, assume a public identity to be more effective agents of legal change.

³⁵ Recent data on attitudes toward the death penalty that Aida Hurtado, Luis Vega, and I have collected in California show a familiar pattern—not only does an overwhelming majority support the

jury box, the ballot box, and in the channeling of public opinion that political interest groups have learned to exploit. If legal change moves on without an informed populace or before the public is ready to move, then the public can undo reform and dismantle change. Unfortunately, this was one part of the Warren Court's legacy and, to a certain extent, it is ours.³⁶ Thus, one of the arenas into which social science, as a vehicle of social and legal change, can be directed is public education. There is still very little emphasis on this in our discipline.

However, I do not mean to imply that I believe this task is as simple and straightforward as attempting to undertake it. Quite the opposite. Educating for legal change implies something very different about the nature of our professional role as well as about the development of the knowledge base from which we might seek to educate. In this context, it matters not just what "the people" think, but what they care about as well. Here is where distance from the concerns of persons touched directly by the topics we study impedes us. Thus, I think educating for legal change requires far more sensitivity to questions that, as my earlier points have suggested, we often ignore. I believe we must spend much more time looking at the realities of this system, not only to understand its internal operation but also to grasp the *context* in which it operates. Values and substantive outcomes are implicated here, and our knowledge base must be enriched by them or our educational efforts will be self-limiting. Before we undertake a proactive educational role with the public, we will need a much better sense of the public's connection to the legal system—the political, ideological, as well as psychological purposes that it serves—and to seek to better comprehend the nature and meaning of legal legitimacy in terms that extend beyond the mere efficiency or factfinding accuracy of institutions or components in this system.

To take just one example from the well-studied area of jury research: I am afraid I cannot share in Hastie, Penrod, and Pennington's (1983) self-confident optimism that "most of the fundamental questions concerning the proper function of the jury can be answered with reference to empirical facts about juror and jury behavior" (p. 4). From the perspective of legal change, at least, the *proper* function of the jury can only be understood with reference to history, to a critical analysis of the legal theory that rationalizes and legitimizes it, to the political and

death penalty, but most are still mistaken in their beliefs about how much the death penalty costs (relative to life imprisonment), its deterrent effect, its racially disproportionate imposition, and even its acceptance by the religious community (Haney, Hurtado, & Vega, 1993; see, also, Ellsworth & Ross, 1983). These profound and widespread misconceptions did not prevent California citizens from focusing almost entirely on the issue of the death penalty as the basis for replacing three justices of their Supreme Court in 1986 (including their Chief Justice, Rose Bird, who happened to be a strong advocate and master practitioner of empirical jurisprudence).

³⁶ Others have suggested different solutions to the intransigent conservatism of the federal judiciary. For example, Freeman (1990) has argued: "If the federal courts are to become, as they were in the past, little more than reactionary apologists for the existing order, we should treat them with the contempt they deserve. One can only hope that other political institutions will be reinvigorated" (p. 147). Yet, all other political institutions (including state courts that he advocates as pursuing a more activist stance under a kind of rebirth of federalism) are even more directly connected to the electorate than the federal judiciary.

sociological realities that surround both the composition and behavior of actual juries in an increasingly diverse society in which contested social meaning is mediated by a process that manages—some would say, manufactures—consensus. This places a much heavier intellectual burden on the next generation of psycholegal scholars who would write, research, and educate in the name of legal change.

I have come to the end of my litany of concerns. But I want to share one final bit of recent history to give further perspective to this discussion. A few months before these comments were to be delivered as an APA address, I was reading the newspaper account of one of the Supreme Court's recent reversals of a key civil rights case. The particular decision, in *Ward's Cove v. Antonio* (1989), had been handed down the day before and was an especially disheartening reversal of doctrines that had been in place for almost two decades to protect the rights of minority workers. The Court's opinion limited the use of statistical data in proving discriminatory impact and also shifted the burden of proof in rebutting related evidence in employment discrimination cases. As I read the newspaper account of this depressing opinion and the reminders in the press that this was but one in a series of such reversals in the area of employment discrimination,³⁷ I wondered how far the Supreme Court's activist conservative agenda would take us and what decisions like these would mean for the future of progressive legal change. I also thought for a moment about the "good old days" beginning, of course, with *Brown*. Those were the days, I imagined—it was just a little bit before my time—when social scientists were involved in effective legal change, when what they did really made a difference. But several months later, I came upon a much smaller newspaper headline, "Topeka School Bias Case is Kept Alive by Ruling," reporting a decision by the Tenth Circuit concerning the historic *Brown* case. The article began: "The school board in Topeka, Kansas has failed to carry out the mandate of the landmark 1954 *Brown v. Topeka Board of Education* desegregation ruling, a federal court ruled in keeping the case open . . ." In the opinion itself, the Tenth Circuit reached the conclusion that "we are convinced that Topeka has not suf-

³⁷ Of course, I was not the only person to be disheartened by these decisions. Some groups saw the decisions "as symbolic as *Plessy v. Ferguson's* retreat from the promise of equal rights for minorities" (Johnson, 1992, p. 12). Much critical academic commentary appeared in reaction (e.g., Belton, 1990; Norton, 1990; Player, 1989). More importantly, in response to a massive campaign by civil rights groups—which turned into a highly charged public and political debate—Congress passed and, on November 21, 1991, President Bush signed into law the Civil Rights Act of 1991. The Act was designed, in the words of one federal judge called upon to interpret it, "to undo the effects of these cases, which [Congress] believed were wrongly decided, and to restore civil rights law to its previous state" (*Stender v. Lucky Stores*, 1992, p. 1305). This sequence of events—civil rights groups seeking justice from Congress to undo the decisions of the Supreme Court—suggests very clearly that times have changed and that the jurisprudence of legal change is in the process of significant transformation as well. Several recent studies also suggest that the courts may not be a productive forum in which to pursue social or legal change on behalf of disenfranchised groups. For example, see Kessler (1990), who found that "local courts may not protect or promote the interests of those groups lacking influence in the political system. Instead, the agenda setting processes may serve to maintain existing inequalities" (p. 127). See, also, from different perspectives, Tanford (1990a) and Rosenberg (1991).

ficiently countered the effects of both the momentum of its pre-Brown segregation and its subsequent segregation acts in the 1960s" (*Brown v. Board of Education of Topeka*, 1989, p. 854).³⁸ So much for the good old days.

Of course, the work begun almost 40 years ago—even on this case that so many of us regard as a defining moment for psychology and law—has not been completed. And we have certainly not moved on to other issues because the old problems have been solved. Discrimination, injustice, oppression—these are the struggles out of which psychology and law was born and they are still the issues that inflame the passions of many of us and inspire much of the work we do. Yet, as my previous comments have indicated, I worry that we have less to say about them now than we once did. What impact have we really had on the quality of justice in the most recent decade in the history of our discipline? Whatever your answer—and it will depend, I suppose, on the issues upon which you focus—the more important question for all of us concerns what impact we will have on the quality of justice over the *next* 10 years. How did we lose the momentum that seemed to gather such force in the two decades after *Brown* (or, more accurately, how was it sometimes redirected away from intellectually and morally challenging questions toward narrower concerns of professionalization and legal acceptance)? And what does this lesson imply about the future? How can we rekindle the vision and commitment of those early years, and should we even try? What will the next historical period dictate about the form and direction of new initiatives in our discipline? How, if at all, do our recent directions—often disparate and narrowly focused directions—shape or determine what the future holds for the discipline as a whole? Do academically oriented disciplines like ours inevitably lack the staying power to produce lasting change? I hope that questions like these can help to initiate a new and broader dialogue about the future role of psychology in the enterprise of legal change. I have suggested some issues that we might think about as we begin to generate much-needed answers. As I have said, I believe that we must soon confront several conceptual stress points that remain in our discipline and that there is some residual conflict and confusion over professional values that eventually must be resolved. We are still plagued, I think, by fundamental, lingering doubts about a commitment to social and legal change. But my specific ideas are less important than the dialogue that they might spawn. It is a dialogue that may well become active and heated, but this kind of debate will be needed to guide psychology and law in the decade to come. This discipline will be tested in the next 10 years in a much different way than in the last. I hope that these kinds of discussions will help to insure that we are ready.

³⁸ The Tenth Circuit found that although there was no longer active promotion of segregation in Topeka's schools, a "current condition of segregation" continued to exist in the schools because "what Topeka did not do is actively strive to dismantle the system (of de jure segregation) that existed" when the original litigation began (p. 886). The court concluded that the early, good faith attempts at remedying segregation were not monitored sufficiently well and that subsequent actions on the part of the school board were not designed to overcome remaining problems. In essence, Topeka lost the momentum necessary to sustain the earlier changes.

REFERENCES

- Abram, K. (1990). The problem of co-occurring disorders among jail detainees. *Law and Human Behavior, 14*, 333-345.
- Abram, K., & Teplin, L. (1991). Co-occurring disorders among mentally ill jail detainees. *American Psychologist, 46*, 1036-1045.
- Abrams, K. (1991). Feminist lawyering and legal method. *Law & Social Inquiry, 373-404*.
- Acker, J. (1990). Social science in Supreme Court criminal cases and briefs: The actual and potential contribution of social scientists as amici curiae. *Law and Human Behavior, 14*, 25-42.
- Arizona v. Youngblood, 488 U.S. 44 (1988).
- Ballew v. Georgia, 435 U.S. 223 (1978).
- Barefoot v. Estelle, 463 U.S. 880 (1983).
- Belton, R. (1990). The dismantling of the Griggs disparate impact theory and the future of Title VII: The need for a third Reconstruction. *Yale Law & Policy Review, 8*, 223-256.
- Bennett, C. (1977). Psychological methods of jury selection in the typical criminal case. *Criminal Defense, 4*, March-April, 11-22.
- Bersoff, D. (1979). Regarding psychologists testify: Legal regulation of psychological assessment in the public school. *Maryland Law Review, 39*, 27-120.
- Bersoff, D. (1987). Social science data and the Supreme Court: *Lockhart* as a case in point. *American Psychologist, 42*, 52-58.
- Blum, J. (1990). Critical legal studies and the rule of law. *Buffalo Law Review, 38*, 59-155.
- Bonta, J., & Gendreau, P. (1990). Reexamining the cruel and unusual punishment of prison life. *Law and Human Behavior, 14*, 347-372.
- Brown, J. (1992). *The definition of a profession: The authority of metaphor in the history of intelligence testing, 1890-1930*. Princeton: Princeton University Press.
- Brown v. Board of Education, 347 U.S. 483 (1954).
- Brown v. Board of Education of Topeka, 892 F.2d 851 [10th Cir. (Kan.) 1989].
- Browne, A. (1987). *When battered women kill*. New York: Free Press.
- Buckhout, R. (1974). Eyewitness identification. *Scientific American, 231*, 23-31.
- Chesler, M., Sanders, J., & Kalmuss, D. (1988). *Social science in court: Mobilizing experts in the school desegregation cases*. Madison: University of Wisconsin.
- Clements, C. (1979). Crowded prisons: A review of psychological and environmental effects. *Law and Human Behavior, 3*, 217-225.
- Clements, C. (1982). The relationship of offender classification to the problems of prison overcrowding. *Crime & Delinquency, 72-81*.
- Commonwealth v. A Juvenile, 449 N.E. 2d 654 (S. Ct. Mass., 1983).
- Constable, M. (1991). What books about juries reveal about social science and law. *Law and Social Inquiry, 16*, 353-372.
- Cox, V., Paulus, P., & McCain, G. (1984). Prison crowding research. *American Psychologist, 39*, 1148-1160.
- Cruse, D., & Browne, B. (1987). Reasoning in a jury trial: The influence of instructions. *Journal of General Psychology, 114*, 129-133.
- Cutler, B. (1990). Introduction: The status of scientific jury selection in psychology and law. *Forensic Reports, 3*, 227-232.
- Diamond, S. (1982). Growth and maturation in psychology and law. *Law & Society Review, 7*, 11-20.
- Diamond, S. (1992). The assessment of sentencing choices through triangulation: A response to Walker. *Law & Social Inquiry, 16*, 115-122.
- Elliott, R. (1991a). Social science data and the APA: The *Lockhart* brief as a case in point. *Law and Human Behavior, 15*, 59-76.
- Elliott, R. (1991b). Response to Ellsworth. *Law and Human Behavior, 15*, 91-94.
- Ellsworth, P. (1991). To tell what we know or wait for Godot? *Law and Human Behavior, 15*, 77-90.
- Elwork, A., Sales, B., & Alfini, J. (1982). *Making jury instructions understandable*. Charlottesville, VA: Michie.

- Erlinder, P. (1984). Paying the price for Vietnam: Post-traumatic stress and criminal behavior. *Boston College Law Review*, 25, 305–347.
- Esser, J., & Trubek, D. (1990). From “scientism without determinism” to “interpretation without politics”: A reply to Sarat, Harrington and Yngvesson. *Law and Social Inquiry*, 15, 171–180.
- Ewing, C. (1990). Psychological self-defense: A proposed justification for battered women who kill. *Law and Human Behavior*, 14, 579–594.
- Fiske, S., Bersoff, D., Borgida, E., Deaux, K., & Heilman, M. (1991). Social science research on trial: Use of sex stereotyping research in *Price Waterhouse v. Hopkins*. *American Psychologist*, 46, 1049–19060.
- Fiske, D., & Shweder, R. (Eds.) (1986). *Metatheory in social science: Pluralisms and subjectivities*. Chicago: University of Chicago Press.
- Ford, J. (1983). In defense of the defenders: The Vietnam vet syndrome. *Criminal Law Bulletin*, 19, 434–441.
- Frazier, P., & Borgida, E. (1985). Rape trauma syndrome evidence in court. *American Psychologist*, 40, 984–993.
- Freeman, A. (1990). Antidiscrimination law: The view from 1989. In D. Kairys (Ed.), *The politics of law: A progressive critique*. New York: Pantheon.
- Funchess v. Wainwright, 788 R. 2d 1443 (1986).
- Furner, M. (1975). *Advocacy & objectivity: A crisis in the professionalization of American social science, 1865–1905*. Lexington, KY: University of Kentucky Press.
- Gendreau, P., & Bonta, J. (1991). Boats against the current: A rebuttal. *Law and Human Behavior*, 15, 563–565.
- Gergen, K. (1985). The social constructionist movement in modern psychology. *American Psychologist*, 40, 266–275.
- Graham, S. (1992). “Most of the subjects were white and middle class”: Trends in published research on African Americans in selected APA journals, 1970–1989. *American Psychologist*, 47, 629–639.
- Grigsby v. Mabry, 569 F. Supp. 1273 (E. D. Ark. 1983), *aff’d*, 758 F.2d 226 (8th Cir. 1985), *reversed*, Lockhart v. McCree, 476 U.S. 162 (1986).
- Grisso, T. (1980). Juveniles’ capacities to waive Miranda rights: An empirical analysis. *California Law Review*, 68, 1134–1166.
- Grisso, T. (1987). The economic and scientific future of forensic psychological assessment. *American Psychologist*, 42, 831–839.
- Haney, C. (1980). Psychology and legal change: On the limits of a factual jurisprudence. *Law and Human Behavior*, 6, 191–235.
- Haney, C. (1982). Employment tests and employment discrimination: A dissenting psychological opinion. *Industrial Relations Law Journal*, 5, 1–86.
- Haney, C. (Ed.) (1984). Special issue on death qualification. *Law and Human Behavior*, 8, 1–196.
- Haney, C. (1991). The Fourteenth Amendment and symbolic legality: Let them eat due process. *Law and Human Behavior*, 15, 183–204.
- Haney, C., & Zimbardo, P. (1977). The socialization into criminality: On becoming a prisoner and a guard. In J. Tapp and F. Levine (Eds.), *Law, justice, and the individual in society: Psychological and legal issues* (pp. 198–223). New York: Holt, Rinehart, and Winston.
- Haney, C., & Pettigrew, T. (1986). Civil rights and institutional law: The role of social psychology in judicial implementation. *Journal of Community Psychology*, 14, 267–277.
- Haney, C., & Hurtado, A. (in press). *Standardized error: Testing, discrimination, and diversity in the workplace*. Boston, MA: Kluwer Academic Press.
- Haney, C., Hurtado, A., & Vega, L. (1993). Enlightened by a humane justice: Public opinion and the death penalty in California. Unpublished manuscript, University of California, Santa Cruz.
- Hare-Mustin, R., & Marecek, J. (1988). The meaning of difference: Gender theory, postmodernism, and psychology. *American Psychologist*, 43, 455–464.
- Harrington, C., & Yngvesson, B. (1990). Interpretive sociolegal research. *Law and Social Inquiry*, 15, 135–148.
- Haskell, T. (1977). *The emergence of professional social science: The American Social Science Association and the nineteenth century crisis of authority*. Urbana, IL: University of Illinois Press.

- Hastie, R., Penrod, S., & Pennington, N. (1983). *Inside the jury*. Cambridge, MA: Harvard University Press.
- Hogan, R. (1988). Positivism is history. Review of D. Fiske & R. Shweder, *Metatheory in social science: Pluralisms and subjectivities*. *Contemporary Psychology*, 33, 9–10.
- Horwitz, M. (1979). The jurisprudence of *Brown* and the dilemmas of liberalism. *Harvard Civil Rights-Civil Liberties Law Review*, 14, 599–613.
- Hoshmand, L., & Polkinghorne, D. (1992). Redefining the science-practice relationship and professional training. *American Psychologist*, 47, 55–66.
- Hovey v. Superior Court, 28 Cal. 3d 1 (1980).
- Jacoby, R. (1987). *The last intellectuals: American culture in the age of academe*. New York: Noonday Press.
- Johnson, C. (1992). The Civil Rights Act of '91. *Wisconsin Lawyer*, 12–15.
- Justice, W. (1990). The origins of *Ruiz v. Estelle*. *Stanford Law Review*, 43, 1–12.
- Kalman, L. (1986). *Legal realism at Yale, 1927–1960*. Chapel Hill, NC: University of North Carolina Press.
- Keeton v. Garrison, 578 F. Supp. 1164 (W.D. N.C.), rev'd 742 F.2d 129 (4th Cir. 1984).
- Keller, E. (1985). *Reflections on gender and science*. New Haven, CT: Yale University Press.
- Kelman, M. (1987). *A guide to critical legal studies*. Cambridge, MA: Harvard University Press.
- Kessler, M. (1990). Legal mobilization for social reform: Power and the politics of agenda setting. *Law & Society Review*, 24, 121–143.
- Levine, F. (1990). Goose bumps and 'the search for signs of intelligent life' in sociological studies: After twenty-five years. *Law & Society Review*, 24, 7–33.
- Little v. Armontrout, 819 F. 2d 1425 (1987).
- Littleton, C. (1989). Feminist jurisprudence: The difference method makes. Review of C. MacKinnon, *Feminism Unmodified*. *Stanford Law Review*, 41, 751–784.
- Llewellyn, K. (1930). *The bramble bush: On our law and its study*. Dobbs Ferry, NY: Oceana Publications.
- Lochner v. New York [198 U.S.45 (1905)].
- Lockhart v. McCree, 476 U.S. 162 (1986).
- Loftus, E. (1979). *Eyewitness testimony*. Cambridge: Harvard University Press.
- Loftus, E. (1983a). Silence is not golden. *American Psychologist*, 38, 564–572.
- Loftus, E. (1983b). Whose shadow is crooked? *American Psychologist*, 38, 576–577.
- Loftus, E. (1991a). *Witness for the defense: The accused, the eyewitness, and the expert who puts memory on trial*. New York: St. Martin's Press.
- Loftus, E. (1991b). Resolving legal questions with psychological data. *American Psychologist*, 46, 1046–1048.
- Lowy, M., & Haney, C. (1980). The creation of legal dependency: Law school in a nutshell. In J. Warner (Ed.) *The people's law review* (pp. 36–41). Reading, MA: Addison-Wesley.
- MacKinnon, C. (1987) *Feminism unmodified: Discourses on life and law*. Cambridge: Harvard University Press.
- MacKinnon, C. (1989). *Toward a feminist theory of the state*. Cambridge: Harvard University Press.
- Maryland v. Craig, 497 U.S. 836 (1990).
- Massaro, T. (1985). Experts, psychology, credibility and rape: The rape trauma syndrome issue and its implications for expert psychological testimony. *Minnesota Law Review*, 69, 395–470.
- McCleskey v. Kemp, 481 U.S. 279 (1987).
- McCloskey, M., & Egeth, H. (1983a). Eyewitness identification: What can a psychologist tell a jury? *American Psychologist*, 38, 550–563.
- McCloskey, M., & Egeth, H. (1983b). Time to speak, or a time to keep silence? *American Psychologist*, 38, 573–575.
- Melton, G. (1981). Children's competency to testify. *Law and Human Behavior*, 5, 73–85.
- Melton, G. (1987). Bringing psychology to the legal system: Opportunities, obstacles, and efficacy. *American Psychologist*, 42, 488–495.
- Melton, G. (1988). The significance of law in the everyday lives of children and families. *Georgia Law Review*, 22, 851–895.

- Melton, G., & Garrison, E. (1987). Fear, prejudice, and neglect: Discrimination against mentally disabled persons. *American Psychologist*, *42*, 1007–1016.
- Menkel-Meadow, C., & Diamond, S. (Eds.) (1991). Special issue on gender and sociolegal studies. *Law & Society Review*, *25*, 215–261.
- Monahan, J. (1981). *Predicting violent behavior: An assessment of clinical techniques*. Beverly Hills: Sage.
- Monahan, J., & Loftus, E. (1982). The psychology of law. *Annual Review of Psychology*, *33*, 441–475.
- Monahan, J., & Walker, L. (1988). Social science research in law: A new paradigm. *American Psychologist*, *43*, 465–472.
- Morse, S. (1990). The misbegotten marriage of soft psychology and bad law: Psychological self-defense as a justification for homicide. *Law and Human Behavior*, *14*, 595–618.
- National Jury Project (1983). *Jurywork: Systematic techniques*. New York: Clark Boardman, Callahan.
- Norton, E. (1990). The end of the Griggs economy: Doctrinal adjustment for the new American workplace. *Yale Law & Policy Review*, *8*, 197–204.
- Note, (1981). Post-traumatic stress disorder—opening Pandora's box? *New England Law Review*, *17*, 91–117.
- Note, (1985). The syndrome syndrome: Problems concerning the admissibility of expert testimony on psychological profiles. *University of Florida Law Review*, *37*, 1035–1057.
- Orne, M. (1979). The use and misuse of hypnosis in court. *The International Journal of Clinical and Experimental Hypnosis*, *27*, 311–341.
- Orne, M. (1984). Hypnotically induced testimony. In G. Wells, and E. Loftus (Eds.), *Advances in the psychology of eyewitness testimony*. Boston: Cambridge University Press.
- Paulus, P. (1988). *Prison crowding: A psychological perspective*. New York: Springer-Verlag.
- Penrod, S., Loftus, E., & Winkler, J. (1982). The reliability of eyewitness testimony: A psychological perspective. In Kerr, N., & Bray, N. (Eds.) *The psychology of the courtroom* (pp. 119–168). New York: Academic Press.
- People v. Galvan, 202 Cal. Rptr. 594 (1984).
- People v. Gonzales, 430 N.Y.S. 2d 655 (1980).
- People v. McDonald, 37 Cal. 3d 351 (1984).
- People v. Murtishaw, 29 Cal. 3d 733 (1981).
- People v. Shirley, 31 Cal. 3d 18 (1982).
- Pettigrew, T., & Taylor, M. (1992). Discrimination. In E. Borgatta & M. Borgatta (Eds.), *Encyclopedia of Sociology*. New York: Macmillan.
- Player, M. (1989). Is Griggs dead? Reflecting (fearfully) on *Wards Cove Packing Co. v. Atonio*. *Florida State University Law Review*, *17*, 1–47.
- Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
- Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978).
- Rasinski, K. (1987). What's fair is fair—Or is it? Value differences underlying public view about social justice. *Journal of Personality and Social Psychology*, *53*, 201–211.
- Rhodes v. Chapman, 452 U.S. 337 (1981).
- Riger, S. (1992). Epistemological debates, feminist voices: Science, social values, and the study of women. *American Psychologist*, *47*, 730–740.
- Roberts, J., & Jackson, M. (1991). Boats against the current: A note on the effects of imprisonment. *Law and Human Behavior*, *15*, 557–562.
- Rock v. Arkansas, 483 U.S. 44, 60–65 (1987).
- Rosenberg, G. (1991). *The hollow hope: Can courts bring about social change?* Chicago: University of Chicago Press.
- Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part*, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1982).
- Saks, M. (1989). Legal policy analysis and evaluation. *American Psychologist*, *44*, 1110–1117.
- Sampson, E. (1989). The challenge of social change of psychology: Globalization and psychology's theory of the person. *American Psychologist*, *44*, 914–921.
- Sarat, A. (1990). Off to meet the wizard: Beyond validity and reliability in the search for a post-empiricist sociology of law. *Law and Social Inquiry*, *15*, 155–170.

- Schwartz, D., & Goodman, J. (1992). Expert testimony on decision process in employment cases. *Law and Human Behavior*, 16, 337–355.
- Severance, L., & Loftus, E. (1982). Improving the ability of jurors to comprehend and apply criminal jury instructions. *Law & Society Review*, 17, 153–197.
- Siegelman, P., & Donohue, J. (1990). Studying the iceberg from its tip: A comparison of published and unpublished employment discrimination cases. *Law & Society Review*, 24, 1133–1170.
- Smith, M. B. (1982). Psychology and humanism. *Journal of Humanistic Psychology*, 22, 44–55.
- Sommer, R. (1971). The social psychology of the cell environment. *The Prison Journal*, 51, 15–21.
- Sonkin, D. (Ed.) (1987). *Domestic violence on trial*. New York: Springer.
- State v. Bilke, 781 P. 2d 28 (Arizona, 1989).
- State v. Chapple, 135 Ariz. 281 (1983).
- State v. Davis, 477 A. 2d 308 (New Jersey, 1984).
- State v. Hall, 390 S.E. 2d 169 (N.C. 1990).
- State v. Hodges, 716 P. 2d 563 (Kansas, 1986).
- State v. Huntley, 730 P. 2d 1234 (Oregon, 1986).
- State v. James, 560 A. 2d 426 (Connecticut, 1989).
- State v. Koss, 551 N.E. 2d 970 (Ohio, 1990).
- Stender v. Lucky Stores, 780 F. Supp. 1302 (1992).
- State v. Nicholas S., 444 A. 2d 373 (1982).
- State v. R. W., 514 A. 2d 1287 (Sup. Ct. N.J., 1986).
- Tanford, J. (1990a). Law reform by courts, legislatures, and commissions following empirical research on jury instructions. *Law & Society Review*, 25, 155–175.
- Tanford, J. (1990b). The limits of a scientific jurisprudence: The Supreme Court and psychology. *Indiana Law Journal*, 66, 137–173.
- Thompson, W. (1989). Death qualification after *Wainwright v. Witt* and *Lockhart v. McCree*. *Law and Human Behavior*, 13, 185–215.
- Toch, H. (1992a). *Mosaic of despair: Human breakdowns in prison*. Washington, DC: American Psychological Association.
- Toch, H. (1992b). *Living in prison: The ecology of survival*. Washington, DC: American Psychological Association.
- Tomkins, A., & Pfeifer, J. (1992). Modern social-scientific theories and data concerning discrimination: Implications for using social science evidence in the courts. In D. Kagehiro & W. Laufer (Eds.), *Handbook of Psychology and Law* (pp. 385–407). New York: Springer-Verlag.
- Tourlakis v. Morris, 738 F. Supp. 1128 (S.D. Ohio, 1990).
- Toussaint v. Rushen, 553 F. Supp. 1365 (1983).
- Tremper, C. (1987a). Sanguinity and disillusionment: Where law meets social science. *Law and Human Behavior*, 11, 267–276.
- Tremper, C. (1987b). Organized psychology's efforts to influence judicial policy-making. *American Psychologist*, 42, 496–501.
- Tribe, L. (1989). The curvature of constitutional space: What lawyers can learn from modern physics. *Harvard Law Review*, 103, 1–39.
- Trubek, D., & Esser, J. (1989). 'Critical empiricism' in American legal studies: Paradox, program, or Pandora's box? *Law & Social Inquiry*, 14, 3–52.
- Tushnet, M., & Lezin, K. (1991). What really happened in *Brown v. Board of Education*. *Columbia Law Review*, 91, 1867–1930.
- Tyler, T. (1990). *Why people obey the law: Procedural justice, legitimacy, and compliance*. New Haven, CT: Yale University Press.
- Tyler, T., & McGraw, K. (1986). Ideology and the interpretation of personal experience: Procedural justice and political quiescence. *Journal of Social Issues*, 42, 115–128.
- Tyler, T., & Rasinski, K. (1991). Procedural justice, institutional legitimacy, and the acceptance of unpopular U.S. Supreme Court decisions: A reply to Gibson. *Law & Society Review*, 25, 621–630.
- Unger, R. (1975). *Knowledge and politics*. New York: Free Press.
- United States v. Carolene Products Co., 304 U.S. 144 (1938).
- United States v. Downing, 609 F. Supp. 784 (1985).
- United States v. Moore, 786 F.2d 1308 (1986).

- United States v. Smith, 736 F.2d 1103 (1984).
- United States v. Stevens, 935 F. 2d 1380 (1991).
- U.S. v. Gordon, 638 F. Supp. 1120 (W.D. La., 1986).
- Van Maaten, J. (1988). *Tales of the field: On writing ethnography*. Chicago: University of Chicago Press.
- Vidmar, N. (1979). The other issues in jury simulation research: A commentary with particular reference to defendant character studies. *Law and Human Behavior*, 3, 95-106.
- Villmoare, A. (1990). Politics and research: Epistemological moments. *Law and Social Inquiry*, 15, 149-154.
- Wainwright v. Witt, 469 U.S. 412 (1985).
- Walker, L. (1979). *The battered woman*. New York: Harper & Row.
- Walker, L. (1989). Psychology and violence against women. *American Psychologist*, 44, 695-702.
- Wards Cove Packing Company v. Atonio, 490 U.S. 642 (1989).
- Watkins v. Sowders, 449 U.S. 341 (1981).
- Wexler, D. (1990). *Therapeutic jurisprudence: The law as a therapeutic agent*. Durham, NC: Carolina Academic Press.
- Wexler, D., & Winick, B. (1991). *Essays in therapeutic jurisprudence*. Durham, NC: Carolina Academic Press.
- Wilson v. Seiter, 111 S. Ct. 2321 (1991).
- Yackle, L. (1989). *Reform and regret: The story of federal judicial involvement in the Alabama prison system*. New York: Oxford University Press.