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Psychology and Law: Women and Syndrome
Evidence (Fiona E. Raitt and M. Suzanne Zeedyk,
Routledge, 2000)**

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Review essay

The Implicit Relation of Psychology and Law: Women and Syndrome Evidence

By Fiona E. Raitt and M. Suzanne Zeedyk
Routledge, 2000

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The Implicit Relation of Psychology of Law offers a trim, honed argument that psychology and law synergistically interact to the detriment of women. The book challenges the reader with insightful and provocative arguments. Although each person will have a different opinion as to the ultimate success of the project, everyone can leave the book with something useful.

Fiona E. Raitt and M. Suzanne Zeedyk build their challenging thesis upon the observation of a dual relationship between the science of psychology and the practice of criminal law. The *explicit relations* are those recognized by practitioners in either field, and even institutionalized by legal practice in the criteria for acceptance of psychological findings as admissible evidence in a courtroom. As interesting as these matters are, the authors' primary focus is instead on the *implicit relations* between the two disciplines. These are the unexamined premises that underlie each, often below the level of overt awareness, but which consistently "operate to the disadvantage of women." Within this theory, "the implicit relation comprises three key characteristics: the tenet of objectivity, a male normative standard against which human behavior is evaluated, and an individualistic model of human behavior." Because both fields share the

same assumptions, their impact on women is mutually reinforcing, producing negative effects beyond the capability of either alone.

The authors illustrate this theoretical framework through syndromes introduced as evidence in the courtrooms of the United States and the United Kingdom. Each of the four syndromes selected for analysis—Battered Woman’s Syndrome, Rape Trauma Syndrome, Premenstrual Syndrome, and False Memory Syndrome—is approached from each of the three elements of the implicit relation. This organizational style lends considerable consistency to the argument Raitt and Zeedyk hope to develop. By analyzing each example by a common standard, the discussion is less vulnerable to the critique of having “cherry-picked” the most favorable evidences, while ignoring those that undermined the authors’ thesis. For this, they are to be applauded, and their example followed.

The crux of the book’s argument is Chapter 3, wherein the authors detail their theory. This section bears the burden of demonstrating not only that the implicit relation exists (easily done, since this is true of almost any two human enterprises), but that it also has the structure they identify and the uniformly negative value they assign. These latter tasks are much more difficult to achieve.

On the first element of the implicit relation, objectivity, Raitt and Zeedyk proclaim their allegiance to postmodern philosophies and thereby their skepticism of any claims about objectivity either as an achievement or an aspiration. Their discussion, however, is satisfyingly evenhanded, even if the outcome is foreordained: “Objectivity . . . endorses the myth of science which maintains that scientists, via some mystical process . . . are endowed with the ability to step outside the influence of culture and personal history to obtain an objective view of the phenomena they study.” On the contrary, they claim, “Knowledge, including scientific knowledge, can never be de-politicized.”

These statements illustrate one of recurring shortcomings of the book. Sweeingly general claims are offered where more subtle discussion would better serve. This professed skepticism of objectivity appropriately targets some kinds of knowledge, but not all kinds. It is more true of social sciences than of physical sciences, for example. And even if true of the process (why this approach was used to study this question at this time), bias at that level does not necessarily discredit the result. The authors veer dangerously close to arguing *ad hominem*, suggesting that certain claims, procedures and ideas can be discounted or ignored because they are of dubious philosophical lineage, when the burden should always be to rebut the specific claims made. It is possible that these broad assertions are more

a matter of style than conviction. But by admitting of no nuance in their claims, the authors force the reader to either accept or reject the argument in its blanketing entirety. This reader rejected the offered conclusions, but not without gaining new insights into the primary problem.

While discussing the second prong of the implicit relation, the male norm, the authors waver on the issue of whether males and females are inherently different in ways that matter to the discussion at hand. No clear statement on this issue could be found that will resolve the ambivalence, leaving the reader to infer the authors' position from an odd assortment of observations. First the authors object to the "reasonable man" legal standard in terms that suggest a belief that women and men are very different. If men are different from women, a male standard of reasonable behavior would indeed consistently disadvantage women. This position renders the basic problem as an inappropriate social and political devaluation of the abilities of women. Accordingly, they cite researchers who have argued that women have traditionally been judged inferior because they fall short of male standard. Carol Gilligan, for example, is cited for her work *In A Different Voice*, which argued that women as a group approach moral problem solving in a manner distinctively different than men. The authors' claim is not that sex differences do not exist, only that they have lacked social esteem.

But the authors next claim that "The issue of gender can appear to be relatively unimportant when contrasted with the fundamental category of 'human'." That view could lead the reader to believe that the authors think sex differences are presumptively unreal, or at least uninteresting and irrelevant. From that perspective the male norm is not simply an unjustified social preference, but also one that builds upon no actual differences. The problem then is only social and political, but also epistemological. One suspects that when pushed the authors would favor the latter position. Yet into this confusion they announce their disdain for the scientific reliance upon Popperian method and the use of the null hypothesis, the very tools that would support a claim that sex differences are subsumable into the larger category of "human." Under the null hypothesis, the presumption is that no difference exists unless one is experimentally demonstrated. The initial assumption of homogeneity, I would have thought, would be very attractive to those making an argument that sex differences are trivial.

Oddly, by renouncing the method of the null hypothesis, the authors appear to presume the sexes to be dissimilar unless they are proven to be similar, a position favoring the conclusion that the sexes are indeed

fundamentally different. If such differences are presumed to exist, however, it becomes disingenuous to also argue that it is obviously unreasonable to favor one set of traits rather than another, up to and including the “reasonable man” standard. If the disfavored traits consistently are those stereotypically assigned to women, the outcome renders sex discrimination a political issue, and not the philosophical one the book tries to frame. What begins as an interesting claim about the interactions of knowledge systems withers, ultimately, into a polemic about power struggles in the gender wars.

I can imagine the troubling aspects of these first two sections being solvable either by new, more refined argument from the authors, or perhaps a clearer statement of the arguments they already wish to present. In the third, however, the obstacle may be insurmountable because the objection flows from the intrinsic characters of the two disciplines they contrast, psychology and law.

The third element of the implicit relation is individualism. The authors criticize the deeply embedded assumption within psychology that the proper unit of study is the decontextualized individual. That observation validly describes many subfields, such as cognitive psychology. But they seem unaware of (or at least, never mention) allied disciplines such as social psychology and cultural psychology that have indeed taken as the unit of analysis something other than the decontextualized individual. To a certain extent, then, their criticisms of psychology have already been addressed by the discipline, leaving their complaints without a target.

Although some kinds of psychology can be nonindividualistic, it is an altogether different matter whether law, especially criminal law, could ever routinely take as its object a unit other than the individual. Here the argument that law, too, should be nonindividualistic, is hampered by the failure of the authors to clearly articulate their understanding of the purpose of criminal law. Against such a background one could assess whether law’s goals would be better obtained by moving the focus from the defendant and placing it onto his social network.

Three common purposes of criminal law and procedure are those of justice, fairness, and assignment of responsibility.¹ Analysis of the text,

¹This typology draws heavily from many sources. John Rawls has been particularly influential, whose last book, *Justice as Fairness* (2001), explicitly relates the first two. Richard A. Posner (*The Problems of Jurisprudence* 220–21 (1990)) offers a tripartite definition of law that encompasses the one here, although in more abstract terms. Specifically, his description of law as “a source of rights, duties, and powers” entails the concept of responsibility on which I focus in this discussion.

however, eliminates the first two, and the third renders any simple relationship between psychology and law unlikely.

Meting out justice is certainly a very common association with criminal law. But one of the bigger surprises of this book is that the authors are willing to sacrifice the just outcome for the individual woman if it furthers the cause of women in general. While invoking one of the syndromes, such as Battered Woman's Syndrome or Premenstrual Syndrome, may help one woman accused of a crime, because its effectiveness depends upon a depiction of women as inferior (e.g., unable to cope with stress, or inevitably subject to irrational mood swings), that defense should be eschewed. Nor do the authors have much patience for any claim that law must be fair. One of their recommendations is to eliminate the hearsay rule, which says that a witness can offer testimony only on matters in his or her direct knowledge: I can say that I saw Harry hit Fred, but not that I heard from Ethel that Harry hit Fred. Raitt and Zeedyk assert the unexpected conclusion that "There is nothing inherently better about 'first-hand' rather than 'second-hand' evidence." Most attorneys (and perhaps most persons of any profession) would disagree.

They reach this result because many crimes against women, such as domestic violence and rape, are unwitnessed by third parties. Rape Trauma Syndrome, especially, was originally introduced to address this problem, as a means to provide "some degree of corroboration that the alleged attack occurred." The traditional rules of evidence, therefore, are disadvantageous to the plaintiff because without direct corroboration the accusations might be too easily dismissed. Allowing the introduction of indirect corroboration would benefit women.

The authors are not wrong about the problem, but they err in their proposed solution. Eliminating the hearsay rule would achieve no net improvement for women because the lax standard could as easily be used against them. A man, for instance, would then be able to introduce second-hand testimony to "prove" that the woman had consented to intercourse and had not, as she claims, been raped. Overall fairness, however, would suffer immeasurably should indirect evidence become admissible.

If not justice or fairness, what then do Raitt and Zeedyk take to be the purpose of law? The assignment of responsibility for specific antisocial acts comports well with the structure of this book. Effectively addressing that need, however, may necessarily work against taking the focus off the accused individual. In other words, law may be necessarily individualistic

in a way that psychology is not, removing the parallelism between the two that the authors posit to construct their theory.

When law seeks to assign responsibility, it is asking who should be punished. Psychology's purpose is very different. It assigns responsibility to understand the action. These undertakings are not always translatable from one to the other, and consequently slippage occurs between the ideal outcomes for law and psychology.

Syndrome evidence is introduced with the expectation that increased understanding of the woman's actions will reduce her culpability and punishment. Raitt and Zeedyk recount how each new syndrome has failed in this regard, and damaged the image of women in the process by pathologizing their actions or normal states. They view this shortfall as the result of some deep cultural malevolence toward women. The simpler explanation, however, is that a round psychological peg is being forced into a square legal hole, with unsurprisingly unsatisfying results. The legal trial is concerned with intent; psychology's focus is on motivation. These two are not interchangeable. The object of the trial is not to bring insight to the actions, but to hold a person accountable.

What the authors identify as a failing of the criminal trial, that it is "not designed to tackle societal phenomena, but to consider 'each case on its own merits,'" many citizens would characterize as its strength. Still, despite my skepticism, law has taken some small steps in the direction the authors hope by the introduction of such social responses as the "culture defense." These seek to put the defendant's actions within a broader context, although not always as a way to displace responsibility but only to mitigate punishment.

As a general rule, however, the fundamental difference between psychology and law on the way responsibility can be assigned may render the relationship between psychology and law one quite other than that described by Raitt and Zeedyk. If psychology can, on the one hand, be nonindividualistic (as many of its specialties are), but law, on the other, is unyieldingly individualistic in that it must ultimately assign specific responsibility unto named individuals, then the claimed implicit relationship disappears, and the text's central theoretical claim evaporates.

The Implicit Relation's arguments are not facile, and will challenge the presuppositions of any not already subscribing to the postmodern cause. Its reading will benefit even those unconvinced by the arguments, not least for its accomplished historical backgrounds of the syndromes discussed. Raitt and Zeedyk offer a finely crafted, at time ambitious text

that admirably presents a distinctive point of view, although one that will leave many readers uncomfortable and provoked. That may have been their hope.²

References

- Becker, M., Bowman, C.G., Torrey, N.M. and Torrey, M. (2001) *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously*, West Publishing Company: St. Paul, Minnesota.
- Conley, J.M. and O'Barr, W.M. (1998) *Just Words: Law, Language, and Power*, University of Chicago Press: Chicago.
- Faigman, D.L. (1999) *Legal Alchemy: The Use and Misuse of Science in The Law*, St. Martin's Press: London.
- Foster, K.R. and Huber, P.W. (1999) *Judging Science: Scientific Knowledge and the Federal Courts*, MIT Press: Cambridge, Massachusetts.
- Gilligan, C. (1993) *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press: Cambridge, Massachusetts.
- Posner, R.A. (1990) *The Problems of Jurisprudence*, Harvard University Press: Cambridge, Massachusetts.

² Some of the fundamental background in legal texts relating to this topic are collected in *Feminist Jurisprudence: Taking Women Seriously* (2nd ed., 2001, Mary Becker et al., eds.). To delve deeper into the problems of science in the courtroom, the reader may usefully consult Kenneth R. Foster & Peter W. Huber, *Judging Science: Scientific Knowledge and the Federal Courts* (1999), which offers an accessible discussion of the standards to admit scientific evidence into legal proceedings. *Legal Alchemy: The Use and Misuse of Science in the Law*, by David L. Faigman (1999), covers some of the same psychological ground as the reviewed book, placing it in the context of scientific evidence more generally. An interesting counterpoint to Raitt and Zeedyk's discussion of the inability of women adequately to tell their stories during criminal trials is John M. Conley and William M. O'Barr's *Just Words: Law, Language, and Power* (1998), which investigates the impact of language on legal power in situations like rape trials.

