Sales

The Trial Process

PLP
2

PLENUM

The Trial Process

Edited by

Bruce Dennis Sales

University of Nebraska
Lincoln, Nebraska

PLENUM PRESS · NEW YORK AND LONDON

Library of Congress Cataloging in Publication Data

Main entry under title:

The Trial process.

(Perspectives in law and psychology; v. 2)
Includes index.
1. Trial practice—United States—Addresses, essays, lectures. 2. Psychology, Forensic— Addresses, essays, lectures. 3. Criminal procedure—United States—Addresses, essays, lectures. I. Sales, Bruce Dennis. II. Series.
KF9656.A75T74 347.73'75 80-20487
ISBN 0-306-40491-5

A Division of Plenum Publishing Corporation
227 West 17th Street, New York, N.Y. 10011

Printed in the United States of America

Contributors

Joyce E. Bauchner, The Network, Andover, Massachusetts

Gordon Bermant, Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C.

David R. Brandt, Department of Communication, Rensselaer Polytechnic Institute, Troy, New York

John S. Carroll, Department of Psychology, Loyola University, Chicago, Illinois

Shari Seidman Diamond, Department of Psychology, University of Illinois, Chicago, Illinois

Ebbe B. Ebbesen, Department of Psychology, University of California, San Diego, California

Amiram Elwork, Department of Psychology, University of Nebraska, Lincoln, Nebraska

Michael P. Farrell, Department of Sociology, State University of New York at Buffalo, Buffalo, New York

Norman E. Fontes, Department of Communication, Michigan State University, East Lansing, Michigan

Bernard Grofman, School of Social Sciences, University of California, Irvine, California

John E. Hocking, Department of Speech Communication, University of Georgia, Athens, Georgia

Richard R. Izzett, Department of Psychology, State University of New York at Oswego, Oswego, New York

Edmund P. Kaminski, Department of Speech Communication, University of New Mexico, Albuquerque, New Mexico

Martin F. Kaplan, Department of Psychology, Northern Illinois University, De Kalb, Illinois

Vladimir J. Konečni, Department of Psychology, University of California, San Diego, California

David Lamm, Georgetown University Law School, Washington, D.C.

Murray Levine, Department of Psychology, State University of New York at Buffalo, Buffalo, New York

E. Allan Lind, Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C.

Elizabeth F. Loftus, Department of Psychology, University of Washington, Seattle, Washington

Gerald R. Miller, Department of Communication, Michigan State University, East Lansing, Michigan

Stuart Nagel, Department of Political Science, University of Illinois, Urbana, Illinois

Marian Neef, Department of Public Administration, Baruch College, City University of New York, New York, New York

William M. O'Barr, Department of Anthropology, Duke University, Durham, North Carolina

Peter Perrotta, Department of Psychology, State University of New York at Buffalo, Buffalo, New York

R. Barry Ruback, Department of Psychology, Georgia State University, Atlanta, Georgia

Bruce Dennis Sales, Department of Psychology and College of Law, University of Nebraska, Lincoln, Nebraska

Cynthia Scherscing, Department of Psychology, Northern Illinois University, De Kalb, Illinois

John Shapard, Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C.

David Suggs, Department of Psychology and College of Law, University of Nebraska, Lincoln, Nebraska

Contents

14

A Critique of Theory and Method in Social-Psychological Approaches to Legal Issues[1]

VLADIMIR J. KONEČNI AND EBBE B. EBBESEN

The first purpose of this chapter is to examine several different theoretical approaches to legal issues. Although most of the discussion will focus on the work that has been carried out by social psychologists, many of the issues are relevant to other efforts in the psychology-law area. An examination of the relative merits of laboratory simulations and *in situ* research on legal decision-making constitutes the second purpose. Finally, an alternative theoretical/methodological approach to legal decisions—one that we favor—will be briefly presented.

THEORETICAL APPROACHES

Discretion in the Legal System

Most of the currently popular social-psychological and personality theory approaches to legal issues have in common the more-or-less

[1]Parts of this chapter were taken from various chapters in Konečni and Ebbesen (in press-a).

VLADIMIR J. KONEČNI and EBBE B. EBBESEN • Department of Psychology, University of California, San Diego, California 92037.

explicit assumption that legal decisions are highly discretionary. Because of the importance of this assumption for the theoretical views that we will examine subsequently, it is useful to begin by drawing a distinction between the discretionary position and an older one that may be labeled the "rule of law."

The traditional view of the criminal justice system, as presented in most legal textbooks, portrays the behavior of the participants in the system as constrained by the rule of law, due process, and administrative guidelines. Each action by a participant is thought to be constrained by a set of rules, precedents, statutory limitations, constitutional interpretations, and so on, all designed to minimize the chances of convicting the innocent, to prevent personal abuses of legally sanctioned power, to insure due process, and to create an atmosphere of impartial and fair treatment. These rules are expected to prevent the participants from taking certain actions (such as a judge telling a jury how to vote, or a police officer coercing a suspect to supply a confession) and to require them to perform others (such as a police officer having to read Miranda rights to an arrestee, or a judge having to inform a defendant of the charges against him). The traditional view assumes that few actions can be taken without being fully scrutinized for adherence to established rules and guidelines. Failures to conform to existing rules are believed to result in mistrials, dismissals, and appeals to higher courts. Although it is admitted that there may be some areas in the system where small degrees of discretion do exist, by far the majority of actions are considered to be highly constrained.

A consequence of this traditional view of the criminal justice system is the belief that a complete understanding of the operation of the system can be acquired merely by studying the full complexity of the procedural requirements described in various constitutional, common, and statutory laws, administrative policies, and procedural guidelines. If the actions of the participants in the system are highly restricted by various rules, then one need only know the rules in order to understand how participants in the system behave.

In the past two decades, a different—and probably far more realistic—view of the legal system has gradually emerged (e.g., Bottomley, 1973; Chambliss, 1968; Cicourel, 1968; Davis, 1969; Frank, 1973; Green, 1961; Hogarth, 1971; Nagel & Neef, 1977; Shaver, Gilbert, & Williams, 1975; Wilkins, 1962, 1964). This view asserts that most of the rules and policies provide very broad, rather than specific, guidelines for action, so broad, in fact, that in many instances the participants are virtually free to behave as they wish. For example, the sentencing of convicted adult felons in most states in the United States and in England

is determined by a judicial decision (Carter & Wilkins, 1967; Dawson, 1969; Hood, 1962; Thomas, 1970). The options available to the judge and many of the steps which must be taken prior to reaching the decision are constrained both by law and by administrative policies. However, because the range of sentencing options typically available to the judge is so broad, and because the rules do not specify in detail how the judge is to consider such factors as prior record, social history, "remorse," education, occupation, "potential for rehabilitation," responsiveness to various types of penal programs, and so on, people convicted of identical crimes can, and often do, receive very different treatments, even from the same judge (Hogarth, 1971).

Similar situations in which participants have more or less complete discretion over a wide range of decision alternatives exist throughout both the criminal and civil systems. Police officers have discretion in deciding when and whom to arrest and, within very wide limits, what crimes the arrestee is to be charged with (Kadish, 1962; LaFave, 1965; Piliavin & Briar, 1964; Reiss, 1971; Toch, 1969). Subsequently, assistant district attorneys can decide to drop, reduce, or add charges (Miller, 1970). In the "preliminary hearing," the presiding judge can often dismiss all or some of the charges and reduce others (Miller, 1970). Assistant district attorneys can plea- and sentence-bargain to whatever extent they deem appropriate and thereby again alter the nature of the charges as well as influence the final sentence (Newman, 1966; Rosett & Cressey, 1976). Referees have a considerable amount of discretion in dealing with juvenile felons (our unpublished data). In civil cases, judges can adjust the amount of child support, alimony, and personal injury compensation almost at will, sometimes altering the amount decided on by a jury by as much as a 10:1 ratio or more (our unpublished data from San Diego County).

In summary, according to the view presented above, the operation of the legal system cannot be understood simply by examining laws, policies, and procedural guidelines, mainly because the actual operation of the system consists of the behavior of the participants, and in most cases, this behavior is highly discretionary and thus only very loosely constrained by the rule of law.

Social-Psychological Approaches

Several theoretical approaches have characterized attempts to understand the discretionary actions of participants in the legal system. One that is common, particularly among social psychologists, is to use quasi-legal settings, procedures, and stimulus materials as a testing

ground for concepts of theoretical interest in a field of inquiry other than the law (e.g., Davis, Kerr, Atkin, Holt, & Meek, 1975; Kaplan & Kemmerick, 1974; Landy & Aronson, 1969; Lerner, 1970; Mitchell & Byrne, 1973; Pepitone, 1975; Pepitone & DiNubile, 1976; Shaver *et al.*, 1975; Sigall & Ostrove, 1975; Vidmar, 1972a). Concepts are borrowed from social-psychological theories and empirically tested under conditions that attempt to simulate a few isolated, impoverished aspects of the legal system or procedure. Equity, attributional biases, perceived similarity of attitudes, attraction, polarization effects in group decisions, and impression management are but a few examples of social-psychological concepts which have been investigated in quasi-legal contexts and used to explain the behavior of participants in the legal system.

Several features of this kind of approach should be noted. First, it implicitly assumes that a small set of mediational constructs will be sufficient to account for the behaviors of most of the participants in the legal system. Everyone is assumed to be affected by, say, attributional biases. Different mediators might be proposed to explain the behavior of district attorneys than to explain jury decisions but, nevertheless, only a few concepts should be required to understand the behavior of each type of participant. Second, many potentially important causal factors of concern to participants in the legal system may be of little importance in a theoretical analysis based on concepts borrowed from social psychology. For example, when trying to predict a judge's sentencing decision, the sentence recommendation of a probation officer may appear—to social psychologists—to be of less importance than, for example, the attitudinal similarity between the defendant and the judge, primarily because the latter is a popular theoretical concept and the former is not.

In short, the real interest of these studies definitely is not understanding, as completely as possible, the behavior of the participants in the actual legal system, but rather in determining whether a social-psychological theoretically derived variable accounts for some variance in the subjects' quasi-legal behavior—such as a verdict pronounced by a simulated jury—even if it explains only a meager (but statistically significant) portion of the variance.

Furthermore, the emphasis on testing ideas borrowed from theories developed elsewhere (for example, small-group dynamics and decision making) tends to direct attention almost exclusively toward certain convenient participants (such as sophomore pseudojurors) and away from the larger picture, that is, the description of the actual operation of the entire legal system that would be invaluable from a predictive point of view. Methods and procedures for studying the variables that affect the behavior of participants in the system are chosen not because they pro-

vide externally valid representations of processes in the real-world legal system, but because they may result in internally valid tests of hypotheses.

A Personality/Individual-Differences Viewpoint

A somewhat different theoretical approach—though one that also recognizes the discretionary nature of legal behavior—attempts to explain the participants' decisions by postulating the operation of global individual-difference factors (e.g., Gaudet, Harris, & St. John, 1933; Green, 1961; Hamilton, 1976; Hogarth, 1971; Nagel, 1962, 1963). Attitudes toward law and order, philosophies of sentencing, liberalism or conservatism, various personality characteristics, economic background, financial interests, sex, age, race, and legal training are examples of some of the global individual-difference factors that have been examined in recent years. In general, individual-difference factors have been able to account for a statistically significant portion of the variation in judicial decisions, but usually only a small percentage of the total variation is explained by such factors. This is not surprising when one realizes that the influence of situational factors (e.g., the size of a judge's caseload, the number of cases that are backlogged, who a participant's superior is, and the general political climate), role- and incentive-related factors (e.g., the fact that assistant district attorneys are more likely to be promoted on the basis of a low prosecution/conviction ratio, whereas police officers are more likely to be rewarded for making a large number of arrests regardless of their "quality" from the prosecutorial point of view), and case factors (e.g., race, prior record, educational background, severity of crime, etc.) is often totally ignored in this theoretical approach (see Bottomley, 1973, for a recent exception). If case factors, for example, do account for variation in the decisions made by the key participants, then a theoretical approach that focuses exclusively on global individual-difference factors will necessarily leave as unexplained some potentially explainable variation in each participant's behavior. In short, causal factors other than those proposed to explain the differences between participants within the same category (such as judges) will almost certainly be required if a complete account of the day-to-day operation of the legal system is desired.

Because they recognize the role of discretion and are generally empirically oriented, the social-psychological and individual-differences approaches seem clearly preferable to the traditional, "rule of law" viewpoint. However, in our opinion, even these approaches do not hold much promise for the development of a unified theory or meta-theory of

the operation of the legal system that would incorporate both descriptive and predictive aspects. (An alternative to these theoretical approaches that we personally favor is therefore presented in the final section of this chapter.)

LABORATORY SIMULATIONS VERSUS IN SITU RESEARCH

The social-psychological and related theoretical approaches to legal issues have had two important, though not very surprising, consequences. One of these is the choice of research problems. A close examination of the literature in legal psychology shows that a very large proportion of all research studies falls into very few categories: (a) jury decisions (e.g., Efran, 1974; Kalven & Zeisel, 1966; Kerr, Atkin, Stasser, Meek, Holt, & Davis, 1976; Landy & Aronson, 1969; Mitchell & Byrne, 1973; Nemeth & Sosis, 1973; Sigall & Ostrove, 1975; Vidmar, 1972a); (b) eyewitness identification and testimony (e.g., Buckhout, 1974; Buckhout, Alper, Chern, Silverberg, & Slomovits, 1974; Doob & Kirshenbaum, 1973; Egan, Pittner, & Goldstein, 1977; Levine & Tapp, 1973; Loftus, 1975; Loftus, Altman, & Geballe, 1975); and (c) legal procedure issues (e.g., Doob, 1976; Farmer, Williams, Lee, Cundick, Howell, & Rooker, 1976; Lawson, 1970; Thibaut & Walker, 1975; Walker, La Tour, Lind, & Thibaut, 1974). Of these, jury decision-making research has been by far the most visible and voluminous (cf. Davis, Bray, & Holt, 1977; Tapp, 1976).

The second consequence has been that perhaps upward of 90% of the research studies in all of these areas, especially in jury decision-making, have been conducted in the laboratory (cf. Bermant, McGuire, McKinley, & Salo, 1974; Davis *et al.*, 1977; Konečni, Mulcahy, & Ebbesen, 1980; Tapp, 1976).

Some of the reasons for the preponderance of the research on jury decision-making are undoubtedly due to (a) the ease with which popular social-psychological concepts—ranging from group dynamics to social decision-making schemes to the effect of attractiveness and similarity of attitudes—can be tested in the simulated-jury paradigm, (b) the fact that researchers could now do "legal" and "applied" research without abandoning their laboratories and sophomores, and perhaps not the least, (c) the mystique that surrounds jury verdicts and the goings-on in the jury room. (The mystique is clearly due far more to the efforts of the entertainment industry and the sensationalist coverage of a few well-publicized trials than to the frequency and importance of jury trials in the day-to-day operation of the legal system.) Be that as it may, given

the prevalence of laboratory simulations in a very popular field of research in legal psychology, the utility of such simulations for the success of efforts to reach a sound understanding of the legal system and process should be closely examined and compared to the value of naturalistic, *in situ*, research efforts.

Many of the reasons why laboratory studies can cause serious problems with regard to the generalizability of findings are well known and need be mentioned only briefly here. For example, researchers' implicit claim that college students can successfully mimic the responses of participants in the real-world legal system has been frequently criticized (e.g., Miller, Fontes, Boster, & Sunnafrank, 1977), as has the fact that laboratory subjects' behavior and decisions have no real consequences (e.g., Ebbesen & Konečni, 1980; Wilson & Donnerstein, 1977), unlike the decisions made in the real world. Another frequent criticism has been that the materials presented to the subjects in the laboratory vastly oversimplify the kind and amount of information to which the participants in the real-world criminal justice system are exposed, and that the stimuli and stimulus dimensions are typically presented in decomposed rather than the more wholistic form which is typical of the real world (Ebbesen & Konečni, 1980; Gerbasi, Zuckerman, & Reis, 1977). Another frequent and obvious criticism has to do with the fact that laboratory subjects' decisions are often made in the absence of key procedural features that characterize the decision-making in the legal system, such as the discussion and deliberation stage in which actual juries engage, the jury foreman, and so on (e.g., Izzett & Leginski, 1974; Myers & Kaplan, 1976; Vidmar, 1972b). A related criticism has to do with the nature of the dependent measures that are often used in laboratory tasks (Ebbesen & Konečni, 1976; Konečni *et al.*, 1980). For example, laboratory juries frequently judge the extent of guilt of the defendant on a scale, whereas their real-world counterparts have to make a dichotomous decision. Similarly, laboratory jurors are frequently asked to determine the fictitious defendant's sentence, even though in many states the judge, and not the jury, does this (see Table 5 in Bray, 1976). Moreover, laboratory jurors are forced to set prison terms for types of crimes which in the real world almost never result in a prison sentence (Ebbesen & Konečni, 1976).

If one considers the possible motivations of the researchers who do laboratory experiments in which some or all of the features criticized above are present, one is inevitably led to the conclusion either that they are not truly interested in understanding how the legal system actually operates, or that they believe that a correct understanding of the functioning of the system and the behavior of the participants in it can

be obtained regardless of the subjects, the consequences of the decisions, the materials and information presented to the subjects, the decision alternatives at the subjects' disposal, and so forth.

However, a considerable and growing body of evidence suggests that the latter view is naive and untenable, primarily because subjects' decisions are generally quite task-specific (see Ebbesen & Konečni, 1980, and Konečni & Ebbesen, in press-b, for an extensive discussion of the task-specificity issue in legal and other decision-making contexts). From the recent decision-making literature it would appear that laboratory decision-makers often seem to be responsive to task characteristics that are incidental to, and not specified by, the theoretical conceptions being tested in decision-making experiments (cf. Olson, 1976). There seem to be no theories that can specify *a priori* when people will be Bayesian, when they will average, when they will add, or when they will be sufficiently sensitive to characteristics of data samples. It is unclear which features of tasks will determine which (if any) of these many different processes will have causal effects on particular decisions.

Given this state of affairs it seems to make more sense to assume that subjects *create* decision rules and processes specific to each particular decision task and experimental situation than to try to develop even more elaborate theoretical models that take into account on a *post hoc* basis the broad range of task-specific behaviors. If the former view is adopted, one would not be surprised to find that the substantively quite irrelevant aspects of a task or of a measurement procedure would have an effect on the results and that factors such as the features of material presented to the subjects, the consequences (or lack of them) of the decisions, the order in which the information is presented, whether or not the stimuli are presented in a decomposed form, whether or not a subject knows that the material comes from a fictitious legal case, the number of times a decision is made, the response scales used, the presence versus absence of a deliberation stage, the amount of time available for making a decision, and so on, might substantially affect the subjects' decisions. If subjects indeed create decision strategies to fit various elements of a task, how can one place any confidence in the information—allegedly concerning the operation of the legal system—that is obtained in the ubiquitous laboratory simulations?

For example, it is not unreasonable to expect that a student "jury" given two or three bits of information about a "case" on a piece of paper may well react to these in quite a different way than a real jury does to information about similar issues in a trial. Trivial features, such as the number of words required to describe, say, the defendant's credibility (or levels thereof) and family history, respectively, may decide which of

these will be given greater weight by the student jurors. In a real trial, information is presented over much longer periods of time, by different participants, and impressions presumably "jell" gradually. The presentation of some types of information (e.g., family history) may take far less time in a trial than that of others (e.g., the defendant's credibility), but the latter bit of information might be presented less explicitly than the former. Note also that presenting information in decomposed form to the subjects automatically eliminates a major decision-making task which the real-world jurors have to face—that of extracting information from the ritualistic and often incomprehensible goings-on that a typical trial involves, and of deciding how to evaluate the various bits of information.

Similarly, finding oneself in a $2 \times 3 \times 4$ within-subjects simulated-jury experiment and making the guilty/not guilty decision 24 times within 10 minutes on a 100-mm scale is clearly somewhat different from being on a jury once in a lifetime, watching a seven-day trial, and deliberating for two days behind closed doors with eleven complete strangers. A photograph of the "defendant" (usually taken from high school yearbooks) that is appended to the sheet that gives other information about the "case" (which is how the variable of the defendant's "attractiveness" is typically manipulated in psychological law experiments) may place too much or too little (who knows?) emphasis on the defendant's appearance (in comparison to a real trial), but it would seem more than plausible that the subjects exposed to the information in this way would respond to it quite differently than would real jurors to a live defendant. Note that we are not arguing that the real-trial procedures are better, more rational, or more conducive to the furthering of justice than are the laboratory procedures. It is simply that the laboratory experiments are presumably attempting to simulate the real-world legal process and decisions, and not the other way around.

A few of the above criticisms lose some of their force if one believes that the real world is "additive," that is, that factors occurring in it have only main effects and do not interact with each other. However, a more plausible view of the world is that it is highly "interactive" (cf. Cronbach, 1975). The high frequency of findings of interactions in psychological, especially social-psychological, experiments supports this view. Sometimes the interactions are between the major factors under investigation, but as often as not, they fall in the category of "context effects"—an umbrella term that subsumes the interactions between the major factors under investigation and certain aspects of the research setting, the experimental task, the particular confederate used, time of day, and a myriad of others. Thus, it would seem that the inference that

because a particular factor has a particular main effect in a laboratory experiment it would have a similar effect on the real-world decision in an entirely different setting, with different participants, is probably quite suspect.

One could also argue that some simulations are better than others and that many of the above problems can be avoided by conducting "good" simulations. However, to the extent that a simulation is trying to discover something about the operation of the real-world legal system—a goal that we heartily endorse—how can one know whether a simulation is "bad" and which of several simulations is "the best," without actually collecting the data in naturalistic settings, that is, in the real-world legal system? If one accepts the view that, on logical grounds, only a real-world study can validate the results of a simulation, it only makes sense to begin the research program by doing real-world studies (especially in a young and largely unmapped discipline), and that in situations where there are limited funds, time, and manpower—frequently encountered in the social sciences—the choice as to which type of study to do is obvious.

What should one do in situations where real-world research cannot be carried out? There are, for example, many aspects of the legal system which are confidential. It is impossible for researchers to be present during jury deliberations and it is extremely difficult to obtain access to files containing information that leads to certain decisions (e.g., the prosecutor's files). Many would probably think that simulation research in these cases is fully justified even if all of our criticisms are correct. A more cautious point of view, and one that we favor, is that erroneous information obtained by scientific methods (which therefore have an aura of truth) is more harmful than no information at all, especially when issues as sensitive as legal ones are being dealt with and people's futures are quite literally at stake.

An important argument against the point of view espoused here should be considered next. Much of the evidence against the use of laboratory simulations comes from real-world studies based largely on correlational data. Therefore, it could be argued (cf. Phelps & Shanteau, 1978) that the discrepancies between the laboratory and real-world studies are due to the inability to separate the real from the spurious causal relationships in real-world data. However, it could be reasonably maintained that all decisions models, whether based on data from simulations or from observations of real-world events are, in fact, only *paramorphic representations* (Hoffman, 1960) of the *actual* decision processes of the subject (whether a judge or a sophomore experimental subject). Models merely *simulate*, that is, are correlated with, the input-

output relationships that are observed (cf. Payne, Braunstein, & Carroll, in press).

In addition, experiments do not eliminate the possibility that causal relationships other than those proposed as explanations may be producing the results. The fact that randomization generally breaks the correlation between one variable and all prior variables has no implications for the correlations between that one variable and all following variables. A manipulation might create many mediating variables and processes each of which, individually or in combination with others, might play a causal role in a final decision (Costner, 1971). Because these mediating processes might be correlated with each other, one winds up in a similar position to the researcher dealing with real-world correlational data. The best one can hope is that the models one develops will describe and predict patterns in the data.

Finally, it should be pointed out that various statistical techniques for estimating causality from correlational data—such as path analysis and other types of causal analysis—are being continuously refined and made increasingly sophisticated (e.g., Blalock, 1971; Heise, 1975; Mayer & Arney, 1974).

We realize that some of our remarks may lead to the accusation that we are preaching scientific nihilism. After all, if laboratory tasks create specific decision processes, rather than tap basic ones, then why not assume that real-world tasks also create just as task-specific decision strategies? We agree with the latter point, but do not believe that nihilism is the consequence. It seems to us that in the area of legal decision-making, as well as in many other types of decision-making, the important truths are to be found in the real world rather than in the laboratory, no matter how high the face validity of the simulations might be. We would prefer to base our conjectures about how people make various types of decisions on observations of the actual people making the actual decisions. Moreover, even if a real-world judge's decision strategies do change when certain features of his or her real-world legal task change—for example, because of administrative or legal modifications—such changes merely reflect the reality of decision making in the actual courts. Quite another matter are changes in decision strategies that are brought about by scientists' often arbitrary decisions to change this or that feature of the laboratory task; such changes typically have no substantive, let alone practical, importance or relevance, and their effects on subjects' decision strategies are therefore of minimal interest.

In addition, we are not arguing that laboratory research on legal issues should be abandoned altogether. There are conditions in which it

might serve as a useful tool in further separating questions about the real-world process. However, rather than assuming that the simulations are good, one ought to collect sufficient evidence to test whether the constructed tasks have captured the necessary details of the real world to be real simulations.

AN ALTERNATIVE THEORETICAL AND METHODOLOGICAL APPROACH

The above criticisms of the current theoretical and methodological efforts in the psychology-law area, coupled with an interest in how the real-world legal system actually operates, have led us, in our own work, to certain research steps and certain theoretical and methodological choices. These are outlined below in summary form.

1. In focusing on the real-world criminal justice system, we have (a) identified the categories of decision-making *participants* (e.g., judges, defendants, attorneys, probation officers, etc.), (b) discovered the details of the *types of information* available to these participants at the time when the decisions are made, and (c) learned about the gross aspects of the procedures whereby the case-relevant information is gathered, selected, and exchanged—which include the identification of *interpersonal influence channels* between the participants, both "overt" ones (specified by procedural and administrative rules and guidelines) and "covert" ones (involving informal exchange of information and influence attempts between the participants).

The above steps led us to the conclusion that decisional discretion exists in a context in which the temporal flow of information is largely constrained by procedural guidelines, which, in turn, suggested a conceptualization of the criminal justice system as a *temporally ordered and interconnected network of decision "nodes."* A node consists of a category of decision-makers (such as superior-court judges), each of whom is required by law to reach certain types of decisions.

2. Having arrived at a preliminary theoretical conceptualization of the system as a whole, the next step was the choice of research methods that would enable us to best discover which factors influence which decisions. In our work on various legal decisions (such as bail-setting, sentencing, police decisions concerning which charges to file, prosecutorial decisions concerning complaint-filing and plea-bargaining, child-support and personal-injury compensation decisions, etc.), we have used a large variety of methods, including interviews, questionnaires, observations of hearings, and the coding of archival information.

For a number of empirical, logical, and practical reasons that are fully discussed in Konečni and Ebbesen (in press-b), *archival methodology* turned out to be far superior to other data-gathering procedures in most of the legal contexts that we studied.

3. The use of archival methodology involved the extensive coding of records, a necessary part of which was the *definition of "predictors" and the development of coding instruments*. In our various projects, we almost invariably defined a relatively large number of predictors. Most importantly, in devising the coding categories, we tried to stay as close as possible to the categories and dimensions used by the participants in the system. In other words, we tried to minimize the "translation" from categories used in the system to higher-level abstract concepts or categories more common in social-psychological theories. (This issue is discussed in detail in Ebbesen & Konečni, in press; Konečni & Ebbesen, in press-b; and Konečni *et al.*, 1980.)

4. Having meticulously coded the records for a large number of cases in terms of predictors and coding categories at a low level of abstractness, and having also noted the actual decisions made in these cases, we could then proceed to analyze statistically the covariation between the information available to the decision-making participants and the decisions that they made, using a variety of multiple-regression and path-analysis techniques. We could thus discover the subjective values and weights attached to the various bits of information by the participants at various nodes in the processing of a case. Finally, we could discover the decisional strategies and combinatorial rules used by the various participants in making the decisions.

5. The results of these efforts, among other things, were the *quantification* of the elusive issue of the *amount of discretion* displayed by various decision-makers in reaching their decisions, and the discovery of the *causal pathways* between various categories of decision-makers in the legal system. The latter was made possible in part by treating events (decisions) in temporally preceding nodes (e.g., the amount of bail a judge set 48 hours after a felony arrest) as possible predictors of subsequent decisions (does being out on bail vs. being in jail affect what sentence one gets from a different judge eight months after the arrest?). The culmination of the cumulative efforts to analyze, in the manner described, the majority of important nodes in the legal system is an improved ability to predict the operation of the system as a whole (Bottomley, 1973; Konečni & Ebbesen, in press-a).

The fact that our approach involves the studying of real-life legal decisions and that the predictor variables are typically those used by the participants in the system (e.g., the extent of the prior record of the

defendant) makes it relatively simple to feed the research results back to the participants and thus provide them with information about the factors that truly influence their decisions, as opposed to the factors that they think influence these decisions (see Ebbesen & Konečni, in press; Konečni & Ebbesen, in press-b; and Konečni *et al.*, 1980, for an extensive discussion of this issue). Moreover, because this approach is relatively straightforward from both the theoretical and empirical points of view, it is possible that the results will be received with less skepticism by the participants in the system than is the case for data from projects motivated mainly by social-psychological theorizing.

CONCLUSIONS

In conclusion, it seems to us that: (a) In a young and largely unmapped discipline, such as legal psychology, it makes sense first to focus on theoretical conceptualizations that are primarily concerned with the operation of the system that is the bread-and-butter of the discipline (namely, the legal system), rather than worry, in these initial stages, about theoretical issues and variables imported from other disciplines, such as social psychology; (b) *in situ*, naturalistic research and archival methodology seem to be superior to other approaches when one's primary objective is the understanding of the operation of an intact, functioning, social system that one cannot experiment with at will; and (c) given limited resources and time, the potential pressures from impatient legislatures and the general public, and a true need for well-documented, data-based change, the legal decisions that should be especially attractive to researchers seem to be those that account for the greatest percent of variance in the processing of cases through the system as a whole.

REFERENCES

Bermant, G., McGuire, M., McKinley, W., & Salo, C. The logic of simulation in jury research. *Criminal Justice and Behavior*, 1974, *1*, 224–233.

Blalock, H. M., Jr. (Ed.), *Causal models in the social sciences*. Chicago: Aldine-Atherton, 1971.

Bottomley, A. K. *Decisions in the penal process*. London: Martin Robertson, 1973.

Bray, R. M. *The mock trial: Problems and prospects for jury research*. Paper presented at the 84th Annual Convention of the American Psychological Association, Washington, D.C., 1976.

Buckhout, R. Eyewitness testimony. *Scientific American*, 1974, *231*(6), 23–31.

Buckhout, R., Alper, A., Chern, S., Silverberg, G., & Slomovits, M. Determinants of eyewitness performance on a lineup. *Bulletin of the Psychonomic Society*, 1974, *4*, 191–192.

Carter, R. M., & Wilkins, L. T. Some factors in sentencing policy. *Journal of Criminal Law, Criminology, and Police Science*, 1967, *58*, 503–514.

Chambliss, W. J. (Ed.), *Crime and the legal process*. New York: McGraw-Hill, 1968.

Cicourel, A. V. *The social organization of juvenile justice*. New York: John Wiley, 1968.

Costner, H. L. Utilizing causal models to discover flaws in experiments. *Sociometry*, 1971, *34*, 398–410.

Cronbach, L. J. Beyond the two disciplines of scientific psychology. *American Psychologist*, 1975, *30*, 116–127.

Davis, J., Kerr, N., Atkin, R., Holt, R., & Meek, D. The decision processes of 6- and 12-person mock juries assigned unanimous and two-thirds majority rules. *Journal of Personality and Social Psychology*, 1975, *32*, 1–14.

Davis, J. H., Bray, R. M., & Holt, R. W. The empirical study of decision processes in juries: A critical review. In J. L. Tapp & S. J. Levine (Eds.), *Law, justice, and the individual in society: Psychological and legal issues*. New York: Holt, Rinehart and Winston, 1977.

Davis, K. C. *Discretion in justice: A preliminary inquiry*. Baton Rouge, La.: Louisiana State University Press, 1969.

Dawson, R. O. *Sentencing: The decision as to type, length and conditions of sentence*. Boston: Little, Brown, 1969.

Doob, A. N. Evidence, procedure, and psychological research. In G. Bermant, C. Nemeth, & N. Vidmar (Eds.), *Psychology and the law*. Lexington, Mass.: D. C. Heath, 1976.

Doob, A. N., & Kirshenbaum, H. M. Bias in police lineups—Partial remembering. *Journal of Police Science and Administration*, 1973, *1*, 287–293.

Ebbesen, E. B., & Konečni, V. J. *Fairness in sentencing: Severity of crime and judicial decision making*. Paper presented at the 84th Annual Convention of the American Psychological Association, Washington, D.C., 1976.

Ebbesen, E. B., & Konečni, V. J. On the external validity of decision-making research: What do we know about decisions in the real world? In T. S. Wallsten (Ed.), *Cognitive processes in choice and decision behavior*. Hillsdale, N.J.: Lawrence Erlbaum, 1980.

Ebbesen, E. B., & Konečni, V. J. Social psychology and the law: Theoretical issues in a decision-making approach to the criminal justice system. In V. J. Konečni and E. B. Ebbesen (Eds.), *A social-psychological analysis of the criminal justice system*. San Francisco: W. H. Freeman, in press.

Efran, M. G. The effect of physical appearance on the judgment of guilt, interpersonal attraction, and severity of recommended punishment in a simulated jury task. *Journal of Research in Personality*, 1974, *8*, 45–54.

Egan, D., Pittner, N., & Goldstein, A. G. Eyewitness identification: Photographs versus live models. *Law and Human Behavior*, 1977, *1*, 199–206.

Farmer, L. C., Williams, G. R., Lee, R. C., Cundick, B. P., Howell, R. J., & Rooker, C. K. Juror perceptions of trial testimony as a function of the method of presentation. In G. Bermant, C. Nemeth, & N. Vidmar (Eds.), *Psychology and the law*. Lexington, Mass.: D. C. Heath, 1976.

Frank, J. *Courts on trial: Myth and reality in American justice*. Princeton, N.J.: Princeton University Press, 1973.

Gaudet, F. J., Harris, G. S., & St. John, C. W. Individual differences in the sentencing tendencies of judges. *Journal of Criminal Law, Criminology, and Police Science*, 1933, *23*, 811–816.

Gerbasi, K. C., Zuckerman, M., & Reis, H. T. Justice needs a new blindfold: A review of mock jury research. *Psychological Bulletin*, 1977, *84*, 323-345.

Green, E. *Judicial attitudes in sentencing*. London: Macmillan, 1961.

Hamilton, V. L. Individual differences in ascription of responsibility, guilt, and appropriate punishment. In G. Bermant, C. Nemeth, & N. Vidmar (Eds.), *Psychology and the law*. Lexington, Mass.: Lexington Books, 1976.

Heise, D. R. *Causal analysis*. New York: John Wiley, 1975.

Hoffman, P. J. The paramorphic representation of clinical judgment. *Psychological Bulletin*, 1960, *57*, 116-131.

Hogarth, J. *Sentencing as a human process*. Toronto: The University of Toronto Press, 1971.

Hood, R. G. *Sentencing in magistrates' courts*. London: Stevens, 1962.

Izzett, R., & Leginski, W. Group discussion and the influence of defendant characteristics in a simulated jury setting. *Journal of Social Psychology*, 1974, *93*, 271-279.

Kadish, S. H. Legal norm and discretion in the police and sentencing processes. *Harvard Law Review*, 1962, *75*, 904-931.

Kalven, H., Jr., & Zeisel, H. *The American jury*. Boston: Little, Brown, 1966.

Kaplan, M., & Kemmerick, G. Juror judgment as information integration: Combining evidential and nonevidential information. *Journal of Personality and Social Psychology*, 1974, *30*, 493-499.

Kerr, N. L., Atkin, R., Stasser, G., Meek, D., Holt, K., & Davis, J. H. Guilt beyond a reasonable doubt: Effects of concept definition and assigned decision rule on judgments of mock jurors. *Journal of Personality and Social Psychology*, 1976, *34*, 282-294.

Konečni, V. J., & Ebbesen, E. B. (Eds.), *A social-psychological analysis of the criminal justice system*. San Francisco: W. H. Freeman, in press. (a)

Konečni, V. J., & Ebbesen, E. B. Social psychology and the law: Some considerations concerning the choice of research problems, settings, and methodology. In V. J. Konečni and E. B. Ebbesen (Eds.), *A social-psychological analysis of the criminal justice system*. San Francisco: W. H. Freeman, in press. (b)

Konečni, V. J., Mulcahy, E. M., & Ebbesen, E. B. Prison or mental hospital: Factors affecting the processing of persons suspected of being "mentally disordered sex offenders." In P. D. Lipsitt & B. D. Sales (Eds.), *New directions in psycholegal research*. New York: Van Nostrand Reinhold, 1980.

LaFave, W. R. *Arrest: The decision to take a suspect into custody*. Boston: Little, Brown, 1965.

Landy, D., & Aronson, E. The influence of the character of the criminal and his victim on the decisions of simulated jurors. *Journal of Experimental Social Psychology*, 1969, *5*, 141-152.

Lawson, R. G. Experimental research on the organization of persuasive arguments: An application to courtroom communications. *Law and the Social Order*, 1970, 597-608.

Lerner, M. The desires for justice and reactions to victims. In J. Macaulay and L. Berkowitz (Eds.), *Altruism and helping behavior*. New York: Academic Press, 1970.

Levine, S. J., & Tapp, J. L. The psychology of criminal identification: The gap from *Wade* to *Kirby*. *University of Pennsylvania Law Review*, 1973, *121*, 1079-1131.

Loftus, E. F. Leading questions and the eyewitness report. *Cognitive Psychology*, 1975, *7*, 560-572.

Koftus, E. F., Altman, D., & Geballe, R. Effects of questioning upon a witness's later recollection. *Journal of Police Science and Administration*, 1975, *3*, 162-165.

Mayer, T. F., & Arney, W. R. Spectral analysis and the study of social change. In H. L. Costner (Ed.), *Sociological methodology: 1973-1974*. San Francisco: Jossey-Bass, 1974.

Miller, F. W. *Prosecution: The decision to charge a suspect with a crime*. Boston: Little, Brown, 1970.

Miller, G. R., Fontes, N. E., Boster, F., & Sunnafrank, M. *Methodological issues in jury research: What can a simulation tell us?* Paper presented at the 85th Annual Convention of the American Psychological Association, San Francisco, 1977.

Mitchell, H. E., & Byrne, D. The defendant's dilemma: Effects of juror's attitudes and authoritarianism on judicial decisions. *Journal of Personality and Social Psychology,* 1973, *25,* 123-129.

Myers, D. G., & Kaplan, M. F. Group-induced polarization in simulated juries. *Personality and Social Psychology Bulletin,* 1976, *2,* 63-66.

Nagel, S. S. Judicial backgrounds and criminal cases. *Journal of Criminal Law, Criminology, and Police Science,* 1962, *53,* 333-339.

Nagel, S. S., & Neef, M. *The legal process: Modeling the system.* Beverly Hills, Cal.: Sage, 1977.

Nemeth, C., & Sosis, R. H. A simulated jury study: Characteristics of the defendant and the jurors. *The Journal of Social Psychology,* 1973, *90,* 221-229.

Newman, D. J. *Conviction: The determination of guilt or innocence without trial.* Boston: Little, Brown, 1966.

Olson, C. L. Some apparent violations of the representativeness heuristic in human judgment. *Journal of Experimental Psychology: Human Perception and Performance,* 1976, *2,* 599-608.

Payne, J. W., Braunstein, M., & Carroll, J. S. Process-tracing of predecisional behavior: An alternative approach to decision research. *Organizational Behavior and Human Performance,* in press.

Pepitone, A. Social psychological perspectives on crime and punishment. *Journal of Social Issues,* 1975, *31,* 197-216.

Pepitone, A., & DiNubile, M. Contrast effects in judgments of crime severity and the punishment of criminal violators. *Journal of Personality and Social Psychology,* 1976, *33,* 448-459.

Phelps, R. H., & Shanteau, J. Livestock judges: How much information can an expert use? *Organizational Behavior and Human Performance,* 1978, *21,* 209-219.

Piliavin, I., & Briar, S. Police encounters with juveniles. *American Journal of Sociology,* 1964, *70,* 206-214.

Reiss, A. J. *The police and the public.* New Haven, Conn.: Yale University Press, 1971.

Rosett, A., & Cressey, D. R. *Justice by consent: Plea bargains in the American courthouse.* Philadelphia: Lippincott, 1976.

Shaver, K. G., Gilbert, M. A., & Williams, M. C. Social psychology, criminal justice, and the principle of discretion: A selective review. *Personality and Social Psychology Bulletin,* 1975, *1,* 471-484.

Sigall, H., & Ostrove, N. Beautiful but dangerous: Effects of offender attractiveness and nature of the crime on juridic judgment. *Journal of Personality and Social Psychology,* 1975, *31,* 410-414.

Tapp, J. L. Psychology and the law: An overture. *Annual Review of Psychology,* 1976, *27,* 359-404.

Thibaut, J., & Walker, L. *Procedural justice: A psychological analysis.* Hillsdale, N.J.: Lawrence Erlbaum, 1975.

Thomas, D. A. *Principles of sentencing.* London: Hienemann, 1970.

Toch, H. *Violent men: An inquiry into the psychology of violence.* Chicago: Aldine, 1969.

Vidmar, N. Effects of decision alternatives on the verdicts and social perceptions of simulated jurors. *Journal of Personality and Social Psychology,* 1972, *22,* 211-218. (a)

Vidmar, N. *Group-induced shifts in simulated jury decisions.* Unpublished manuscript, University of Western Ontario, 1972. (b)

Walker, L., LaTour, S., Lind, E. A., & Thibaut, J. Reactions of participants and observers to modes of adjudication. *Journal of Applied Social Psychology*, 1974, 4, 295–310.

Wilkins, L. T. Criminology: An operational research approach. In A. T. Welford, N. Argyle, D. V. Glass, & J. N. Morris (Eds.), *Society: Problems and methods of study*. London: Routledge & Kegan Paul, 1962.

Wilkins, L. T. *Social deviance*. London: Tavistock, 1964.

Wilson, D. W., & Donnerstein, E. Guilty or not guilty? A look at the simulated jury paradigm. *Journal of Applied Social Psychology*, 1977, 7, 175–190.