
An Editorial Viewpoint

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The objective of this volume has been to bring together the work of researchers specializing in the study of various important decisions made by the different participants in the criminal justice system. We hoped that our organization of the material in terms of temporally and causally related decision nodes would elucidate important aspects of the system's operation. The goal was to obtain a reasonable description of various aspects of the functioning of each decision node and to improve the accuracy of these descriptions by explicitly recognizing the connections among the nodes and by treating outputs from certain nodes as inputs to others.

Several of the chapters in the volume have gone beyond the descriptive level to application. By application we do not mean simply doing *in situ* research, but rather the use of research results within the system in a way that almost always produces both a measurable degree of change in the way in which the system operates and consequent changes in social values.

Perhaps the clearest example of this is the work of Wilkins on federal parole decision-making (Chapter 13). After constructing an empirically useful description of the decision node, Wilkins and his associates formulated guidelines that resulted in a major change in how parole decisions are made. The new guidelines embody a set of values about those factors that should and should not be taken into account in making parole decisions, and are thus reflective of the underlying philosophy of the federal parole system. The factors incorporated into the decision matrix clearly place emphasis on certain aspects of the offender and the offense more than on others and therefore incorporate some values and not others. Although Wilkins

took pains to explain that the guidelines were formulated after much consultation with the actual decision-makers on the parole board, i.e., that the values embodied in the guidelines were theirs rather than his, this is beside the point. The fact of the matter is that the new guidelines constrain the decision-making process in such a way that the parole board members are explicitly required to use a particular set of values, out of many possible sets, at the overt behavioral level in making their decisions.

The formulation of guidelines is important because of the very real possibility that parole board members privately hold one set of values, verbally espouse another set, and behaviorally make decisions that can best be described by a still different set. As has been shown in several chapters in this volume, many seemingly complex legal decisions can be predicted by models containing very few variables. Yet, a decision-maker, such as a parole board member, may privately believe that, say, race, being from a broken home, a drug problem, and many other factors are all important and should be taken into account, though the board member may try not to do so out of respect for public opinion, the Bill of Rights, or whatever. At the verbal level, for example, in interviews with the press, these private beliefs may be camouflaged and quite a different set of factors may be endorsed. The person's actual decisions in real cases may, in fact, be best predicted by one or two factors, which may well be quite different from both the privately espoused factors and from those publicly (verbally) endorsed. Thus, paradoxically, the closet racist and the public (at the verbal level) civil libertarian may behaviorally be neither; moreover, the actual decisions of closet racists who privately believe that they are, in fact, taking race into account (despite verbal disclaimers) may in truth be quite benign and not responsive to race. The introduction of guidelines—provided that they are sufficiently explicit and their application by the decision-makers monitored and otherwise enforced—would insure at least a better match between publicly expressed values and those guiding the actual decision-making behavior.

The work on prosecutorial activities presented by Gelman (Chapter 9) exemplifies a situation where major changes in the operation of a particular decision-making node can be produced by the application not of research results *per se*, but of a particular methodology and the accompanying technological changes required to implement that methodology. The elaborate procedure for coding each case and the sophisticated computer analyses of the data that the PROMIS system typically entails make it difficult for the decision-makers who use PROMIS to cling to incorrect ideas about which factors, precisely, they take into account when making decisions. Naturally, one would expect such data-based self-revelations to produce changes in the decision-making behavior of the prosecutors.

Whereas other chapters, such as those by Maslach and Garber on parole, Kerr on trials, Grant et al. on police decisions, and our own work on the setting of bail and sentencing, do not represent examples of application of either research results or methodology to the respective decision-making nodes with which they deal, in almost every case the descriptive effort seems sufficiently elaborate that the actual application would be a quite straightforward next step if there were appropriate incentives for both the researchers and the decision-makers to carry it out. At the very least, it would seem that quite specific recommendations could be made to the decision-makers on the basis of the findings presented in this volume.

In the remainder of this chapter, we would like to venture some recommendations that go beyond the actual day-to-day operation of the individual decision nodes and reflect more general regularities that became apparent, we think, as a result of looking at the criminal justice system as a temporally and causally organized network of decision-makers with broad discretionary powers. Although these comments and recommendations originated in the data that have been presented, they are hardly value-free.

In fact, the title of this chapter—"An Editorial Viewpoint"—was meant to alert the reader not to expect the type of summary statement one usually finds in the "Implications and Conclusions" chapters of edited volumes. We feel that each of the chapters is already complete in this sense and that the preface adequately explains the rationale for bringing them together. We used the word "editorial" in the journalistic sense, to convey that we intended to present a highly personal viewpoint—a set of impressions generated both by the material in this volume and by our observations of the operation of the criminal justice system. We hasten to emphasize that this is our own viewpoint, one that is not necessarily shared by other contributors to the volume. In addition, consistent with the editorial approach, and in order to make the main points more prominent, we have intentionally avoided a comprehensive discussion of the many legal and psychological subtleties of the issues raised here.

Literally all of the chapters in the volume form the basis for our principal recommendation, that on-line data-gathering procedures capable of encoding numerous characteristics of each case (e.g., characteristics of the offender and the crime, as well as decisions concerning the processing of the case that had been made prior to its reaching the stage under observation) should be instituted at each significant decision node. There seems to be no excuse for not transforming the criminal justice system into a sophisticated data-gathering and data-analysis system with feedback features, making it a true self-experimenting system. Note that we are advocating the collection of a great deal of high-quality data and the use of sophisticated statistical analyses at each node, of the type that would allow the

development of reliable causal models. The simple baseline data currently provided by county, state, and federal agencies and typically presented in two-factor contingency tables (e.g., type of crime \times age of offender) are not nearly good enough. Also, we are not advocating the introduction of additional levels of legal bureaucracy, merely a fairly major shift in what the currently employed bureaucrats do.

In simple terms, perhaps the most important benefit of a thorough attempt by the criminal justice system to collect data on itself would be that unsubstantiated myths about the operation of the various decision nodes would be replaced by hard facts. Having been told what it is that they are, in fact, doing and which factors they are, in fact, taking into account, the decision-makers could then ask themselves, collectively and individually, whether what they are doing is what they would like to be doing, and equally important, what they should be doing. These are, of course, complex issues because there is likely to be a considerable amount of disagreement within any category of decision-makers with regard to the ideal policy and what should most influence that policy—the decision-makers' private beliefs, legal precedents, fellow professionals' opinions, constitutional issues, the Bill of Rights, the decision-makers' constituents (or the people who appointed them), public opinion (locally or on a county, state, or national basis), and so on. In other words, we are not suggesting that knowing the details of each node's operation will solve the problem of a fundamental lack of social consensus—if such exists—on the part of the various segments of the public, the legal profession, and other special-interest groups about how a given node should operate. At least, however, one would have a solid factual basis from which to seek consensus. This would be in sharp contrast to the present situation where radically different (and incorrect) portrayals of the operation of the various nodes are arbitrarily, but self-confidently, made by different groups of decision-makers and various segments of the public, whose reasons seem to range from blissful ignorance to self-serving attempts to maintain or to change the *status quo*, as the case may be.

For example, the sentencing data that we presented (Chapter 11) challenged several notions about the sentencing process that seem to have been accepted almost as truisms both by the legal profession and by the public. On the one hand, the ideas that sentencing decisions are complex, that many factors are taken into account, that individualized justice is being meted out, that important information is presented at sentencing hearings had all been virtually unchallenged, had all received strong backing from the judges themselves, and had further insured that the judges would be perceived as the key decision-makers in the sentencing process. Yet, all seem to be incorrect. On the other hand, the defendants, defense attorneys, and civil libertarians have often been critical of the judiciary on the issues

of sentencing disparity and racial prejudice; yet these notions, too, appear unsubstantiated in important ways.

In addition to collecting data on itself, we recommend that the criminal justice system be required to make public the details of the models that best describe the operation of the various decision nodes (which factors are actually taken into account, with what weights, etc.). Further, we recommend that the incentive structures for various categories of decision-makers (police officers, prosecutors, judges, probation officers, and so on) be revealed. The incentive structures disclosed by systematic data-collection and data-analysis efforts may well turn out to be quite different from what the public, and perhaps even the decision-makers themselves, now believe. Making such information available would expose to public scrutiny what is now a largely closed system operating by its own rules—rules that seem imperfectly related to the publicly espoused goals and ideals. It would make decision-makers in the system more socially accountable than they now are, and facilitate a rational cost–benefit analysis of specific legal measures, court procedures, and legislative acts affecting the criminal justice system.

What the public now sees is a carefully designed and orchestrated series of expensive legal rituals, self-serving verbal “fronts,” and legislative maneuverings responsive principally to changing political climates. The main function of these activities may well be to create—whether consciously or not—certain incorrect impressions about the system’s operation and values. Chiefs of police are forever talking about their dedication to public safety; yet it may well be that the officers’ promotions are largely governed by the sheer number of arrests they make, regardless of the quality of these arrests (see Chapter 6), in terms of either their impact on public safety or the probability of successful prosecution.¹ Prosecutors who are usually staunch defenders of plea bargaining (ostensibly to save public money and avoid overloading the court calendar) are quick to go to

¹Evidence that the beat officers’ arrest and charging practices are not driven primarily by the likelihood of conviction nor by public safety issues comes from several sources. Certain types of arrests seem to be made because they are easy. For example, although the arrest rate for felony drug violations (for adults) was quite high in California in the mid-1970s—in fact, they constituted the most frequent arrest charge (around 50% of all adult felony arrests were in this category)—the felony conviction rate on drug charges was only 10%. In contrast, during the same period, the burglary conviction rate, for example, was close to 30%, even though fewer adult felony arrests (19%) were made in this category. In other words, the police were apparently spending much of their time making a type of felony arrest that rarely resulted in a felony conviction. From a different perspective, a study conducted by Piliavin and Briar (1964) on factors affecting juvenile arrests suggests that the offender’s “attitude” and reaction to police requests and commands at the time of arrest also have a major effect on the likelihood that the offender will be charged with a felony, even though it is possible that the arresting officer is implicitly using the juvenile’s “negative attitude” as an indicator of future threat to public safety.

trial when it is likely to be covered on the front pages of newspapers.² Defense attorneys put on a performance at sentencing hearings apparently mostly in order to convince their clients that something is being done on their behalf—since, after all, the sentencing decision is not actually affected by the events at the hearing. Judges attend one hearing after another, believing (or pretending?) that they are making decisions, when, in fact, they often merely rubber-stamp the decisions made by others—the prosecutors (for the amount of bail), the probation officers (for the sentence), or the psychiatrists (for the disposition of mentally disordered sex offenders). Meanwhile, at public expense, they surround themselves with pomp and circumstance, with flags and gavels, presumably “to instill respect”—in the face of the fact that the great majority of convicted felons display their respect for the judges and the law by having an arm-long record of felonies going back to their teens and by violating probationary and parole requirements whenever possible (see Chapter 11). Legislatures bring about important and expensive modifications in the criminal justice system, such as the recent change, in the state of California, from the indeterminate to the determinate sentencing system, on the basis of “facts” that are barely more than gossip—unsubstantiated opinions by chiefs of police, prosecutors, judges, and other public figures, about whether, and how well, the old system was working and what would be gained by switching to the new one. These opinions are presented to legislators in “hearings”—a frequently used, but notoriously unreliable, fact-finding methodology. None of these apparent pitfalls and shortcomings can be corrected without collecting and analyzing the appropriate data and making them public.

Our age, if not exactly enlightened, at least has grudgingly begun to accept the logic, rigor, and tools of science. But as Brandt (1980) has pointed out, “older, unscientific habits of thought persist in all of us, and prescientific bodies of knowledge thereby manage to survive and even sometimes to flourish.” Brandt’s comments were concerned with physiognomy, the ancient art of “face reading,” but he could just as well have been writing about the criminal justice system. A long time ago, Justice Oliver Wendell Holmes (1897) wrote that “for the rational study of the law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” To this day, however, many decision-makers in the criminal justice system remain either unacquainted with, or deeply suspicious of, the logic of statistical procedures, computer

²In addition, in part because plea bargains are more likely to be reached in cases where the prosecutor is unsure that a jury will return a favorable decision, prosecutors thus manage to keep their—more visible—trial conviction rates high.

analysis, and the use of scientific method (let alone cost–benefit economic analyses). The system often appears to rest instead on an arrogant assertion of judicial competence and on the idea that opinions forcefully expressed from the position of legal authority are preferable to scientifically obtained facts and conclusions, even when the problem at hand involves measurable phenomena and not nebulous interpretations (such as, for example, those involved in the recent controversy over whether the Ten Commandments may be posted in Kentucky schoolrooms).

The system further consistently relies on antiquated ideas about “human nature,” many of which are grotesquely at odds with the findings of modern social, behavioral, and cognitive science regarding human perceptual, cognitive, and physical abilities, decision-making processes, and reactions to social influence (see Chapter 5). A judge’s instruction to a jury not to take into account a certain bit of information improperly brought up in a trial is quite naively assumed to have precisely the desired effect (or else such an instruction represents yet another example of a vacuous rule of procedure invented and used for window-dressing purposes only). A U.S. District Judge recently issued a preliminary injunction prohibiting the officers of the Los Angeles Police Department from using the carotid-artery hold (“choke hold”) on troublesome suspects unless they find themselves in situations that threaten “their life or bodily harm.” The judge, typically, neglected a minor detail: he did not define the “threat of bodily harm” that would justify the use of the above hold. He also chose to ignore the reality of many police–suspect encounters in a large and extremely violent American city. In the words of a commentator, “an officer [would have] to instantly decide: ‘Do I use a hold? Do I use my baton? . . . Do I call headquarters?’ And meanwhile he’s [the suspect] beating the hell out of you” (Los Angeles Times, December 19, 1980).³

³The judge’s injunction prohibiting the choke hold was subsequently upheld by the Ninth Circuit Court of Appeals on the grounds that it was a “relatively innocuous interference by the judiciary with police practice,” which, allegedly, “can hardly be characterized as an abuse of discretion . . . when the record reveals that nine suspects . . . have subsequently died, allegedly of the injuries sustained in the application of these holds” (*Lyons v. City of Los Angeles*, 80-6078 [August 17, 1981]).

Characteristically, the Court of Appeals is not averse to playing the “statistics game” (the reference to nine deaths) when it suits the court’s purpose. Even more typically, the court omits any reference to baselines and appropriate control conditions: How many police officers would have been killed or injured had they not applied the choke hold? How many suspects would have escaped and committed further crimes if the choke hold had not been used on them? How many resisting suspects would have been killed by the police officers by other means had the choke hold been illegal? Finally, nine deaths—but out of how many thousands of choke-hold applications over how many years? In any rational and accountable decision-making context, the court’s reasoning would be found unconvincing and naive in the extreme.

Judges across the nation have been making decisions and issuing orders and injunctions on issues as diverse as who is going to be bused where, which data the Census Bureau may release, whether or not an academic tenure decision is appropriate, whether or not stray dogs on runways represent sufficient danger to incoming aircraft to justify the dogs' being shot by airport officials, and whether the housing of prisoners in a statewide prison system is adequate or not.

One may well ask which aspect of the judges' training has made them competent to decide such issues, or even make public pronouncements about them, given that in almost all of the mentioned cases, and countless others, they have gone well beyond simply implementing or interpreting the law. Should they be given the privilege to use whatever additional evidence they want (if any), and evaluate it in whatever unscientific manner they deem appropriate, to reach decisions of enormous social consequences in terms of monetary cost and quality of life—all of this with a minimum of social accountability? Are the judges truly the most appropriate agents of social change, the most competent interpreters of the fluctuations in public mood, the most reliable quantifiers of changing perceptions of what constitutes, say, "cruel and unusual punishment"? Can the judges be trusted to make decisions that rest on accurate perceptions of the defendants' motives, conflicts of interest, and bias, when they—quite unrealistically, we think—apparently consider themselves as not being subject to human fallibility and as not having self-serving ulterior motives in reaching decisions? Recently, the U.S. Supreme Court justices unanimously gave themselves (and other federal judges) large and retroactive salary increases. To accomplish this, the justices struck down several laws passed by the U.S. Congress on the grounds of their being "unconstitutional" with reference to the so-called compensation clause; this clause forbids any decrease in the judges' salaries while they are in office, and is, rather conveniently, applicable only to federal judges. Also struck down by the justices was a law passed by Congress that "required federal judges to disqualify themselves from cases when they have a 'financial interest' in the outcome." To accomplish this, the Supreme Court invoked the similarly convenient "rule of necessity"—"the legal principle that a judge should not disqualify himself if his participation is absolutely necessary to arrive at a decision" (*Los Angeles Times*, December 16, 1980). A shining example indeed of unbiased judicial reasoning and of what happens when a category of decision-makers is trusted to develop rules that define the limits of their own behavior and prerogatives, as well as those of entities allegedly providing "checks and balances."

In the light of the examples presented above and other emerging evidence, a reasonable question to be asked is: How have so many decision-makers within the criminal justice system, and judges in particular, been able to keep scientific procedures out of the courthouse?

A much-used tactic is for people in the system to appoint themselves as arbiters of whether it is in the "public interest" for that part of the system in which they function to be scientifically studied. Much of the time, the net result amounts to little more than a lightly disguised sabotage of scientific inquiry (and public scrutiny) for reasons of self-protection. This volume itself would have been more complete (and this editorial less emotional) were it not for the closed-door policy so consistently employed by the participants in the system. For example, after lengthy negotiations with various members of the San Diego County District Attorney's office (including the District Attorney himself), we were given permission to code completed prosecutorial files from which the identifying information had been removed. Subsequently, however, when after a great deal of effort and expense our coding instrument had been completed and the study proper about to begin, the permission was inexplicably and unceremoniously revoked. Similarly, in the county Probation Department, we were strongly discouraged from interviewing probation officers.

Another tactic is the repetition by various members of the system, *ad infinitum*, of the "every case is different" doctrine, which has at least two implications: (1) a large amount of the participants' decision-making discretion is both desirable and necessary; and (2) a scientific description of how a particular decision (for example, sentencing) is typically reached is impossible. Of course, a judge, for example, would not have the slightest inclination (let alone competence) to validate such—as we have seen largely inaccurate—claims. The force of self-confidently expressed opinion from a position of authority, even if contradicted by data, is deemed sufficient and is relied on to carry the day. Never mind the very real possibility that such claims may appear so attractive and "self-evident" to the judges largely because the claims justify their vastly inflated authority and an almost unchecked decision-making discretion that is often accompanied by sloppy thinking and a lack of familiarity with scientific procedures. For example, judges have been known to apply quite arbitrary criteria as to when statistics are or are not acceptable in a wide range of cases (Hart and McNaughton, 1959; Loh, 1979).

A further tactic, used especially by judges, has been to create numerous (and expensive) rules of procedure and due process. Many of these are of questionable utility and epiphenomenal in terms of

any real effect on the processing of the vast majority of cases. However, such procedures (e.g., the vacuous bail and sentencing hearings) are useful to the participants in the system in that the participants are made to look indispensable and their functions and authority are further broadened, while at the same time giving the public and the media a ritual performance to be entertained by, and the illusion of justice at work to cling to.

From this perspective, the more traditional, quaint, and surrounded by mystique that these rules are, the better. In a socially and technologically rapidly changing world, archaic procedures and assumptions about social behavior are reified in order not to rock the judicial (sometimes constitutional) boat, and considerable effort is invested to convince the public that this should be so.

There are, for example, the venerated concepts of the jury of one's peers and of the sanctity of the jury room, even though:

1. It has been amply documented (see, e.g., Chapter 10) that juries are totally unrepresentative, let alone consist of the defendants' "peers" (whatever it is that was meant by this term originally: peers along which dimension?).
2. Enormous media coverage (unimaginable 200 years ago) precedes some trials and virtually precludes a fair trial, by unbiased jurors, even if it is moved to a different county or state. (How, by the way, does a judge have the expertise to decide that the adverse publicity has been sufficiently widespread to justify moving the trial, when this is an essentially polling and statistical question?)
3. There are good reasons to assume, on the basis of the social-psychological literature, that the opinion which the foreman holds at the beginning of the jury's deliberation influences the final verdict to a highly disproportionate degree, and that factors which are important in who is elected the leader of a small group, such as a jury (e.g., the proportion of time he spends talking, his social standing, his maleness, even his height), may have absolutely nothing to do with the reliable recollection of the evidence presented, its careful evaluation, or with a tendency to adhere closely to the judge's instructions. Yet, even if many jury verdicts were indeed influenced by factors that have little to do with "justice" and idealized jury attributes and activities, this could, by definition, never be scientifically documented (and the procedure consequently changed for the better), because of the inviolable sanctity of the jury room, however irrational or counterproductive this may be in an age vastly different from the time when the Constitution was framed.

In effect, the criminal justice system has lovingly created and cultivated many procedural and structural features that safeguard the *status quo* and insure the system's perpetuation. When one cuts through the self-serving, emotional, and pseudohumanistic verbiage that surrounds issues such as the sanctity of the jury room, what becomes apparent is that many participants in the criminal justice system have no interest in true improvement of its functioning, in enlightened innovation, not even in becoming aware of what it is that they themselves really do. In an age of proliferating public information and disclosure acts, a time when documents ranging from Presidential papers to CIA files to letters of recommendation for graduate school are more or less in the public domain, is it really reasonable to keep events as important as those in the jury room closed to responsible and competent scientific investigation?

Another tactic that has helped the courts' efforts to avoid public criticism and scientific examination has involved the handling of well-publicized cases (e.g., those involving famous or notorious defendants) in a way substantially different from the "ordinary" ones (see Konečni, Mulcahy, and Ebbesen, 1980). In addition to window-dressing changes (e.g., longer hearings), there is the more important fact that, for example, both the number of factors taken into account in sentencing and their weights seem to be different in such well-publicized cases than in the otherwise comparable run-of-the-mill ones. Since the well-publicized cases represent a miniscule proportion of the case load, it follows that the public is consistently misinformed about how the system normally operates. It is largely through the handling of such exceptional cases that the myths of individualized justice, of the uniqueness of each case, and of the frequency and importance of jury trials (as opposed to plea bargaining), among others, are forced into public (and legislators') consciousness.

In short, the participants in the criminal justice system, and the judges in particular, have done a very thorough public-relations job, and they have had a long time to get it done. Moreover, they are relentlessly and unabashedly continuing to do it. Only recently, in November of 1980, Justice Matthew O. Tobriner, the senior Justice of the California Supreme Court, was quoted by the *Los Angeles Times* as saying: "I suggest [that] a statewide permanent organization should be recruited from members of the Bar Association and [other] organizations . . . to create an atmosphere favorable to the courts."

The criminal justice system is a vast, entrenched bureaucracy, most of whose members have very little motivation to change the system that has served them so well thus far, especially motivation to change it by means of scientific procedures the logic of which they had not been traditionally trained to understand. The vested interests

and the power of this bureaucracy to resist change are enormous. Moreover, even the apparent adversaries within the system (e.g., prosecutors versus defense attorneys) have been through the same law-school curricula, share similar values and distrust of applying scientific procedures to the law, and are fully aware that they need each other to obtain the rewards to which they have become accustomed.

It is in the light of these ideas that we have decided to part with tradition and not end this chapter with the customary platitudes on an "optimistic note." Looking at the situation realistically, and realizing the character of the massive social forces at work, we are highly skeptical that our recommendations have even a remote chance of being implemented or that this volume, and others like it, will have much of an impact in legal circles. The romantic union (or "interface" in unromantic computerese) of scientific psychology and the law does not seem to us to be just around the corner. A scientific way of looking at human behavior, involving baselines, data collection, and statistics, does not seem likely to be adopted by legal practitioners in the near future. In the meantime, legal inertia and the unchallenged authority of the judiciary will insure "business as usual." This state of affairs is likely to continue as long as contempt of court leads to jail, and contempt of science is met with indifference or even occasional approval.

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