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SOCIAL SCIENCE "THEORY" AND THE LEGAL DECISION-MAKING PROCESS: A RESPONSE TO PROFESSOR KEITH O. HAWKINS

EMORY KIMBROUGH, JR.*

Professor Keith Hawkins in his paper on legal decision making has made abundantly clear the complexities thereof, and proposes two basic models by which the whole issue might be illuminated. It is the basic contention of the remarks to follow that legal decision-making is but a specialized form of decision-making in general, and that, if this be the case, the work of the social scientist in dealing with the process itself and the context within which it takes place might indeed provide some valuable insights with respect thereto. The present paper therefore will be directed to the application of a sampling of the social-science theoretical literature to the legal decision-making process, relying primarily upon ideas drawn from the literature of complex organizational theory, sociological theory, and, to a most cautious degree, economic theory. It should be acknowledged early on that at times the connection between a given theory and the decision-making process might appear to be somewhat weak; nevertheless, useful results might be forthcoming.

A profitable beginning might be made by asking what decision-making is in the first place. The literature on complex organizations is full of attempts to address such a question, usually from the perspective of how managers go about making decisions within the organizational context. Such quite often involve extremely elaborate "systems models," and are perhaps more noteworthy for their elegance than their utility.¹ A good example of an attempt at definition is to be found in Shull, Delbecq, and Cummings' *Organizational Decision Making*:² "A conscious and human process, involving both individual and social phenomena, based upon factual and value premises, which concludes with a choice of one behavioral activity from among one or more alternatives with the intention of moving toward some desired state of affairs." The same authors identify at least three sets of variables which should be considered in an investigation of the process:³

1. the decision maker, including his subjective perceptions of the problem and his unique frame of reference for his intellectual ruminations;

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1. *E.g.*, F. KAST & J. ROSENZWEIG, *ORGANIZATION AND MANAGEMENT: A SYSTEMS APPROACH* 403-34 (1970).

2. F. SCHULL, JR., A. DELBECQ, & L. CUMMINGS, *ORGANIZATIONAL DECISION-MAKING* 31 (1970).

3. *Id.* at 27.

2. the ends and goals being sought, either those of the system, or his private set of values or some mix of the two; and
3. the environment within which the action is to take place.

The conception of decision making expressed in the position developed by Shull, *et al.*, would be considered to be an example of the *open system* model of decision making. Kast and Rosenzweig elaborate upon that model further by saying that

The open-system model of decision making is an attempt to describe a more realistic process for individual and organizational decision making. It focuses on human involvement in the various steps of the process and allows for the impact of numerous environmental forces. This view opens the system by eliminating the assumption of classical rationality. That is, we do not assume that the decision maker has complete knowledge and is a logical, systematic maximizer. . . . Concentration on the human element leads to concepts such as learning and adaptation. Continual feedback during the decision process causes adjustments in both ends and means. The system is dynamic rather than static; thus explicit computational techniques must give way to more judgmental approaches.⁴

The open-system model thus would regard the legal decision making mechanism or system to constitute a "natural whole," and system changes are seen to be regarded more or less unplanned, and everything is in a state of emergence, development, evolution, etc. Also, and quite crucially, much attention is given to the nature and operations of the environment.

After considering in general terms the nature of the open-system concept, one still must ask whether such a concept or model really applies in the legal decision-making process. Some would undoubtedly argue in the negative, and say that the *adjudicative* type of decision-making would more properly be described as a *closed* system, since much of it is bounded by law and judicial precedent, and geared to goal attainment (a decision) via the utilization of rational strategies. The late James Thompson in describing the closed system model noted that

The rational model . . . results in everything being functional . . . making a positive, indeed optimum, contribution to the over-all result. All resources are appropriate resources, and their allocation fits a master plan. All action is appropriate action, and its outcomes are predictable.⁵

How might this question be resolved? Perhaps a tentative resolution would suggest that since there is a tendency for the adjudicative decision-

4. F. KAST & J. ROSENZWEIG, *supra* note 1, at 405.

5. J. THOMPSON, ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY 6 (1967).

maker to be bound by certain strictures inherent in the law, the closed system model would largely apply; most of the *balance* of the legal decision-making process is much more fluid, and hence more accurately described via the open-systems model. In conclusion, it is being suggested here that the systems concepts, both open and closed, and, in particular, the definition of decision-making derived therefrom, might be useful in an investigation of the legal decision-making process.

The discussion of the problem of the definition of the term *decision-making* from the perspective of the social sciences, especially the complex organizational theory component thereof, hopefully has a bearing upon what legal actors and other significant decision makers in the legal decision-making sphere *actually do*. The systems models developed by social scientists could help one understand better the "frame" within which legal decisions are worked out, and therefore introduce an enhanced degree of "reality" therein; perhaps all that has been said might be adequately summed up by the following statement:

Decision making is a social event to the extent for example, that facts and values are social phenomena. The validity of a "fact" is often the function of the incidence in society of observation of an event. Values often reflect group norms which have been internalized by the members. . . . The decision process, the concept of the problem, and the variables considered are most often sociological in nature.⁶

We now turn to a consideration of some of the specific issues raised by Professor Hawkins in his paper, and only a rather limited number of aspects will be considered. Once again, the strategy to be employed herein is to ask whether a particular idea, aspect, etc., might be better appreciated if analyzed via the framework of social science "theory." To such concerns we now turn.

Legal decision-making of a negotiative form: Professor Hawkins rightly points out that a considerable portion of the legal decision-making process involves the negotiations carried on by the various participants in legal decisions, and perhaps there is the implicit assumption made that more is known about the adjudicative decision than about the negotiated decision. If this be the case, might not the social sciences, particularly sociology, be able to make some contributions to our understanding of the latter? The sociologist of course is very much committed to the study of various *types* of groups, and one type typically identified in many sociology texts would be the *formal decision-making* group. DeFleur, D'Antonio, and DeFleur note that

Increasingly important in modern society are small groups, such as committees, commissions, councils, juries, boards of supervisors,

6. *Id.*

and other appointed or elected groups, which are formed for the specific purpose of making decisions and formulating policies within larger organizational structures. . . . [I]n spite of . . . obstacles, however, social scientists have accumulated an impressive amount of information about the social organization and patterns of interaction that are characteristic of small task-oriented groups.⁷

This type of group certainly would be found on the *negotiative* level of legal decision-making. DeFleur and his colleagues note that the formal decision making group is characterized by the following dimensions:

1. The interplay of formal and unstated goals (collective/individual goals).
2. The typical pattern of interaction: collecting information, evaluating information collected, reaching a decision, restoring equilibrium.
3. The interplay of *formal* and *informal roles*: although there are officially designated leaders, quite often particular members are likely to assume informal leadership roles: the best idea man, the one who gives guidance to the group, etc., even the one who provides "comic relief."
4. Social control: When a decision making group operates within the context of some larger group, as is usually the case, the formal controls of the larger group carry over into the smaller one.
5. Ranking systems:
 1. Both role-playing and relative rank within a small decision making group are influenced by the status and roles that members have outside the group.
 2. Both role playing and relative ranking within a small decision-making group are influenced by the status and roles that members have outside the group.
 3. The pattern that evolves may represent a complex of several different ranking systems, each based upon different criteria: hierarchy of relative popularity, hierarchy of relative power, etc.⁸

In a study of jury deliberations, Strodbeck and Mann identified many of the above aspects as being present.⁹ Perhaps it can be suggested that research

7. J. DEFLEUR, W. D'ANTONIO, & L. DEFLEUR, *SOCIOLOGY: HUMAN SOCIETY* 67 (1974).

8. *Id.* at 68-70.

9. F. Strodbeck & R. Mann, *Sex Role Differentiation in Jury Deliberations*, 19 *SOCIOMETRY* 3-11 (1956).

which has been carried out on both "natural" and "artificial" formal decision-making groups might shed a considerable amount of light upon the dynamics of the negotiated legal decision making process.

On the location of legal decision-making authority: Professor Hawkins suggests that there is a considerable amount of diffusion in legal decision-making authority, noting several illustrations to establish the point. Might one discover a model or construct which would add focus to this particular idea? One possibly useful model might be that developed by John Kenneth Galbraith in his book, *The New Industrial State: the Idea of Technostructure*.¹⁰ The technostructure, according to Professor Galbraith, "embraces all who bring specialized knowledge, talent, or experience to group decision-making processes." The technostructure thus is made up of all those personnel, from the top of the lower reaches, who are charged with the *acquisition* and the *processing* of information. The technostructure is seen, therefore, to be the "guiding intelligence" of the "organization" or structure, and hence the prime decision-making apparatus.¹¹ Although Professor Galbraith has the large business firm in mind as he develops the concept of technostructure, it might be a useful tool for the exploration of how legal decision-making personnel are in fact organized within the legal structure. Such an approach would sensitize the user to the collective nature of that structure, and would have one look beyond just the "significant legal personalities" aspect.

One particular area warrants further elaboration, and such bears upon the issue of *autonomy*. Galbraith argues that the technostructure strives to be protected from outside intervention. Might not the same be said for the legal technostructure in its transactions with its environments? In looking within the technostructure, perhaps another aspect of the question of *autonomy* arises: to what extent do those who are involved in the negotiative realm try to protect themselves from arbitrary interventions on the part of adjudicating officials, or indeed, any other pressure groups?

Influences upon legal discretion: Professor Hawkins states that ". . . it is still empirically rather unclear how legal rules or statements actually influence legal discretion, and it is difficult methodologically to throw light on the issue by listening to decision makers discuss their judgments in a formal fashion. . . ." If Vilfredo Pareto,¹² the important late nineteenth- and early twentieth-century economist and sociologist were alive today, he would undoubtedly argue that only under the rarest of circumstances do human actors act in a *logical manner*, and that most human behavior is nonlogical in nature. Perhaps the only clear-cut examples of logical behavior would be the person in the market place attempting to maximize payoff, and the scientist in the laboratory attempting to explore a scientific problem. Most behavior results from "sentiments" hidden deep within the psyche of

10. J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 71 (1967).

11. *Id.*

12. See D.V. PARETO, *THE MIND AND SOCIETY* (1935).

the organism which produce behavior tendencies (residues), which must be "explained" or justified (derivations). The theory suggests that we act, make a decision, etc., and justify (explain) *after the fact*.¹³

Pareto goes beyond the individual decision maker and looks at law itself in somewhat the same vein:

A lesser error, but still quite a serious one, is to assume that court decisions in a given country are made in accord with its written laws. The constitutions of the Byzantine emperors were often a dead letter. In our day, both in Italy and in France the written laws of the civil code may supply at least an approximate picture of practical legislation; but the penal code and its written laws do not in the least correspond with practical decision, and the divergence is frequently enormous. We need say nothing of constitutional law. There is no relation whatever between theory and practice, except in the minds of a few silly theorists.

A practical fact is the result of many other facts, some of which give rise to theories and may therefore be learned through them. Take, for example, a penal decision following the verdict of a jury. Distinguishable among the factors entering into such a sentence are the following: (1) Written law—the part it plays in criminal cases is often insignificant. (2) Political influences—in certain cases very important. (3) Humanitarian inclinations in judges and jurymen—these are knowable from humanitarian theory and literary sources. (4) Emotional, socialistic, social, political, and other inclinations on the part of jurymen—all knowable from theories and literary sources. (5) The general notion common to all despotisms, whether royal, oligarchical, or democratic, that law does not bind the "sovereign," and that the "sovereign" may substitute personal whims for enacted law. This notion, too, is knowable through theories. In our day it is the fashion to say that "what we need is a 'living' law," a "flexible" law, a law that "adapts itself to the public conscience." Those are all euphemisms for the caprice of the individuals in power. (6) Numberless other inclinations, which are not perhaps generally inoperative, but which may chance to be preponderant in the minds of the twelve individuals—usually of no great intelligence, no serious education, no very high moral sense—who are called upon to serve on juries. (7) Private interests of the citizens in question. (8) The temporary impression made upon them by some striking fact—so after a series of startling crimes juries are inclined to be severe for a time.

In a word, it may be said that court decisions depend largely upon the interests and sentiments operative in a society at a given moment;

13. See *id.* 171-230.

and also upon individual whims and chance events; and but slightly, and sometimes not at all, upon codes or written law.¹⁴

On the question of rationality in the legal decision-making process: Professor Hawkins might be accused of somewhat understating the matter when he says that ". . . it is quite possible that the image of the rational, calculating introspective decisionmaker can be over-extended, and it is necessary to contemplate the possibility that many kinds of legal decisions can be made without being logically thought through, because they are made on impulse, or because they are made in conformity with 'normal'—if often intellectually unexplored—ways of deciding matters." The same sort of reservation concerning rationality in the decision-making process has been raised in the literature on complex organizations, and perhaps the most important statement has been made by such writers as Cyert,¹⁵ March,¹⁶ and Simon.¹⁷ Two "models" of man (decision maker) are put forth: First, the "rational" decision-maker who is able to make rational calculations and rational decisions once he has decided upon his goals; and, second, the "intendedly" rational decision-maker who *attempts* to be rational; but his limited capacities and the limited capacities of the organization (or structure) prevent anything anywhere near complete rationality. What, then, does the intendedly rational man do in the process of trying to make a decision? In contrast to the "rational" decision-maker, who seeks to *optimize* his payoff, that is, to formulate the best possible decisions, the *intendedly* rational decision-maker is willing to *satisfice*, that is, to make a decision which is a reasonably adequate one with respect to a particular issue. In other words, he is willing to settle for a decision that would work, and he is both unwilling and unable to conduct a long laborious search for the "one best alternative."

It would appear that it would be worthwhile to consider to what extent the satisficing model might be relevant vis-a-vis both the adjudicative and the negotiational sectors of the decision-making process. As is suggested in Professor Hawkins's paper, negotiation most likely plays a more crucial role in the higher reaches of the judiciary than might generally be recognized.

In the same general context, Professor Hawkins confronts us with a rather interesting issue when he states that ". . . it is still empirically rather unclear how legal rules affect discretion," etc. Can we perhaps agree with the position put forth by Professor Karl Weick when he argues¹⁸ that organizations are not the tight, rationally contrived structures that they are usually construed to be, especially by authors of administration texts? He argues via the idea of "loose coupling" that rationalized procedures are indeed rather rare in real organizations, and that organizations are composed

14. *Id.* at 278-281.

15. See R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963).

16. *Id.*; J. MARCH & H. SIMON, *ORGANIZATIONS* (1959).

17. *Id.*; H. SIMON, *ADMINISTRATIVE BEHAVIOR* (2d ed. 1957).

18. K. Weick, *Educational Organizations as Loosely Coupled Systems*, 21 *AD. SCI. Q.* 1-19 (1976).

of units and processes which maintain their own identity, are semi-independent, being only loosely related to one another. The implication of this argument is simply that there is much going on in an organizational setting that is *not* consciously and directly under the control of some rational controlling mechanism, that the organization is not characterized by its component parts existing in "lock-step" relations with all other parts. This image of organizations in general, and, perhaps, legal decision-making in particular, would force one to wonder whether in a given case outcomes are really intended by organization/system leaders, or, as Weick puts it, actions are really the result of intentions. Thus, if Weick be correct, much that takes place is not the result of willful intent, but the result of the fact of "loose coupling." Perhaps there would be some utility forthcoming if we would try to identify "loose coupling tendencies in the legal decision-making mechanism, as Weick has tried to do with respect to the educational sector.

The rationalistic and naturalistic models of legal decision-making: To some extent, the nature and faults of the rationalistic decision-making model have already been addressed in this paper, and perhaps the most significant judgment forthcoming is that it is not a terribly accurate representation of the real world. In the general development of sociological theory, the rationalistic type is sometimes equated with the use of a scientific methodological orientation (positivism or neo-positivism) as opposed to a "humanist" orientation. All of this of course evokes an image of society which suggests that, although things do go wrong and unfortunate things occur, there is order, stability, pattern, and such can be perceived and comprehended via the senses. Much of contemporary sociological theory, particularly that of the Parsonian and/or functional persuasions, has followed this particular logic, and has been criticized, mainly by the conflict school, for embracing an image that patently distorts reality.

Turning to the *naturalistic* type of legal decision-making, one might begin by inquiring further into the nature of that perspective. Professor William Catton obliges us by providing us with a set of criteria with which it can be determined whether a given approach is indeed naturalistic in nature:¹⁹

1. A study is naturalistic only to the extent that it asks questions whose answers depend on sensory observation (with the aid of instruments when necessary). Thus naturalism stresses "objectivity"—in the sense that the conclusions of a study are subject to corroboration in parallel research by other investigators.
2. A study is naturalistic only if it seeks to explain given phenomena by reference to data that are or could be available prior to (or at least concurrently with) observations of the phenomena to be explained. It must shun outright teleological explanation.

19. W. CATTON, JR., FROM ANIMISTIC TO NATURALISTIC SOCIOLOGY 5 (1966).

3. A study is naturalistic only if it considers change, rather than continuity, to be the problem requiring explanation. This third element of naturalism may be called the "axiom of inertia."
4. Finally, a study is naturalistic only if it posits no "unmoved movers"—i.e., never explains a change in terms of something that does not itself change. One of the distinguishing traits of certain forms of animistic thought has been the adherence to the unmoved mover concept.

To a considerable degree it could be argued that the general conception of the organization developed by Professor Weick discussed earlier also might be considered to be a naturalistic model.

Professor Hawkins, however, chooses to focus not so much on theories pertaining to structures, but rather upon naturalistic interpretations of human behavior. In particular, he is suggesting that the *phenomenological* and the *ethnomethodological* orientations come close to capturing the reality of the legal decision-making process. These two approaches might be considered to be a reaction against the excessive distortions of reality perpetuated by the rationalistic model. Taken together, one would have the analyst "bracket" all metaphysical and epistemological presumptions, to get at the "essence" of the actor's perception of his world, to ascertain the meanings attributed by actors to the world, and to identify those techniques developed by actors to facilitate an understanding of the world.²⁰ Focusing more specifically upon ethnomethodology, Poloma states that, "Put simply, the ethnomethodologist is concerned about how . . . people make sense of their everyday world. The ethnomethodologist is concerned about the way persons ascribe order or pattern to their reality."²¹

Professor Hawkins is asserting that a major means of achieving an understanding of the legal decision-making process is to try to comprehend how legal decision-makers *do* go about making sense of their everyday world, and that the phenomenological/ethnomethodological approaches might be useful in such an endeavor. Whether either strategy taken individually, or both together, can "deliver the goods" is of course still a matter of considerable conjecture, but, at least, one or both may provide a first step, theoretically speaking.

A more traditionally minded sociologist might ask at this point whether a formulation developed by the great German social scientist Max Weber might be a more useful way to understand the legal decision-making question. In his discussion of how the analyst *comprehends* sociological data, he argues that such can be done on two levels: the level of *causally adequate understanding* (*erklären*), and understanding on the level of meaning. Causally adequate understanding (which is reasonably close to the rationalistic model)

20. For a discussion of phenomenology and ethnomethodology, see J. TURNER, *THE STRUCTURE OF SOCIOLOGICAL THEORY* 393-421 (rev. ed. 1978).

21. M. POLOMA, *CONTEMPORARY SOCIOLOGICAL THEORY* 181 (1979).

is described by Weber the following way: "An interpretation of a sequence of events is causally adequate if careful observations lead to the generalization that it is probable that the sequence always will occur in the same way."²² Secher, in the introduction to his English translation of Weber, further elaborates this position when he notes that "A causally adequate interpretation is achieved when the probability of a recurrence of a phenomenon under the same circumstance is empirically determined."²³

Understanding on the level of the *meaning* is seen by Weber to involve two dimensions: the understanding of subjective meaning of another's act (*deuten*), and the understanding of *motive* (*verstehen*). Understanding on the level of meaning appears to come quite close to the naturalistic mode of comprehending the legal decision-making process. However, Weber is not content just to provide us two modes of understanding: *adequate comprehension must involve both* causally adequate understanding, and understanding on the level of meaning. In Weber's own words,

A correct causal interpretation of typical action means that the process which is claimed to be typical is shown to be both adequately grasped on the level of meaning and at the same time the interpretation is to some degree causally adequate. If adequacy in respect to meaning is lacking, then no matter how high the degree of uniformity and how precisely its probability can be numerically determined, it is still an incomprehensible statistical probability.²⁴

As Nicholas Timasheff points out, ". . . the most adequate explanation in terms of meaning has no causal significance if there is no proof of the probability of the action in question; at best it remains a plausible hypothesis."²⁵

The views of Max Weber presented above might therefore have something to say to the issue raised by Professor Hawkins: the dichotomy between the rationalistic and the naturalistic approaches. Perhaps there is some way to reduce the dichotomy in favor of a *rapprochement* between some of the elements of the rationalistic and the naturalistic orientations. How to achieve such is certainly beyond the scope of the present paper; even Max Weber was unable to supply a totally suitable solution to the problem he addressed.

On Professor Hawkins's views concerning statistical decision theory: Professor Hawkins argues that the use of statistical decision theory is not so much inappropriate as premature. The present writer would heartily agree with Professor Hawkins, and would be joined by numerous other sociologists who have the same sentiments. Some prominent nineteenth-century theorists,

22. See N. TIMASHEFF, *SOCIOLOGICAL THEORY: ITS NATURE AND GROWTH* 172 (1967) (quoting Weber).

23. M. WEBER, *BASIC CONCEPTS IN SOCIOLOGY* 17 (H. Secher trans. 1972).

24. M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 99 (T. Parsons ed. 1947).

25. See N. TIMASHEFF, *supra* note 22, at 178.

including Georg Simmel, voiced misgivings about placing too much emphasis upon the statistical approach in general. Perhaps the most important recent statement is to be found in Professor Lewis A. Coser's presidential address before the American Sociological Association in 1975; in discussing the training of sociologists, he made the following observation:

There is at least some evidence that we tend to produce young sociologists with superior research skills but with a trained incapacity to think in theoretically innovative ways. Much of our present way of thinking as well as our system of rewards for scientific contributions encourages our students to eschew the risks of theoretical work and to search instead for the security that comes with proceeding along a well traveled course, chartered though it may be by ever more refined instruments of navigation. . . . Too many enthusiastic researchers seem to be in the same situation as Saint Augustine when he wrote, on the concept of time, "For so it is, Oh Lord, My God. I measure it but what it is I measure I do not know."²⁶

In conclusion, the present writer has attempted to demonstrate how the issues raised by Professor Keith Hawkins in his paper on legal decision-making might be to some degree illuminated by a sampling of theories drawn from the complex organizational, sociological, and economic sectors. Although in some cases these theories do not completely "fit" the legal situation, perhaps a consideration of such would provoke questions which otherwise would not be asked, and insights which might not otherwise emerge. As noted much earlier in this paper, legal decision-making is a social endeavor, and not just an exercise in logic. After all, as Justice Holmes stated in *The Common Law*: "The life of the law has not been logic: it has been experience."²⁷

26. L. Coser, *Two Methods in Search of a Substance*, 40 AM. SOC. REV. 692, 693 (1985).
27. O. HOLMES, JR., *THE COMMON LAW* 1 (1881).

