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THE INTERPRETIVE METHOD IN THE STUDY OF LEGAL DECISION-MAKING

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I. INTRODUCTION

The study of decision-making by individuals, small groups, and informal organizations has become a reasonably well developed field of social science research on the legal process. At one level, formal decisions are the basic output of the legal system; they arise from claims, affect rights and duties, and reflect rules or norms.[1] At another, informal level, the core of the legal process is defined by the decisions of "street-level officials"[2]—the police, inspectors in regulatory agencies, prison guards, staff specialists of all kinds—who as Schuck aptly states are ". . . awash in discretion"[3] and who because of the system of rewards and incentives they live under tend to act ". . . *without regard to where the balance of social costs and benefits lies.*"[4] Formal decisions often reflect what these officials do rather than the objective, calculated application of "facts" to general rules. An understanding of the penumbrae of decision-making at the informal level, therefore, is of considerable significance for policy formation and implementation. At the risk of over-simplification, it is possible to identify two fundamental approaches to the study of decision-making, each of which has important implications for this effort.

One focus with a long tradition of productive inquiry is concerned primarily with specifying the conditions that produce "bounded rationality" in decision-making—constraints inherent in the complexity of problems that limit the capacity to process information and define alternatives.[5] In the other focus, decisions may be studied within an interpretive framework which assumes that what is most important is how key actors impute meaning to the decision task and the way such "ideological" understandings influence outcomes.[6] Both of these approaches are equally valid, and the choice of perspective is a function of what interests the researcher. They imply that decision-making in legal institutions—such as the police, courts, parole

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1. L. FRIEDMAN, THE LEGAL SYSTEM 25 (1975).

2. *See* M. LIPSKY, STREET-LEVEL BUREAUCRACY (1980).

3. P. SCHUCK, SAVING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 66 (1983).

4. *Id.* at 76.

5. *See* J. March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, BELL J. OF ECON. (Fall 1978).

6. D. PARIS & J. REYNOLDS, THE LOGIC OF POLICY INQUIRY 166-201 (1983).

boards, prosecutional departments, and regulatory agencies—is embedded in a complex organizational context;[7] bureaucratic and political factors interact to complicate an ideal model of intended rationality in which decisions are the result of purposive choice and clearly ordered objectives. Goals are viewed as problematic and part of the inquiry; one cannot safely assume a single, agreed upon objective that governs action.

Although functions and settings clearly differ, commentators generally recognize that decision-making tasks in legal institutions are defined by a particular symbolic structure. In judging individual cases, decision-makers often are confronted with the need to demonstrate adherence to what Gusfield has termed the "utilitarian metaphor," the idea that decisions are rational to the extent that they are based on a fundamental belief in deterrence and assessments of the moral character of the individual facing judgment.[8] Organizational constraints may limit the capacity of a legal institution to project this symbol, exposing decision-makers to charges of arbitrariness and inconsistency. As March has stated: "It is hard to show the linkage between decision and outcome. Thus legitimacy often depends on the appropriateness of the process as much as it does on the outcomes."[9] An essential aspect of research on legal decision-making involves an analysis of the way a basic conflict is played out between the need to confirm public symbols about law enforcement and internal, bureaucratic imperatives.

The interpretive,[10] or social constructivist[11] method views decisions as the outcome of "systems of meaning that emerge and develop within the social structure to provide understanding of the social world. . . ."[12] Applied to the study of legal institutions, this perspective is concerned with the way shared values influence the meaning of evidence, rules, procedure, and goals. Keith Hawkins has provided a comprehensive and insightful illustration of this approach applied to parole board decision-making.[13] The method and analysis complement other major work which has focused on the regulatory process.[14] His essay in this colloquium demonstrates that the study of legal decision-making is not simply a matter of isolating criteria that affect predictions about future behavior, nor is it a matter of evaluating clear

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7. *See* SELZNICK, LEADERSHIP IN ADMINISTRATION 17 (1957). The term "institution" is appropriate to research on legal decision-making because in the study of formal organizations, this concept denotes the particular values that influence the technical, rational requirements of the task. *See also* W. Astley & A. Van de Ven, *Central Perspectives and Debates in Organization Theory,* 28 AD. SCI. Q. 264 (1983) (institutions "embody a response to vested interests residing in their environments").

8. J. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS 115 (1981).

9. J. March, *Decision-Making Perspective,* in A. VAN DE VEN & W.F. JOYCE, PERSPECTIVES ON ORGANIZATION DESIGN AND BEHAVIOR (1981), at 232.

10. *See* D. PARIS & J. REYNOLDS, *supra* note 6, at 180.

11. J. PFFEFFER, ORGANIZATIONS AND ORGANIZATION THEORY (1982).

12. *Id.* at 9-10.

13. Reference is to Dr. Hawkins' essay in this colloquium.

14. K. HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION (1984).

alternatives on the basis of objective facts. Rather, the process is inherently reflexive and ambiguous: reflexive because the ongoing relationship and interaction between parole board and prison authorities demonstrably affects the interpretation of official, formal reports; ambiguous because decision preferences are inconsistent and subject to change, and because there is no clear-cut, accepted theory that defines the relationship between a prison "career" and behavior on the "outside." The Hawkins study, then, appropriately is characterized by Clifford Geertz's elegant description of the interpretative method in the study of law: "It is a matter of talking about irregular things in regular terms without destroying thereby the irregular quality that drew us to them in the first place . . . a most irregular business."[15] This article analyzes several of the central themes in Hawkins' presentation of the "irregular business" of understanding decision-making in legal institutions: the concept of "decision frame;" the prominence of particular frames in decision-making; the generalizability of the analysis to other legal settings, particularly regulation; and, in conclusion, several implications of this approach for normative theory and policy design.

II. The Nature of "Decision Frames"

An understanding of this concept is central to Hawkins's essay and provides an innovative theoretical perspective for the analysis of parole decision-making. As an organizing construct, it is suggestive of further theoretical development rather than conclusive or inclusive. The idea of a "decision frame" is an example of what is termed a "sensitizing concept" in ethnographic research following the interpretive method. Such concepts are meant to guide further analysis, and, by definition, lack initial specification and precision: "Sensitizing concepts are an important starting point, they are the germ of the emerging theory and provide the focus for further data collection."[16]

A "decision frame" is defined as "the structure of knowledge, experience, values and meanings which the decision-maker shares with others and brings to a choice;" "a master code which shapes, typifies, informs and even confirms the character of choices."[17] There is a degree of ambiguity in

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15. G. Geertz, Local Knowledge: Further Essays in Interpretive Anthropology 224 (1983).

16. M. Hammersley & P. Atkinson, Ethnography Principles in Practice 180 (1983).

17. Hawkins, *supra* note 13 at 1191. "Decision frames" are at times dramatically revealed in formal decisions such as judicial opinions. Consider the following from two cases concerned with food and drug regulation in which the "decision frame" reflects a strongly paternalistic view of the consumer. In U.S. v. 62 Packages Marmola Prescription Tablets, 320 U.S. 43 (1943): "The Federal Food, Drug, and Cosmetic Act was not made for experts, nor is it intended to prevent self-medication. The purpose of the law is to protect the public, the vast multitude which includes *the ignorant and unthinking and the credulous* who, when making a purchase, do not stop to analyze." Also in U.S. v. Dotterweich, 320 U.S. 282, (1943): "Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit

this definition, in the term decision-maker. As Hawkins points out in discussing "the locus of authority" for decision-making, institutional settings differ in terms of whether decisions are made by a single actor or collectively.[18] The parole boards under study are formal institutions of decision-making consisting of official members who act through individual vote or group interaction. A significant "process" in the parole setting is the way values and meanings of individual members interact with those of other members and evolve over time. Without some focus on this dynamic, one assumes that the decision-maker employing a particular frame is a group construct, an ambiguity which poses a problem concerning the appropriate unit of analysis in explanations of how cases are treated and interpreted.[19] The meaning and utility of the decision frame concept remain incomplete unless the analysis specifically addresses the way individual meanings coalesce into shared systems of interpretation.

In a concept related to that of "frame," Diesing has argued that a "decision-making structure" must have what he terms the characteristics of "differentiation" and "unification" if it can be said to exist at all.[20] Differentiation refers to the extent to which the process provides for the presentation of diverse values, norms, and options; unification is defined as the underlying process whereby these elements become integrated or remain in tension. There are clear normative implications in this aspect of the definition of decision frame. For present purposes, it is sufficient to note that the degree of "differentiation" or "unification" in a parole board can be a significant influence on decision outcomes. The interaction among key actors is an important influence on the substance of a decision frame. As one author has stated in a general analysis of decision-making in administrative law:[21]

> The process of interaction among the participants in a decisional process seems likely to influence the choice, by each participant, of

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commerce, rather than to throw the hazard in *the innocent public who are wholly helpless.*" (cited in E.R. PARISER, ET AL., FISH PROTEIN CONCENTRATE: PANARA FOR PROTEIN MALNUTRITION 102 (1978) (emphasis in original).

18. Hawkins, *supra* note 13, at 1171-73.

19. In organization theory this is the familiar individual vs. collectivity issue: is behavior properly conceived as an aggregate of individual decisions, or in terms of the structure of the decision-making entity, or both? As Astley and Van de Ven state:

> [O]rganizational parties are both independent actors and involved members of a larger collectivity. On the one hand, they act autonomously so as to maximize their chances of obtaining whatever goals they seek individually, apart from those of the collectivity. On the other hand, they adhere to unifying patterns of cultural and social order as they take on responsibilities as part of a larger social entity.

W. Astley & A. Van de Ven, *supra* note 7, at 263-4. This issue poses a fundamental question: Is the "decision frame" a "collective" construct or an individual one which incorporates images of the norms adopted by the group and organization?

20. P. DIESING, REASON IN SOCIETY 170 (1962).

21. D. Gifford, *Decisions, Decisional Referents and Administrative Justice*, LAW AND CONTEMP. PROB. (Winter, 1972).

> the referents which will underlie his decisions. . . . [T]his interaction process seems to have both dynamic and stabilizing dimensions in the sense that it may affect the information upon which each decision-maker acts and it may reinforce a natural inclination on the part of each decision-maker to repeat prior solutions.

The centrality of this dimension of interaction is further underscored by other concepts in Hawkins' definition of a decision frame. The idea of a "master code," for example, connotes a system of shared meaning that is larger than the sum of the individual decision-makers. Similarly, the notion that a decision frame serves to "confirm the character of choices" implies an underlying dynamic that produces conformity—a process whereby individuals rationalize and justify deviant viewpoints without serious negative consequences. Again, this suggests that one cannot fully grasp the theoretical impact of the "decision frame" concept construct without some explicit analysis of the interaction among individual decision-makers.

Studies of organizational decision-making indicate that decisions often serve strategic purposes.[22] These studies view the process as a ". . . continuing conflict in preferences among various actors."[23] The question arises as to how a similar dynamic defines in part the nature of interaction among parole board members and between the board and the prison. One result of this interaction may be the development over time of an accepted set of "rules of the game"—a relatively stable ideology which submerges open conflict and dissent. From this perspective, a decision frame would evolve into what Brown has termed an "organizational paradigm," a system of implicit rules that determines relevant and irrelevant information in decision-making.[24]

In conceptualizing the idea of a decision frame, it is important to maintain a clear distinction between the "world views," or ideological perspectives of decision-makers and organizational factors in a particular situation. In legal decision-making these perspectives include beliefs about the culpability of violators, the efficacy of the law in proscribing behavior or providing incentives for desired conduct, and the purpose of the legal institution within the system of criminal or civil justice. The process by which organizational constraints influence cognitive judgments in individual cases has been outlined by Emerson in an analysis of the plea-bargaining phenomenon. He notes that while decision-makers frequently define the problem as one of caseload pressure, plea bargaining in actuality reflects a collective judgment made by attorneys and judges about the "worth of a

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22. On the relationship between strategy and the use of information in organizations, March states: "[I]nformation is an instrument of consciously strategic actors. Information may be false; it is always serving a purpose. . . . Thus information is itself a game. . . . [M]eaning is imported to messages on the basis of theories of intention that are themselves subject to strategic manipulation." J. March, *supra* note 9, at 217.

23. J. March, *supra* note 5, at 595.

24. *See* R.H. Brown, *Bureaucracy as Praxis: Toward A Political Phenomenology of Formal Organizations*, 23 AD. SCI. Q. (1978).

case."[25] Thus the way decision-makers perceive constraints—formal and informal policies and workloads—is an important component of a decision frame. By studying such interpretations one can arrive at a deeper understanding of how decisions are made.

To the extent that decision frames incorporate perceptions of exogenous factors such as caseload effects, they reveal that the decision-making process corresponds less to the ideal model of calculated rationality and more to what has been termed "posterior rationality." According to March, the idea of posterior rationality involves the discovery of intentions, or goals, by decision-makers after the fact ". . . as an interpretation of action rather than as a prior position."[26] Resource problems and organizational demands can be used to justify discrepancies between actions taken and symbols of what ought to have been done. The "goal" of the decision in such instances becomes the "need" to conform to the demands of a caseload, given certain resource constraints, and to demonstrate the legitimacy of this action. As Emerson observes, "[S]howing how caseload 'pressures' have necessitated the 'inappropriate' disposition of a particular case, the agent provides a good reason for the action that has been taken and hence established its rational character."[27] Resources and workload demands affect the way an individual case will be categorized—for example, as serious or non-serious, trivial or worthy of time and effort.[28] These factors are thus indirectly part of a decision-frame, yet also exogenous, objective conditions that should be clearly identified in an empirical description of the decision-making process. They can create a discrepancy between the interpretation of what should happen to a case and what is ultimately decided.[29] Similarly, formal and informal policies that determine the allocation of available resources are significant dimensions of the process. It could be hypothesized that an analysis of such organizational factors would be particularly important in explaining the similarities and differences in decision-making across parole boards. This would provide a useful contextual framework for understanding the general interpretive themes in Hawkins' essay.

The interpretive focus poses unique problems of explanation, several of which are illustrated by the decision-frame concept. One such issue is suggested by the question: Why does a particular frame predominate at a particular time in decision making? To explore this further, one can examine in some detail the principal "decision frame" in the Hawkins analysis, namely that parole decisions are influenced by interpretations of the impact of decisions on the management of the prison. As Hawkins states: "It is as a problem of organizational management . . . that overcrowding is regarded

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25. R. Emerson, *Holistic Effects in Social Control Decision Making*, 17 LAW AND SOC'Y REV. 441 (1983).

26. March, *supra* note 5, at 593.

27. Emerson, *supra* note 25, at 442 (emphasis in original).

28. *Id.*

29. *Id.*

with greatest concern. It is a widely-held belief in the prisons—one which parole-board members are well aware of—that an overcrowded institution causes problems of control."[30] In posing this question, I recognize that basic tenets of an interpretive research design may be compromised by implying that events can be easily explained by a single factor. This is not my purpose and to do so would be an injustice to the complex empirical relationships illustrated by Hawkins' analysis of the parole decision-making process. The following discussion is intended in the spirit of Diesing's use of the concept of a "pattern model of explanation," in contrast to the familiar deductive model in social science which argues for the development and specification of general laws of action. In describing the former, he states as follows: "The objectivity of this sort of model and of the explanations based on it lies not in any one component but in the whole. . . .[31] [A] pattern is rarely if ever finished completely. The model builder always has loose ends to work on, points that do not fit in, connections that are puzzling."[32]

The "organizational management" frame occurs within an objective reality of external pressures on prison growth.[33] The centrality of this variable is indicated by Hawkins's argument that: "Whether or not there remains a means of discretionary early release in the form of traditional parole, questions about managing the penal system will have to be resolved in practice, *for its priorities transcend the particular penal philosophy ostensibly in operation.*"[34] Notwithstanding this general context, however, one wonders why the factor of institutional control is so predominant and pervasive. For example, does the fact that parole-board members primarily rely on prison officials for information about individual cases make it important not to be perceived as unconcerned about the needs of these officials. If so, it may become increasingly difficult to "trust" the data on which parole board members must rely to make determinations.

The general issue is whether a "norm of reciprocity"[35] can be said to characterize the process by which parole decisions are responsive to the goals of prison officials. How does the parole decision-making process, as viewed by board members, benefit, if at all, from a general display of concern for the problem of institutional control? From this perspective, it could be hypothesized that decision-making occurs within a system of mutual expec-

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30. Hawkins, *supra* note 13, at 1235.

31. P. DIESING, PATTERNS OF DISCOVERY IN THE SOCIAL SCIENCES 154 (1971).

32. *Id.* at 164.

33. *See* R. Berk et al., *Prisoners as Self-Regulating Systems: A Comparison of Historical Patterns in California for Male and Female Offenders*, 17 LAW AND SOC'Y REV. 580 (1983) (recent study of the history of parole in California provides important validation for significance of "organizational management" frame). This research found that parole-release decisions were used to regulate the flow of prisoners and argued that this, in turn, most likely was related to concerns about the need to maintain control inside the prison. *Id.*

34. Hawkins, *supra* note 13, at 1237 (emphasis added).

35. *See* A. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. (1961).

tations that serves to reduce uncertainty, but also creates perceived obligations.[36] Another hypothesis concerns the role of professional ideologies in the decision-making process. Shared professional values, for example, have been found to be an important factor in explaining the dominance of pro-protection goals and programs in occupational health and safety regulation.[37] Thus, the definitions of a case can be said to reflect common professional orientations. Hawkins notes this variable in an assessment of one state parole board, "Madison," that was particularly sensitive to the problem of institutional control. The Madison board consisted primarily of members who had had professional careers in the penal system.[38] Even if this is not the case, however, it is plausible that the nature of the parole board function is such that there would be a considerable affinity between the values of board members and those of prison officials in the criminal justice system. As noted previously, it is the accounts of prison officials that provide parole boards with the basic data members use to judge cases. A prison career is presented selectively to a board; in this sense, a complex history is "bracketed"[39] by prison authorities, and it is these segments, together with explicit and implicit evaluations, that assign a particular meaning to a case.

Another hypothesis follows from the fact that it is difficult for parole decision-makers to rationalize decisions in individual cases on the basis of objective, accurate predictions about parole effectiveness. In situations of uncertainty, a decision-maker needs to elaborate a framework that can serve as a justification for the exercise of discretion, the purpose of which can be to absolve the decision-maker of direct responsibility. One function of "looking inward" to the needs of the prison, rather than "outward to the community"[40]—a utilitarian view oriented to the outcome of a decision—is that "looking inward" allows the decision-maker to legitimate decisions in terms of an exogenous variable, namely, the requirements of prison officials. The consequences of parole decisions do not have to be justified according to an ambiguous cause-effect model of parole recidivism.

Still another hypothesis is that decision-makers are able to adopt the "organizational frame" because parole as an area of law enforcement is not subject to external, public demands associated with the utilitarian model. The potential of parole failure is not considered a serious political threat by decision-makers. Board members, however, may be quite sensitive to criticisms that they are not responsive to conditions of overcrowding which could result in charges of violating rights and prison instability. From another perspective, it can be argued that because there is no widely validated utilitarian model linking inmate offense with behavior and successful reha-

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36. *See* C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY 52 (1965).

37. *See* S. Kelman, *Occupational Safety and Health Administration,* in J.Q. WILSON, THE POLITICS OF REGULATION 52 (1980).

38. Hawkins, *supra* note 13, at 1200.

39. K.E. WIECK, THE SOCIAL PSYCHOLOGY OF ORGANIZING at 130 (1979).

40. Hawkins, *supra* note 13, at 1198.

bilitation, basing decision-making on moral evaluations serves system maintenance needs. This is particularly evident when the problem of institutional control stems from overcrowding. The idea that decisions are made by determining who is good and who is bad projects an image that parole decision-making is fundamentally rational—a process that systematically sorts inmates into those who can profit from release and those who are not susceptible to rehabilitation. At the same time, actual decisions can be made in response to imperatives of institutional control. We can assume from the Hawkins study that organizational constraints are equal in importance to estimates of the probability of recidivism in parole decisions. Yet a theme in other studies of the law enforcement process is that, while choices are made in response to such system constraints, they also are meant to reinforce certain symbols. Two key symbols include demonstrating a concern for consistency in decisions—treating like cases alike—and for individualized justice. Hawkins rightly points out that "the interests of systems management take precedence over the interests of personal liberty as well as over the interests of punishment."[41] Arguably, however, the ordering must occur within another significant context of the process—one defined primarily by these symbols of law enforcement.[42]

An important aspect of Hawkins' analysis, which the "organizational frame" illustrates, is the nature of the interaction between the parole board and prison officials. Presumably prison authorities can be quite explicit about problems of overcrowding in communicating criteria in support of the desirability of release. In other cases prison officials might signal the importance of denial in order to help legitimate control over the inmate population. What is striking is the relative unconcern of parole decision-makers about the adverse effects of a wrong decision—the released offender who proceeds to commit crimes in the community. Risk aversion in parole decision-making appears to be controlled by the assumption that the perceived costs of a wrong decision to release are less than the perceived costs of a wrong decision to deny parole. This contrasts with the findings of an earlier comparative study of the reasons for granting and denying parole in Kansas, Michigan, and Wisconsin which found that decisions to deny parole were made in response to perceptions of negative community attitudes:[43]

> Parole boards are often reluctant to release assaultive offenders despite their own estimate of the high probability of parole success. One reason for this is the board's concern for the safety of the community—that while the probability of recidivism may be low,

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41. *Id.* at 1237.

42. *See* T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) (classic work on this theme, particularly Chapter VII, *Law Enforcement); see also* M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964).

43. *See* R. Dawson, *The Decision to Grant or Deny Parole,* 3 WASH. U. L. Q. (1966), *reprinted in* B. ATKINS & M. POGREBIN, THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW (1978) at 380.

> the seriousness of the violation, if it occurs, is likely to be great. But another reason for the board's reluctance to release assaultive offenders is its concern about adverse public reaction if the offender violates parole in a spectacular manner.

One reason for these contrasting themes may be the finding by Hawkins noted previously that release frequently is conditional on a "contract" for future good behavior. A contract for future good behavior legitimates release because the decision can be justified by a period of exemplary behavior. Additionally, board members can use this behavior as a basis for predicting future good conduct and rehabilitation.

Decision frames arguably are a function of the particular history and politics of the times. Messinger and his colleagues have pointed out the significance of history in an insightful study of the institution of parole in California.[44] In summarizing the California experience, they conclude as follows:[45]

> . . . inquiries into the development of penal reforms must be alert to changes over time in the problems of the organizations they serve. Adopted to deal with complaints about justice, parole was turned 15 years later to the relief of prison crowding—a use continued into the 1970s. . . . This development created still further problems, including the felt need for a revised justification of parole. As the supervisory apparatus grew, those responsible for it began to understand, or at least talk about, parole in a new way and to adopt justifications for it keyed to their experiences and interests. In time parole came to be represented as a rehabilitative program.

This analysis illustrates the dominance of different "decision frames" at various points in the history of parole decision-making. Such research illustrates the value of combining historical analysis with an interpretive framework based on an observational methodology that, unfortunately, is often constrained to a specific, narrow period in the life of a decision-making institution. A combination of methods can provide insight into a problem identified at the conclusion of the Hawkins' essay: "One of the major tasks for those interested in legal decision-making is to understand why and in what circumstances decision-makers accord changing priority to competing decision frames."[46]

Historical studies reveal the way decision frames reflect exogenous political forces. With this perspective, the basic outlines of a theory of decision frames can be discerned. Such a theory would include the central hypothesis that the decision-making process can be characterized as an ongoing conflict among external demands on decision-makers (the use of parole

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44. *See* S. Messinger et al., *The Foundations of Parole in California*, 19 LAW AND SOC'Y REV. 69 (1985).

45. *Id.* at 103, 104.

46. Hawkins, *supra* note 13, at 1242.

to regulate prison size), professional values that focus on the purpose of law enforcement (rehabilitation vs. retribution), and the requirements of the system (efficiency and institutional control). The next section of this article discusses several of these ideas in the context of a comparison between parole and regulatory decision-making.

III. Parole and Regulatory Decision Making

The Hawkins essay draws attention to important parallels between parole decision-making in the penal system and decision-making in regulatory enforcement. The discussion implies that the process of legal decision-making involves three critical tasks that are generalizable to most legal institutions: first, deciding whether or not to "create" a case—to invoke the formal legal system in connection with an investigation; second, choices imposed by the "career" of a case as it moves through the law-enforcement system; and finally, decisions relating to the issue of when to remove a case from the system. The "glue" binding these tasks together is derived from a principle of the interpretive method: Decisions at any one stage are, in part, a function of perceptions and beliefs about what key decision-makers did and will do at the other stages. It is in this sense that legal decision-making is properly considered a seamless web of action and reaction—a "decision" does not only exist at a particular time; it must be viewed in terms of a socially constructed history and future.

The parole and regulatory settings are both complex mixtures of what Reiss has termed "compliance" and "deterrence" models of law enforcement.[47] They are compliance-oriented because of the emphasis placed on efforts to monitor the behavior of violators in the interest of preventing future harm. This goal exists alongside a deterrence system which is designed to impose penalties for past conduct. In the case of parole, conflicts arise when it is believed that punishment should be meted out to deter future misconduct and, at the same time, decision-makers attempt to create incentives for future compliance—this is illustrated by the bargaining process described in the Hawkins study. Regulatory decision-making produces a similar dilemma because the need to negotiate a future state of compliance exists within a system of criminal justice that formally mandates the use of sanctions to punish past and deter future violations. This situation can cause considerable role confusion among regulatory officials. The compliance and deterrence models provide a useful conceptual framework which underscores the role of assumptions about enforcement tasks in decision frames. As Reiss and Biderman have noted in defining compliance regulatory enforcement:[48]

> Even where compliance seems to fail more often than it succeeds, such as in housing code enforcement or in the release of offenders

47. *See* A. Reiss, Jr., *Selecting Strategies of Social Control Over Organizational Life*, in K. Hawkins & J.M. Thomas, Enforcing Regulation 24 (1984); A. Reiss, Jr. & A. Biderman, Data Sources on White-Collar Law-Breaking (1980).

48. Reiss & Biderman, *supra* note 276-77.

> for probation or parole, compliance continues to be the operating assumption because of a belief that behavior or conditions can be changed by "acts of compliance." Failure in these cases, more often than not, rests in the fact that these operating assumptions of tracking and direct monitoring either cannot be fulfilled, that they are in some sense not enforced, or that they are otherwise enforceable. Failure may also be due to a fault in the presumption that the behavior or conditions of violation can be changed by acts of compliance.

Although sharing characteristics as compliance systems, parole and regulatory institutions of legal decision-making also differ in significant ways. One important difference stems from the fact that the regulatory agency and potential violators—firms—are both complex bureaucracies. As a consequence, the decision frame of agency officials is complicated by perceptions and beliefs about the underlying causes of violations. At one extreme, the regulatory decision-maker may see the firm as a unitary, rational actor involved in an amoral calculation of the costs and benefits of violating the law. At the other extreme, behavior is viewed as caused by the failure of management procedures; the interpretation of a violation is a direct function of an image of the firm as an information system in which it is difficult to isolate both intent and accountability.[49] The decision-making task of effecting compliance is further complicated by the fact that the individual firm as violator exists in an inter-organizational environment. The consequences of this situation for the decision process in antitrust regulation have been identified by Gabel and Beckenstein:[50]

> [T]he rewards of corporate violations, such as price-fixing actions, are a function of relationships among competitors. Significant rewards arrive only from coordinating multi-corporate strategies. Therefore, understanding the offense requires that the decision maker's motives be analyzed in the context of external corporate relationships as well as internal corporate environments. Abstract analysis would be easier and more realistic if the manager and his or her risk preferences could be treated in isolation. Unfortunately, while the separation of ownership and control is a reality of modern corporate life, complex interrelationships among the managers, the corporate hierarchy, and the corporate environment are equally real.

In the parole setting, on the other hand, we know relatively little about the way in which the prison as an organizational system "creates" cases that must be formally addressed by the parole board. We know less about parole

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49. *See* R. Kagan & J. Scholz, *The Criminology of the Corporation and Regulatory Enforcement Strategies,* in HAWKINS & THOMAS, *supra* note 47, at 40.

50. *See* A. Beckenstein & H. Gabel, "Organizational Compliance Processes and the Efficiency of Antitrust Enforcement" (1980), unpublished paper presented at 1980 annual meeting of the Law and Society Association.

boards—less, for example, about the role of specialized staff and management procedures in guiding cases through the system, or whether states differ in terms of the use of bureaucratic procedures. Do parole boards at all approximate formal organizations? Is there a sense in which they have a hierarchical structure? A division of labor? The fact that regulatory agencies are complex formal organizations introduces technocratic criteria into the decision frames of regulation. An emphasis on the role of standard operating procedures as a means of implementing "bureaucratic rationality" competes with questions of value and moral judgment in the decision-making process.[51] As a means of attaining efficiency goals, the regulatory process is subject to a distinct set of policies that specify the way information is to be gathered and analyzed. In recent years, this has increasingly taken the form of requirements that formalize the process, including analytic techniques such as cost/benefit analysis, risk assessment, and optimization methods.[52] A focus on the utility of these approaches can be said to differentiate the decision-making process in regulation from that in many other legal institutions. In general, it can be argued that an emphasis on such formal methods can lead to the neglect of other equally significant kinds of information for decision-making. Brewer and DeLeon have argued, for example, that policy analysis should not be the sole basis for the selection of a decision alternative:[53]

> [I]deological and technical information must be reconciled. Ideological information refers to the thoughts, feelings, attitudes and conduct of human beings: technical information refers to the material and measurable aspects of an issue. Any policy goals, the decision or decisions reached in its pursuit, and the consensus sought to justify the choices will have ideological and technical elements intertwined.

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51. *See* J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 26 (1983). Professor Kimbrough's comment in this colloquium, *supra,* also discusses this issue.

52. *See* C. Diver, *Policy-Making Paradigrams in Administrative Law,* 95 HARV. L. REV. 393. Similarly, Gifford has noted the importance of cost analysis and program planning as key "decisional referents" for agency officials. *See supra* note 21, at 16:

> The relevance of cost analysis and program planning is that once the agency's resources are allocated by program, many agency decisions and especially those with major budgetary impact will be reached in the light of their cost and the agency's program plan. Whether to proceed by rule or by adjudication in connection with particular kinds of undesirable conduct, whether to proceed through precisely formulated rules issued in advance or to proceed by restructuring objectionable transactions, whether to issue complaints in certain categories of cases are all questions whose discussion within the agency and resolution by the agency will, or should, use cost analysis and the agency's programmed budget as referents. In order properly to decide a particular issue such as a complaint-issuance or effectively to argue within the agency for or against a particular resolution of such a decision, an agency official would have to be familiar with the grounds upon which that decision should or would be reached.

53. G. BREWER & P. DELEON, THE FOUNDATIONS OF POLICY ANALYSIS 182-183 (1983).

Another significant difference between the parole and regulatory settings concerns the structure of decision-making tasks. Within the penal system, the parole board has primary responsibility for interpreting evidence about cases, and, subsequently, the imposition of sanctions or the granting of parole. The granting of parole also triggers a system for observing the behavior of released offenders, a process analogous to that in regulation when an inspectorate attempts to monitor compliance with standards. Unlike tasks in the parole setting, however, these tasks in the regulatory setting are bracketed by two other significant decisions: First, considerable discretion as to which of a large array of potential targets should be subjected to an investigation; and, second, the fact that regulatory decision-makers consider the possibility of sending a case to another legal institution—prosecution—if efforts to bargain for, or negotiate, compliance fail. Both of these areas of discretion can exercise considerable influence over the task of deciding what evidence is relevant, what inferences should be made, and what legal actions should be taken.[54] The regulatory enforcement process is frequently governed by perceptions of how prosecutors in a different bureaucracy might treat a case; and the process also is affected by a prior resource deployment process which, in effect, led to the creation of the case. In addition, there usually is a blurred distinction between responsibility for creating a case and the exercise of discretion about final disposition. Parole-board members, in contrast, are constrained by a heavy reliance on the documentation and representations made by prison officials; as decision-makers they play a limited role in case creation in the prison.

A third important difference between decision-making in parole and in regulation is that the context of the latter frequently has included considerable formal interest group activity. Regulatory policy in the United States has been heavily influenced by the demands of organized interest groups who define decision-making in terms of their potential gains and losses and who seek a substantive role in the process.[55] In general, the external politics of the regulatory process can have a direct impact on decision-making. A case in point is the experience of the Occupational Safety and Health Administration (OSHA) several years ago with the notorious Kepone issue, a crisis which severely tested that agency's ability to cope with an acutely adversarial political environment.[56] Prior to 1975, OSHA had developed and implemented an explicit set of rules designed to control caseloads—in effect, a formal policy governing the decision-making process in substantive cases. In part, the policy stated that complaints would not be responded to if they did not come from a current worker in a plant or the union. The complaint

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54. C. Diver, *A Theory of Regulatory Enforcement,* 28 PUB. POL'Y 283 (1980).

55. *See* R. NOLL & B. OWEN, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS (1983) (useful collection of case studies that analyze role of interest groups in decision to deregulate).

56. C. Diver, "OSHA B: Targeting Inspections," case study in the Public Policy Curriculum Materials Development Program (1981) at 3.

about the problem of Kepone, a toxic pesticide that had caused the death of a number of workers, came from a former employee of its manufacturer and was not investigated. This resulted in considerable political pressure on the agency with the result that OSHA instituted a revised "decision-making" policy that gave equal priority to all complaints regardless of source. The effect of this on the decision-making process, however, was rather dramatic. A 1978 study found that in 80 per cent of the complaints investigated under the revised policy there were no violations of any OSHA standards.[57] This episode illustrates the profound effect that political pressures resulting from criticism of decision-making policy can have on the decision-making process. The Kepone disaster led to a dramatic drop in proactive, or programmed, inspections and a huge backlog of complaints. Such external pressures can have an impact on the way an inspector defines and interprets an investigative situation: whether or not to "create" a case; judgments about culpability; and professional attitudes about the purpose of the law.[58]

A major premise of the interpretive method is that the researcher should adopt what Hart has termed the "internal" point of view[59] and attempt to understand the beliefs and values that govern action. The "internal" perspective contrasts with that which would define the process solely in terms of coalition formation, political forces, or cognitive limits on information. As Nonet points out, such an "external" research paradigm is "unable or unwilling to grasp the *reasons* that institutional actors have for behaving the way they do. From that point of view the observer reads out of existence the system of norms by which persons guide, justify, and evaluate their actions."[60] This suggests that the decision-making process can be analyzed within a conceptual framework that identifies the fundamental value choices in legal decisions. For analytic purposes, three such dilemmas can be posited:

1. *Moral judgment vs. instrumentalism:* This issue focuses on assumptions about the purpose of law and the legal process in social control. It views the decision-making process as a complex judgment of, on the one hand, the culpability of the violator and the harm to society of behavior, and, on the other, a determination of the most efficient means of effecting desired behavior. Friedman's analysis of "price rationing" and "moral, ideological" theories of the role of the legal system provides a useful framework for understanding this dilemma.[61] The former is a purely instrumental perspective and reflects the belief that law should influence behavior by imposing prices; proscribed acts are best discouraged through appropriate penalties. In contrast, the moral viewpoint is based on "an approach that

57. *Id.*

58. *See* Emerson, *supra* note 25. Thus, in the regulatory setting external political demands affect case load pressures which, in turn, affect the interpretive process in individual cases.

59. H.L.A. HART, THE CONCEPT OF LAW (1921), cited in Nonet, *The Legitimation of Purposive Decisions,* 68 CALIF. L. REV. 269 (1980).

60. *See* Nonet, *supra* note 59, at 269 (emphasis in original).

61. L.M. Friedman, *Two Faces of Law,* 1984 WIS. L. REV. 13.

treats law not as a kind of Sears, Roebuck catalogue of goods and prices, but as a book of moral precepts, a history of norms and values, a set of propositions, each tagged with some degree of ethical worth. . . . The level of sanctions is considered, therefore, not as an indicator of price, but as an index of degrees of moral assessment."[62]

These two theories coexist in the decision-making process of parole boards. There are cases not at the "margin," when it is relatively clear that an individual should be evaluated from a moral perspective. In these instances, the board interprets the gravity of the act as a basis for evaluating the meaning of a "ticket" for institutional misconduct.[63] In marginal cases, however, the importance of maintaining an equilibrium of institutional control enters into the decision process. Here, cases are bargained—inmates are offered what is, in effect, bilateral contracts when the consideration on the part of the authority is the implicit promise of release within a specified time frame and the consideration on the part of the prisoners is good behavior. The system, in other words, specifies a clear price for future conduct; but it is also a decision that, for the moment, withholds making a decision about release based upon moral evaluations of past acts. In this sense, bargaining, as it does in all situations, reflects a compromise among interests, rather than an authoritative statement about a right or privilege. As stated previously, however, this analysis does not deny the reality of the management of public symbols in decision-making.[64] It can be hypothesized that the interest of the institution in maintaining an equilibrium of control rarely will be offered as an explicit rationale for a bargain. As Friedman rightly argues, such concepts "are not what the legal system 'really' is. . . . The categories are, first, categories of relationships between surface appearances and working realities. If you ask why we should be concerned with surface appearances, the answer is, they are clues to social forces, including cultural ones."[65] Regulatory enforcement differs from parole decision-making in the use of the moral category because, first, regulatory officials often don't believe in attaching the moral precepts of the criminal law to violations;[66] and, second, because sanctions that can pose a credible "price" for the failure to live up to compliance "contract" frequently are illusory.[67]

2. *Simple vs. complex views of the decision problem:* A second issue, related to evaluations of the culpability of the violator, is concerned with explaining how a decision-maker defines the context of a problem. Arguably, legal decision-makers bring to the task a set of beliefs about the cause of a violation that influences the evaluation of information and decision outcomes. An example is Muir's study of the predisposition of police officers

62. *Id.* at 16.
63. Hawkins, *supra* note 13, at 1204-05, 1218.
64. *See supra* note 42 and accompanying text.
65. L. Friedman, *supra* note 61, at 22.
66. K. Hawkins and J. Thomas, *supra* note 47, at 6.
67. K. Hawkins, *supra* note 14.

to apply the "tragic" or "cynical" perspective to individual cases.[68] The tragic perspective presupposes a "complex causal" pattern as the basis for blameworthiness; the cynical view, in contrast, finds fault to be a simple matter of the personal choice of the individual.[69] Both are ways of making sense of the human condition. While issues of culpability enter into other decisional situations—for example, judgments about the personal responsibility of welfare clients or employee motivation—they are basic to legal decision-making. This is true of the parole board setting when for a variety of reasons decision-makers assume that prisoners should and can be responsible for their own behavior in the system, particularly when the decision is rationalized and made contingent on a future period of exemplary behavior.[70]

Judgments about the responsibility of "clients" for problems are an important component of the way officials rationalize decisions. In the parole setting, decision-makers are put in the position of having to confirm an ideology of self-determination on the part of inmates. As Goffman states in his analysis of the nature of total institutions such as prisons, the management ideology of these institutions must assume inmates have the capacity to change their attitudes and behavior:[71]

> Although there is a psychiatric view of mental disorder and an environmental view of crime and counterrevolutionary activity, both freeing the offender from moral responsibility for his offense, total institutions can little afford this particular kind of determinism. Inmates must be caused to 'self-direct' themselves in a managerial way, and, for this to be promoted, both desired and undesired conduct must be defined as springing from the personal will and character of the individual inmate himself, and defined as some thing he himself can do something about.

Similar assumptions readily are apparent in regulatory law enforcement when views about the underlying motives of business firms can influence the decision to "find" a violation.[72] In housing-code regulation, it has been found that inspection style varies depending on assumptions made about the responsibility of tenants vs. landlords, and the extent to which inspectors interpret non-compliance as a reflection of socio-economic conditions, personal vindictiveness, or the self interest of tenants or landlords.[73] Assumptions about culpability that influence an interpretation of the responsibility for acts are related to the first issue—the dilemma of moral judgment vs. instrumentalism. If an official defines the role of the legal process from a

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68. W.K. MUIR, JR., POLICE: STREET CORNER POLITICIANS (1977).

69. *Id.* at 179.

70. Hawkins, *supra* note 13, at 1226-27.

71. E. GOFFMAN, ASYLUMS 86-87 (1961).

72. R. Kagan & J. Scholz, *supra* note 49, at 68.

73. *See* H.L. Ross & J.M. Thomas, "Blue-Collar Bureaucrats and the Law in Action: Housing Code Regulation in Three Cities" (1981), paper presented at annual meeting of Association for Public Policy Analysis and Management, Washington, D.C.

moral perspective, assumptions of change through self-responsibility and the goal of compliance may be less evident. In contrast, the "price-rationing" model assumes deterrence, the capacity to change behavior and achieve compliance if a proper system of incentives can be designed and implemented.

3. *Procedural justice vs. system maintenance:* It is clear that an important frame of reference for decision-making in legal institutions derives from the fact that, on the one hand, there are pressures to provide individual justice through due process and equal treatment for like cases and, on the other, to be responsive to the management needs of the system. The latter concern is based upon the recognition that a legal system is comprised of interdependent institutions and is appropriately characterized as a production line when the decision outcomes of one institution provide the inputs to another.[74] The problem of justice follows logically from the symbolism of formal rationality in decision-making, when it is expected that decisions in individual cases will be grounded in general rules faithfully applied to specific cases. From this perspective, it can be argued that a basic difference in the decision frames of legal institutions is the extent to which the decision-making process is governed by the need to avoid threats to legitimacy.

In the regulatory process, for example, the avoidance of threats to legitimacy has been found to be a major influence on agency behavior.[75] The Hawkins study of parole decision-making indicates that legitimation is important because of the desirability of displaying consistency and rationality, but even more so because of the organizational management concerns of prison officials. In the absence of direct, organized political pressures on the parole board, its decisions either are legitimated or criticized through their impact on the need for prison officials to maintain authority and control. In regulation, elaborate rules have frequently been instituted to implement a "decision frame" defined by interest group participation that supposedly will institutionalize procedural justice.[76] Indeed, the regulatory decision-making process can be characterized as an explicit conflict between the value of participation and the objective of implementing economically efficient policies designed to cope with managerial problems.[77] In the due-process debate in administrative law, particularly welfare rights, the decision process has been aptly characterized as one of "interest balancing" and involves difficult questions such as: "Can the dignitary costs of individuals and the administrative costs of government, for example, be measured in the same currency?"[78] This dilemma contrasts with that of parole decision-making when organizational management concerns appear to be more salient than the requirements of procedural rationality.

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74. C. Diver, *supra* note 54, at 280.

75. J.Q. Wilson, *supra* note 37, at 378.

76. *See* R. Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. (1975).

77. R. Reich. *Warring Critiques of Regulation,* Regulation, January-February, 1979, at 38.

78. J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 47 (1985).

Another difference between the decision frames officials utilize in the regulatory process and parole concerns the nature of interdependent relationships in the law enforcement system. As Hawkins observes, there is a process of implicit collaboration between prison officials and parole decision-makers as the latter appear to be acutely sensitive to the organizational management concerns of the former.[79] In regulatory enforcement, when agency officials make decisions on the basis of predictions about what prosecutors will do with cases, the situation can be more adversarial than collaborative. This can affect the viability of strategies for improving the performance of regulating inspectorates. As Diver has argued:[80]

> An agency's inability to control any single important actor in the enforcement process weakens its capacity to control the others. . . . Investigative personnel naturally attempt to anticipate prosecutors' preferences in allocating their time and attention. A material incompatibility between those preferences and the formal behavioral controls exerted on the investigators undermine those controls.

Similarly, the housing code enforcement study cited previously found that inspectors may be hesitant to send cases to housing court because of adversarial encounters with judges who either consider inspectors incompetent or believe that housing code cases should not be part of the criminal justice system.[81] Reiss and Biderman have noted the importance of this general area of inquiry for future studies of the organization and use of information systems by regulatory agencies: "Of particular interest would be an examination of how the discretionary processes of an agency in selecting cases for output to another information system compare with those of other sources."[82] The structure of parole decision-making is such that boards cannot formally control who appears before them; however, it is clear that prison officials indirectly influence the disposition of cases through an information system they control and which, in turn, defines the quality of parole "cases."

The foregoing discussion suggests that individual, ideological, and organizational factors interact to produce decision frames. A common theme in a variety of legal institutions is the way competing values in these three dilemmas are central to the decision-making process. The first concerns basic assumptions about the purpose of the law; the second, judgments about how and why a decision problem exists; and the third is an assessment of whether to adopt rules of procedure that may compete with administrative requirements. Surrounding each of these issues is the theme of managing the "game" of decision-making in law enforcement. A single-minded response to a particular ideological view or organizational imperative may create a

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79. Hawkins, *supra* note 13, at 1198.
80. C. Diver, *supra* note 54, at 294.
81. H.L. Ross & J.M. Thomas, *supra* note 73, at ____.
82. A. Reiss, Jr. & A. Biderman, *supra* note 47, at 454.

problem of legitimacy: The perceived failure to live up to public, symbolic expectations of what the decision-making process is supposed to accomplish.

IV. Conclusion: Policy Implications

The major policy implications of the Hawkins essay can be discussed in terms of the utility of so-called "predictive" studies and the nature of rationality in decision-making.

Predictive studies attempt to correlate decision outcomes with policy consequences. Applied to parole decision-making, this type of research analyzes the relationship of variables such as past behavior and the seriousness of offense to judgments of release or denial, and, in turn, the effects of decision outcomes on recidivism. While predictive studies represent a common—some would say dominant—research paradigm in the field of criminology, the method is generalizable to other fields of law enforcement. For example, one might analyze the effects of various independent variables as criteria for determining violations in order to predict future compliance with regulatory standards.[83] In criminology, the argument over the validity and utility of predictive research has become quite heated. Wilkins has recently criticized a report of the Canadian Law Reform Commission opposed to predictive studies because, the report concluded, predictive judgments necessarily are based on probabilistic analysis, thus posing serious ethical issues of liberty:[84]

> This kind of argument is absurd on more than one count. In the first instance it is based on a false logic. The issue is not whether we may know the past with more precision than we may estimate the future; the issue is the quality of the decisions that we can make. . . . Those who reject predictive analyses for projection are stating that better decisions would be made if the qualities of the available data were *not* fully exploited or that more appropriate decisions can be made with regard to offenders if a restriction is set upon the issues of information.

This reaction clearly illustrates the normative issues which inevitably enter into the debate over method in the study of legal decision-making.

Predictive studies illustrate the positivist tradition in social science research. There is an emphasis on the formation of precise hypotheses and the operationalization of variables. Quantitative methods of analysis are employed that utilize multivariate statistical techniques which enable the researcher to assess the interactive effects of independent variables on outcomes and consequences. While these requirements pose formidable problems, it is short-sighted to argue that this type of methodology has no contribution to

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83. *See* C. Veljanovsky & P. Burrows, The Ecomonic Approach To Law (1980).

84. L. Wilkins, *The Politics of Prediction,* in Prediction in Criminology 40-41 (D.P. Farrington & R. Tarling, eds., 1985).

make to the study of decision-making. As Wilkins points out, such studies do not involve "merely statistics"[85]; statistical evidence, by definition, incorporates estimates of probability and the relevant models include error terms. It is also not the case that the methodology is limited intrinsically because it cannot account for the complexity of the process. Factors that attempt to explain relative contributions to variance in the decision process can be incorporated into models.

Hawkins takes certain of these studies to task for presuming a single, unitary goal: "[P]arole boards are in the business of predicting who will be risky prisoners to release and accordingly releasing the less risky while holding the more risky. . . ."[86] Such a criticism generally is warranted and has been leveled persistently at social science research which attempts to assess the impact or effectiveness of law. Two points concerning methodology should be noted: First, the positivist research framework can be of value in understanding why and how decision-making bodies deviate from formal, normative goals; it can do so, if properly conceived, by using aggregate data to demonstrate patterns and variance. Second, the positivist framework can account for the assessment of a variety of goals in decision-making. Conceptually, it is possible for models to include variables which attempt to specify norms that have been adopted by the key administrative units who are responsible for decision-making in individual cases.[87]

More basic problems with the positivist approach to predictive studies have been identified by Hawkins in his assertion that "essentially they are atheoretical."[88] To the extent that research fails to include analysis of the "black-box" transforming inputs to decisions into outputs, it fails by definition to be concerned with the messy world of how decision-makers define reality, the influence of symbols and ideology, and the problematic nature of information. In the regulatory setting, for example, this can lead one to neglect the value of an interpretive perspective for understanding the disagreement and conflict among scientific experts charged with the formal responsibility for making decisions about standards. Breyer provides a valuable illustration in his analysis of the problems of utilizing expert panels to "screen" new drugs.[89] Panalba was an antibiotic which had the sole virtue of having a combination of ingredients, thus making it easier for physicians to prescribe a drug without having to make a detailed, accurate diagnosis in each case. The government's scientific advisory panel gave Panalba an ineffective rating because, as Breyer points out: "The scientists believed that doctors *should* make precise diagnosis and use antibiotics more precisely designed to fit the disease. A different panel with more practicing physicians

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85. *Id.* at 42.

86. Hawkins, *supra* note 13, at 1182.

87. L. Wilkins, *Policy Control, Information, Ethics, and Discretion*, in L.E. ABT & I.R. STUART, SOCIAL PSYCHOLOGY AND DISCRETIONARY LAW 55 (1979).

88. Hawkins, *supra* note 13, at 1186.

89. S. BREYER, REGULATION AND ITS REFORM 142 (1982).

and fewer academics might have been swayed by the claim that what matters is what doctors *will* do, not what they *should* do."[90] In general, it is becoming increasingly apparent that policy research aimed at improving the regulatory process must focus on the assumptions that agency decision-makers make about the regulated. Efforts to implement a deterrence-oriented enforcement policy will be less than successful if regulators simply assume that regulated firms are rational actors.[91] And the research enterprise seems even more complex when the reflexive, game-like quality of the decision-making process is realized. It has been argued, for example, that, in antitrust enforcement, firms will adopt compliance behavior that involves the "strategic use of ambiguity" in direct response to the use of this same approach by the regulatory bureaucracy.[92]

These themes highlight the obvious: Positivistic models may be useful to the extent that they are combined with interpretive research which probes the complexities of the decision process. The fault with many positivistic studies would seem to be their hesitancy to adapt "thick," ethnographic descriptions of the task, organizational constraints, and "decision frames" to the requirements of operationalization. As Hawkins further points out, the useful data in studies of decision-making is not only what can be coded from case files.[93] The danger of assuming this is illustrated graphically by Hawkins' analysis of the way information from inmate files is actually used in parole decision-making. The "file" reflects an extremely complex interpretive history of the offender's prison career. Thus, the "language" of presentation in files is of considerable significance, although this is a relatively unexplored area of interpretive sociological research on decision-making. It might be hypothesized that the language of these files tends to minimize, or sanitize, the role of power and adversarial relations in prison careers, and, in contrast, portrays the extent to which the inmate is "benefiting" or not benefiting from conformance to the system. As Edelman points out, language is symbolic and can blur the essential adversarial quality of interaction in institutions such as prisons.[94] The interpretive method highlights the extent to which it can be dysfunctional to rigidly conceptualize decision-making as "the pursuit of conclusive fact and proof."[95]

The policy implications of research on legal decision-making also follow from the fact that legal institutions ideally embody procedural values associated with the allocation of rights and benefits. Justice is considered the yardstick of decision- making activity. Issues arise over the amount and type

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90. *Id.* at 143 (emphasis in original).

91. *See* Diver, *supra* note 54, at 266-267; Kagan & Scholz, *supra* note 49, at 71.

92. *See* Gabel & Beckenstein, *supra* note 50, at 15.

93. *See* Hawkins, *supra* note 13, at 1186.

94. M. EDELMAN, POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL 134-135 (1977).

95. *See* D.K. COHEN & C. LINDBLOM, USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM-SOLVING 81 (1979).

of discretion to grant decision-makers.[96] This has resulted in a variety of recommendations to limit discretion, policies which, in fact, reflect a "narrow legalistic conception of 'decision.' "[97] The implications of interpretive studies of the decision-making process, however, are quite different. The interpretive method would base policy recommendations on an understanding of the way the *problem* of discretion is defined by decision-makers, posing questions such as: Why is discretion in a particular context labeled "arbitrary" and "capricious"? Does the disparity in outcomes in similar cases reflect a consistent pattern? What is it about the nature of problems as viewed by decision-makers, that results in a particular outcome? As Gusfield states: "[T]he object of study is not a set of conditions; it is the activities of people who perceive conditions as problems."[98] This perspective may or may not lead to policies which modify procedure in an attempt to control discretion.

Policy-oriented research on decision-making has frequently been based on a model of calculated rationality. It is generally assumed that improved decisions can result from a greater specification of measurable goals, and a precise mapping of the causal relationships among factors which affect goals. The Hawkins analysis of the nature of the decision-making process illustrates how difficult it is to validate such a model. Legal decision-making is not simply a set of rational calculations about the costs and consequences of violators or violations, but rather the social construction of action. Decisions are not a logical response to a problem "out there" that one can describe objectively.[99] In order to improve decision, either procedurally or in terms of implementation and consequences, it is necessary for inquiry to focus on how problems are defined—how the issues which create the need for a decision are a matter of values embedded in unique organizational and political settings. It is in this sense that it is not easy to define a logical policy role for socio-legal research on decision-making. Perhaps the most

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96. *See* K. DAVIS, DISCRETIONARY JUSTICE (1969). Recent assessments of the administrative process, reviewing various interpretive studies, have concluded that it may not be desirable always to attempt to limit discretion. *See* Baldwin & Hawkins, *Discretionary Justice: Davis Reconsidered,* PUB. L. 580 (1984).

97. *Id.* at 582.

98. J. Gusfield, *On the Side: Practical Action and Social Constructivism in Social Problems Theory,* in STUDIES IN THE SOCIOLOGY OF SOCIAL PROBLEMS 40 (J.W. Schneider & J.I. Kitkuse, eds., 1984).

99. *See* K.E. Weick, *supra* note 39, at 169. This implies what Wieck has termed the "enactment perspective" in the theory of organizational behavior. Applied to the study of decision-making, this framework focuses on the subjective nature of decision tasks and organizational realities; how beliefs and values influence perception and "transform" the decision environment so that it conforms with those beliefs and values. An important implication of this process, according to Wieck, is that issues of what is true or false, or correct and incorrect, become less relevant than what is reasonable. The policy implications for more effective decision-making are indicated by his argument that "endless discussions of questions about whether we see things the way they really are, whether we are right, or whether something is true will be replaced by discussions that focus on questions such as what did we do? What sense can we make of those actions? What didn't we do? What next steps best preserve our options and does least damage to our repertoire? *Id.*

responsible view is that such research should be critical to the extent that it attempts to increase our understanding of the way policy-makers—those in positions of authority—interpret events.