QUESTIONS OF VALIDITY AND DRAWING CONCLUSIONS FROM SIMULATION STUDIES IN PROCEDURAL JUSTICE: A COMMENT

JILL K. ANDERSON
ROBERT M. HAYDEN

I. INTRODUCTION

Pauline Houlden's article explores an often neglected aspect of plea bargaining—the defendant's role in, and perception of, the process. It is a valuable contribution to the plea bargaining literature. Her findings should certainly be considered, along with those of studies using different methodological approaches to similar problems (e.g., Heinz and Kerstetter, 1979; Arcuri, 1975), by anyone interested in modification of the plea bargaining system. However, in making policy recommendations solely on the basis of her own results, Houlden goes beyond what can justifiably be concluded from her data. She is not alone in such overextension; it is common in simulation studies of procedural justice (Sheppard and Vidmar, 1979, is an explicit exception). In this comment we discuss several issues of validity and try to show how failure to consider them affects conclusions drawn from simulation research.

II. SIMULATION RESEARCH AS A METHODOLOGY

Our starting point is Lind and Walker's "Theory Testing, Theory Development and Laboratory Research on Legal Issues" (1979), which discusses the methodological perspective inherent in simulation research. Particular attention is given to its application to a series of studies conducted by John Thibaut, Laurens Walker, and others to test the proposed advantages of the adversary system. This article is particularly appropriate to our examination of Houlden's paper. She participated in many of those experiments, and relies heavily on their theoretical developments and experimental results in her own plea bargaining research.

LAW & SOCIETY REVIEW, Volume 15, Number 2 (1980-81)

Lind and Walker explain that the type of simulation research they are discussing starts with a general theory of legal behavior which contains assumptions and logical derivations that can be examined for internal consistency and are open to empirical testing (1979: 5). Simulation research uses a deductive methodology to test this theory rather than to inductively discover general principles of legal behavior. These studies, then, should be evaluated with reference only to the original theoretical principle they were designed to test.

Lind and Walker make a strong case for the use of simulation experiments in testing theories of legal behavior. However, they are less persuasive when they propose that practical application of the theory comes from applying the theory itself to legal questions (1979: 6). Such applications can be seriously misleading if they are made without considering the limitations inherent in simulation research. Some scholars have disregarded these limitations in drawing conclusions and making policy recommendations on the basis of their findings. The present paper is a case in point. We focus our discussion around problems of sociological, conceptual, and structural verisimilitude. First we explain these terms and their place in simulation research generally; then we discuss Houlden's paper in light of these concepts.

Much discussion and criticism of simulation research has focused on structural verisimilitude. How well does the simulation correspond to the actual form of the institution being investigated? Damaska (1975) and Hayden and Anderson (1979) raise this kind of question concerning the experiments by Thibaut *et al*., which purportedly test the advantages of the adversary system and which are the basis of Lind and Walker's discussion. Lind and Walker (1979) claim that such criticism of simulation research, aimed at its failure to reproduce real-life settings, is invalid, because simulation research is based on a deductive theory-testing methodology. As long as the research design adequately provides for and tests the variables contained in the theory, it does not matter if the design exactly replicates reality. However, simulation research of the type discussed by Lind and Walker and conducted by Houlden does assume at least minimal structural verisimilitude. While Lind and Walker assert that this is basic research, only testing specific theories, many researchers have used their findings to make recommendations for procedural changes and to draw policy implications (see, e.g., Thibaut and Walker, 1978: 122-124; Houlden, 1981: 267-291). Clearly they believe their research

designs simulate real-world settings to a degree. To claim that simulation research cannot be criticized for failing to accurately reflect the real world while using the findings of such research to make policy recommendations is inconsistent.

Structural verisimilitude concerns the relation of a simulation to the institution under study, viewing the latter in isolation. Sociological verisimilitude demands sufficient allowance in the simulation experiment for the role of the institution as a component of a complex social system. It becomes necessary to consider who uses the institution and to what end; what resources (money, knowledge, political influence) actors possess; whether some people are regular participants (e.g. "repeat players," cf. Galanter, 1974), and similar factors. Such issues must be considered before evaluating any "policy implications" of a simulation study or making "recommendations" on the basis of it (see Sheppard and Vidmar, 1980).

Sociological verisimilitude is also concerned with whether the general theory being tested has isolated the correct independent variables and restrictions on the domain of the theory. Lind and Walker argue that restrictions on the domain of the theory will become evident in the course of testing the theory (1979: 8). However, this assumes that those designing the research are sensitive to such restrictions and that other independent variables are not included in the theory. If a variation is not allowed for in the experimental design, it will certainly never show up (see Hayden and Anderson, 1979: 23-24). For example, to use Lind and Walker's illustration and explanation: if the theory of adversariness applies to torts, but not contract disputes, this restriction would appear through theory-testing experiments; in the absence of data indicating such a failure for one type of dispute, the theory should not be limited to specific contests (1979: 8). However, if the theory would not be upheld for contract disputes, but contract cases are never included in the experiments, a conclusion that the tests upheld the theory for all disputes is clearly wrong.

This problem can be overcome in two ways. First, the theory could provide for all independent variables and restrictions on the domain. However, this is obviously impossible in a simulation setting. Second, the results could be presented in such a way as to clearly set out the limitations on the theory imposed by the variables and restrictions actually tested. To return to the above example, rather than reporting that the theory of adversariness was upheld for disputes

generally, if all experiments were conducted with tort disputes, the conclusion would be that the theory was upheld for tort disputes.[1]

Conceptual verisimilitude is concerned with whether the problem and theory under study correspond to a problem as it would be identified from a knowledgeable legal perspective (see Vidmar, 1979: 96). We will return to this in our discussion of Houlden's research, which we will now consider in terms of the criteria outlined above.

III. STRUCTURAL VERISIMILITUDE

From the one description of a plea-bargaining procedure that Houlden presents, and from her discussion of plea bargaining throughout the article, it appears that she worked with a concept of plea bargaining as one or more meetings between prosecuting and defense attorneys solely to work out a settlement for each individual case. The image is of a formal meeting—a distinct, recognizable stage in the criminal process: "the plea bargaining session." But do such sessions really occur? If they do not exist, then Houlden's major policy recommendation—that defendants be allowed "to attend the plea negotiation session and participate whenever they feel that their case would be benefited by their intervention" (Houlden, 1981: 289-290)—is of doubtful utility. If plea bargaining does not take place in the manner in which she describes it, then the modifications she recommends will have no true empirical referent.

Whether "plea bargaining sessions" as viewed in Houlden's article really exist cannot be answered simply. From the rich data on plea bargaining, it is clear that the practices subsumed under that name vary widely by jurisdiction, and perhaps even among courts in a given jurisdiction. Nevertheless, it seems that there are some patterns to plea bargaining that do cut across jurisdictions. Thus, Feeley (1979) notes that what usually happens in some lower courts is not explicit bargaining, with the two sides making proposals and counter proposals. Rather, there is a joint effort by the attorneys to match the offense and the offender with existing, albeit informal, classifications. There are already "set prices" or "going rates"

[1] This, of course, assumes that the fact that it was a tort dispute was the important independent variable. Maybe it was the fact that the experimental case involved people who had no relationship prior to the incident giving rise to the tort that was important, and if the experimental tort case had involved two sisters the theory would not have been upheld.

for most combinations of the two most important factors: prior record and severity of offense. Mather (1979) terms this "implicit bargaining," and reports that she found it in less serious cases. It was her experience that usually only serious cases were the subjects of explicit bargaining, and that even then the negotiations took place "within a well-defined context of typical case outcomes" (Mather, 1979: 121). Knowledge of the definitions used in "implicit" bargaining would probably be essential for effective participation in it. If inmates are not likely to have such knowledge, Houlden's suggestions for applying her research become questionable.

IV. SOCIOLOGICAL VERISIMILITUDE

Houlden's article presents several problems of sociological verisimilitude, but most center on one major issue: the competence of defendants to make use of appearing at the plea bargaining session if they are given an opportunity to do so. Attendance and participation are different activities; we doubt that simply providing defendants with an opportunity to attend the plea bargaining session, if there are constraints on participation, will lead to increased defendant satisfaction. Yet constraints on defendant participation seem to exist. In a field study of pre-trial conferences in Florida, only 19 percent of the defendants who attended made more than five comments in their sessions (as opposed to 25 percent of the attending victims and 88 percent of the police), and only a third of the defendants made recommendations to the court. In fact, "most recommendations were made at the request of the judge and amounted to an expression of approval of or acquiescence in the agreement reached by the professional parties [i.e. the attorneys and the judge]" (Heinz and Kerstetter, 1979: 359). Perhaps it is not surprising that of the nonlawyer participants in these conferences (police, victims, and defendants), defendants—who participated least—were the least satisfied with the process (Heinz and Kerstetter, 1979: 363).[2] These results seem contrary to Houlden's thesis, perhaps because her idea of what constitutes opportunity for defendant participation is quite far removed from the "sociological reality" reflected in

[2] In fairness to Houlden, we should point out that the plea bargaining conferences observed in the Heinz and Kerstetter study involved a judge who could have intimidated the defendants. She also briefly mentions some methodological difficulties with the study, and questions the validity of their conclusions. Even if we accept her criticisms as valid, however, and disregard Heinz and Kerstetter's conclusions as to the satisfaction of the defendants, the lack of defendant participation they observed is still striking.

the field study. The lack of participation of the defendants in that study may account for their relative lack of satisfaction. Houlden does not consider the possible relationship between participation, as opposed to mere attendance, and satisfaction, which could account for the difference in results between the field study and her role-playing[3] simulation.

The implicit bargains described by Mather (1979) are those in which no express promises need be made by either side. All parties involved in the negotiations understand what is standard practice in the type of case under consideration. One of Mather's informants, a sitting judge, gave as a hypothetical example of this type of "bargaining" a case in which the defendant had been charged with three counts. The defense attorney asks if he can "have" (gloss: "plead guilty to") one count. The prosecutor asks which one, and on getting that information, agrees: the defense can have one count. No mention is made of the other two counts or of the disposition of the one count to which a guilty plea will be entered, because everyone involved knows what will happen: the other two counts will be dismissed, and the judge will give his standard sentence (Mather, 1979: 71).

This type of implicit bargaining works because all of the regular participants share an understanding of how the system works, of the explicit and implicit rules governing normal behavior in the particular social process of the court in question. But this type of specialized knowledge is only acquired through repeated participation in this social process over an extended period of time. It seems doubtful that most defendants would have the requisite knowledge to fully comprehend this type of implicit plea bargaining, much less to take part in it. Nor is it very likely that they will be in a better position to comprehend what really is transpiring in more explicit plea bargaining. Feeley (1979: 464-465) observes that the common practice of lawyers in criminal cases is to present a defendant with the "going rate" for the relevant offense, describing it as an exceptionally good deal. The defendant accepts the "deal," believing it to be a bargain, because he does

[3] While we do not wish to enter into the discussion of the generalizability of results based on role playing, Houlden's assertion that "the results of procedural justice [preference] studies obtained using a role-playing methodology . . . were replicated in studies in which subjects actually experienced a conflict resolution procedure" would seem to be an overstatement. The studies she cited in which subjects "actually experienced a conflict resolution procedure" (i.e. Walker *et al.*, 1974; LaTour, 1978) were simulation studies, and thus their results may not necessarily be safely extended to cover real-life situations.

not know any better. This lack of knowledge on the defendant's part makes the model of plea bargaining that Houlden presented to her subjects appear quite unrealistic. Houlden tells the subjects that if they don't like a proposed deal they can reject it—but what criteria will a "real life" defendant have to evaluate the desirability of a deal proposed by his lawyer?

A second possible consideration is based on defendants' probable lack of knowledge of the legal system. A major policy implication of Houlden's research is that defendants should be permitted to attend the plea bargaining session "and participate whenever they feel that their case would be benefited by their intervention." But she does not indicate how a defendant should be expected to reach the conclusion that he can help his case by speaking. Certainly legal "reality" is apt to differ from everyday concepts of reality (see Buckner, 1970), and one way to look at dispute processing is to see it as transforming a dispute into the categories used in the relevant legal forum (Mather and Yngvesson, 1981; Moore, 1977; Comaroff and Roberts, 1977; cf. Llewellyn, 1962). A defendant is not likely to know what those categories are or how they are related to "the facts" (though Galanter's [1974] repeat player might have such knowledge). Concomitantly, a defendant's view of what the relevant facts are in his case may be at variance with the demands of the legal forum (see Kidder, 1974: 26-27). Some observations by Arcuri on "Jailed Defendants' Views of Plea Bargaining" are relevant here. Arcuri interviewed fifty inmates to ascertain their views of plea bargaining:

> Two interesting tactical points emerged from the interviews: several prison-wise defendants who usually had previous convictions reported that they asked their public defender if they could "do better" on a deal, while first offenders reported that they made no mention of "bargaining" and appeared to accept or reject a deal as offered. This suggests that experienced offenders approached "making deals" with a distinct advantage; they know when to ask their attorneys to bargain. First offenders, however, often do not know the informal rules of the game in plea bargaining (Arcuri, 1975: 17).

Defendants may well feel they are not competent to deal with legal professionals, and thus remain silent during all stages of the legal process. However, even if a defendant is dissatisfied with his lawyer's construction of his case, there are still likely to be several obstacles to his attempting to overrule his own lawyer. First is the common psychological barrier often felt by a layman in questioning the judgment of a professional. Even if this barrier is overcome, many

defendants may not want to risk angering their lawyers by seeming to question the lawyer's professional judgment.

There is one area of sociological verisimilitude for which Houlden's article does offer interesting and important data: the question of the influence of the type of informant on data collected. In a significant departure from previous studies on procedural justice, Houlden drew part of her sample of respondents from among a group of prisoners in a Florida county detention center. As these subjects probably had greater knowledge of how plea bargaining really works than did the undergraduate psychology students who made up the rest of the respondents (and who are more typical of the respondents in psychological studies of procedural systems), it is very interesting to see that the responses of the two groups of subjects differed in a number of ways. Because of the limited scope of the experiment, it is not possible to draw precise conclusions about how the type of respondent influences the results in a simulation or role-playing experiment, but the differences in the responses of the inmates and undergraduates in this experiment indicate that more work on this question is necessary. In any event, it is to be hoped that future researchers investigating procedural systems will be as conscientious as Houlden in choosing suitable populations from which to draw their samples of respondents.

V. CONCEPTUAL VERISIMILITUDE

Conceptual verisimilitude is concerned with the relationship between the social scientist's view of a problem and how the same matter would seem from a knowledgeable legal perspective (Vidmar, 1979: 96). From this perspective, Houlden's concept of plea bargaining is unrealistic, as she seems to consider it to be a type of fact-finding procedure involving the presentation of testimony, argument, and a finding of guilt. There are difficulties with the model of plea bargaining used and with the recommendations given.

The problem with Houlden's model of plea bargaining is that by confounding it with fact finding she may have focused on the wrong variables. Drawing on the work of Thibaut *et al.*, she sees the most important variable in defendant satisfaction as the amount of defendant control over the presentation of evidence. Yet *their* work was mainly concerned with adjudicatory processes, and even if such defendant control is critical for determining satisfaction with adjudicatory

processes, it may not be for negotiation.[4] The object of negotiation is not to determine truth or justice, but to get the best deal possible. Evidence may be presented during negotiations, but only to the extent that it increases one's bargaining strength. Evidence, facts, truth, and justice have no intrinsic value for a person engaged in plea bargaining; for a guilty defendant particularly, the correct determination of them is at best irrelevant and probably detrimental. In short, Houlden seems to confuse the function of plea bargaining—making a good deal—with that of a trial—a correct determination of guilt or innocence.

The confounding of negotiation with fact finding also raises problems, from a legal perspective, with Houlden's recommendations for increasing defendant satisfaction by increasing defendant control over the presentation of evidence. The evidentiary process has long been thought to require extensive sets of rules to ensure the veracity of the evidence presented and to protect certain interests of the court, the parties, and society at large. Houlden's recommendations for the reform of plea bargaining, if carried out, would lead to situations where evidence was presented without the benefits of the normal system of procedural safeguards. Such a development could well face problems of constitutionality, or simply of hostility from judges who wish to preserve traditional rules of evidence.

VI. CONCLUSION

The focus of our criticism in this comment is the practice of drawing conclusions from simulation research without adequate consideration of other factors bearing on the object of the study. Laboratory research necessarily involves reducing the complexity of a social situation so that key variables may be controlled. But it is imperative to re-introduce those complexities when drawing conclusions from those experiments. Failure to do this is particularly troublesome when the conclusions lead to the formation of policy recommendations.

But let us end on a positive note. We agree with Lind and Walker (1979) that simulation experiments are of great utility

[4] The study by LaTour *et al.*, (1976) cited by Houlden contains an indication that plea bargaining may be intrinsically unsatisfactory to Americans, as their American student subjects least preferred bargaining as a mode of procedure for an assault case. If this is actually the case, then the utility of trying to increase satisfaction with a basically unsatisfactory procedure can be drawn into question.

in building theories of legal behavior. But policy recommendations must be sensitive to the structural, sociological, and conceptual concerns which we have discussed. The simplified world of the simulation experiment is fine for theory building, but for applied research a multi-method approach is needed (Konečni and Ebbesen, 1979). The ultimate utility of theories can only be judged in studies of real-life situations, and these are infinitely more complex than are laboratory simulations.

REFERENCES

ARCURI, Alan (1974) "The Jailed Defendant's View of Plea Bargaining," 14 *Court Review* 14.

BUCKNER, H. Taylor (1970) "Transformations of Reality in the Legal Process," 37 *Social Research* 88.

COMAROFF, John and Simon ROBERTS (1977) "The Invocation of Norms in Dispute Settlement: the Tswana Case," in Ian Hamnett (ed.), *Social Anthropology and Law*. New York: Academic Press.

DAMASKA, Mirjan (1975) "Presentation of Evidence and Factfinding Precision," 123 *University of Pennsylvania Law Review* 1083.

FEELEY, Malcolm (1979) "Pleading Guilty in Lower Courts," 13 *Law & Society Review* 461.

GALANTER, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Review* 95.

HAYDEN, Robert M. and Jill K. ANDERSON (1979) "On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibaut and Walker," 3 *Law and Human Behavior* 21.

HEINZ, Anne and Wayne KERSTETTER (1979) "Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining," 13 *Law & Society Review* 349.

KIDDER, Robert (1974) "Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India," 9 *Law & Society Review* 11.

KONEČNI, Vladimir and Ebbe EBBESEN (1979) "External Validity of Research in Legal Psychology," 3 *Law and Human Behavior* 39.

LA TOUR, Stephen (1978) "Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication," 36 *Journal of Personality and Social Psychology* 1531.

LA TOUR, Stephen, Pauline HOULDEN, Laurens WALKER, and John THIBAUT (1976) "Procedure: Transnational Perspectives and Preferences," 86 *Yale Law Journal* 258.

LIND, E. Allan and Laurens WALKER (1979) "Theory Testing, Theory Development, and Laboratory Research on Legal Issues," 3 *Law and Human Behavior* 5.

LLEWELLYN, Karl (1962) "A Lecture on Appellate Advocacy," 29 *Chicago Law Review* 627.

MATHER, Lynn (1979) *Plea Bargaining or Trial?* Lexington, MA: D.C. Heath.

——— and Barbara YNGVESSON (1981) "Language, Audience, and the Transformation of Disputes," 15 *Law & Society Review* (forthcoming).

MOORE, Sally Falk (1977) "Individual Interests and Organizational Structures: Dispute Settlements as 'Events of Articulation,'" in Ian Hamnett (ed.), *Social Anthropology and Law*. New York: Academic Press.

SHEPPARD, Blair and Neil VIDMAR (1980) "Adversary Trial Procedures and Testimonial Evidence: Effect of Lawyer's Role and Machiavellianism," 39 *Journal of Personality and Social Psychology* 320.

VIDMAR, Neil (1979) "The Other Issues in Jury Simulation Research: A Commentary with Particular Reference to Defendant Character Studies," 3 *Law and Human Behavior* 95.

WALKER, Laurens, Stephen LA TOUR, E. Allan LIND, and John THIBAUT (1974) "Reactions of Participants and Observers to Modes of Adjudication," 4 *Journal of Applied Social Psychology* 295.