BOOK REVIEW

PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS. By John Thibaut and Laurens Walker. Hillsdale, N.J.: Lawrence Erlbaum Associates, 1975. Pp. vii, 150. $9.95.

Reviewed by Shari Seidman Diamond and Hans Zeisel***

Anglo-American trial procedure has traditionally been labeled as "adversary," in contrast to the "inquisitorial" trial procedures employed on the European continent. *Procedural Justice: A Psychological Analysis*, which is the joint effort of two distinguished scholars—a social psychologist and a law professor—is a bold attempt to determine which of these two systems better serves the purposes of justice. It describes and analyzes a series of laboratory experiments designed to compare "adversary" and "inquisitorial" procedures with respect to their actual and perceived ability to obtain and transmit unbiased information.

The thread which links the studies of the book's three sections is the role of a third party in dispute settlement. The first set of studies focuses on the extent to which a third party should be the decisionmaker; the remaining studies assume a third party to be the final decisionmaker and examine his role as an information gatherer and appraiser under a variety of controlled conditions. The skill of the authors is reflected consistently in the ingenuity of their manipulations and in the care of their controls. Perhaps even more impressive is the pioneering nature of their effort, in that they have empirically explored an area that so far has received little attention. In so doing, the book employs the strength of controlled research to dissect the complex variables of procedural justice and identify their critical components. The authors have also used relevant psychological theory and legal literature in the development of their research, showing a breadth of research that has not generally characterized previous efforts by social scientists in the study of

* Assistant Professor of Criminal Justice and Psychology, University of Illinois, Chicago Circle. Ph.D. Psychology 1972, Northwestern University.

** Professor Emeritus of Law and Sociology, University of Chicago Law School. Dr. Jur. 1927, Dr. Pol. Sci. 1928, University of Vienna.

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legal structures.[1] With a final touch of sophistication, the authors, recognizing that cultural norms may determine preferences in conflict resolution, have conducted replications of their experiments in France, Germany and England.

While the book seeks to inform a dual audience, the effort is not always successful. The social scientist misses tables and graphs, and occasionally a better understanding of the law, while the legal scholar may need a more complete description of experimental procedures. The authors note this problem and point out that the studies were published in more complete form elsewhere;[2] nevertheless, the omissions occasionally are troublesome. This problem is one that is probably common to most of the emerging law and social science literature, but in light of the mutual educative function such writing can serve, redundancy is to be preferred.

The book's first study (chapter two) examines the preferences of litigants for various degrees of third party participation in conflict resolution in the following situations: with and without time pressure for a decision, in the presence or absence of a standard resolution scheme and when the participants were in individual competition or were interdependent. Greater third party control was preferred when there was time pressure, when a standard existed and when participants were in competition rather than interdependent.[3] Results of this first study are presented verbally rather than in numerical form, however, which makes it difficult for the reader to order the statistical results. In view of this problem, the authors decided wisely to alter this form of presentation in chapter three; indeed, all the other studies contain tables or graphs. The preference for greater third party control where the participants have clearly opposing interests was again indicated by a study in chapter three, where a hypothetical contract dispute was used.[4] In addition, mediation (low third party control) was shown here to be less successful in producing settlements where clearly opposing interests are involved than when disputants had more compatible outcome preferences.[5]

The experimental results of these first two studies suggest that litigants will prefer a third party decisionmaker when party interests are competitive. These outcomes are used to set the stage for the ensuing focus on third party decisionmaking in the conflict-permeated territory of litigation. The intended implication is that third party control is justified by the preferences and

1. The research reported in PROCEDURAL JUSTICE was supported mainly by a grant from the Law and Social Sciences Program of the National Science Foundation. The program encourages interdisciplinary work through its funding of scientific research on law and legal institutions.

2. PROCEDURAL JUSTICE 6 n.1.

3. *Id.* 15.

4. *Id.* 20.

5. *Id.* 21.

needs of the litigants. The legal reader may be mystified by this orientation, however, in view of the fact that the overwhelming majority of legal cases involving competitive interests are settled before trial, many without even informal mediation by a judge. The explanation for this apparent paradox is that the rules of the experiment prohibited compromise, the means by which litigant settlement is generally achieved. The authors acknowledge that this prohibition may have reduced the correspondence between their experimental arrangements and the typical bargaining situation, but are apparently satisfied that the deviation is not serious. One ought to be more skeptical. Without allowing bargaining and compromise, the first section (chapters two and three) contributes little to an understanding of the procedures available for resolving conflicts that lead to litigation—the primary focus of the book.

The experiments discussed in the following four chapters simulated the trial framework of the legal system in order to examine the various roles that can be played by the decisionmaker and the presenters of information. Chapters five and six show this type of research at its best. In chapter five, subjects were assigned to a court- or client-centered role by being told either that their financial reward was dependent on their helping the judge to arrive at "as fair and accurate a decision as possible"[6] (a court-centered role) or on obtaining a favorable outcome for their client (a client-centered role). These rewards were simulated through a point system. The participants were also told which role their opposing counsel had assumed. Finally, as they "bought" facts in the case with "points" they had been given (which decreased their compensation), subjects were allowed to discover that twenty-five, fifty or seventy-five percent of the facts favored their side. The authors found first, that client-centered attorneys purchased more facts than court-centered attorneys when only twenty-five percent of the facts favored their client,[7] second, that bias in presentation was higher for client-centered than for court-centered attorneys,[8] and third, that representation bias by client-centered attorneys was lower when they faced a client-centered attorney than when they faced a court-centered attorney.[9]

The authors assert that these experimental results indicate that the client-centered attorney faced with an early unfavorable picture makes a more thorough search for facts.[10] The typical civil attorney or overburdened public defender, however, unlike the experimental subject, has not one but many cases. Will the attorney increase the diligence of his search for

6. *Id.* 31.
7. *Id.*
8. *Id.* 33-34.
9. *Id.* 34.
10. *Id.* 34, 38-39.

favorable facts in an unpromising case? Or will he turn his attention to other cases he has a better chance of winning and try in the difficult case for a good plea bargain or settlement? The subject in this laboratory study was faced with a single case on which to succeed or fail. He may react differently to the likely prospect of failure if confronted with a multitude of cases with varying probabilities of success. One can easily imagine a study in which an attorney-subject is assigned a series of cases and his reactions to an early unfavorable distribution of facts are assessed against this background. It is therefore the design and not the laboratory method that impeaches the finding.

A second result of the research is the finding that evidence presented by the client-centered attorney is less biased when he is confronted with another client-centered attorney, rather than by a court-centered attorney. The authors suggest that higher motivation by the client-centered attorney causes him to misinterpret his facts, seeing them in a more favorable light than is warranted.[11] It could also be, however, that the client-centered attorney assumes that an opposing client-centered attorney will be more likely to bring out those facts—and that the facts will not cause as unfavorable a reaction or be given as much weight if they are admitted at the outset. Criminal defense attorneys often behave this way in front of juries, frequently quizzing their client on his criminal record under direct examination before opposing counsel has the opportunity to cause its disclosure.

In chapter six the authors devised a clever means to investigate the impact of pre-trial bias on decisionmaking in the adversary versus inquisitorial modes. Pre-trial bias was introduced in half of their subjects by reading to them a series of cases which indicated that in the majority of instances the action under discussion was unlawful. The decisionmakers were then presented with fifty brief factual statements concerning the case they were to decide, twenty-five indicating that the action was lawful and the other twenty-five indicating that the action was unlawful. The order of presentation (lawful-unlawful or unlawful-lawful) was also varied, and half the subjects received all facts from a single presenter (inquisitorial) while the other half received the lawful facts from a defense presenter and the unlawful facts from a prosecution presenter (adversary). In addition to finding that the bias condition generally produced more guilty verdicts[12] and that whoever presented his case last had the greater impact ("recency effect"),[13] the authors discovered that the bias condition had a greater effect when subjects heard the evidence in an inquisitorial mode than in an

11. *Id.* 34.
12. *Id.* 46.
13. *Id.* 45, 51.

adversary mode.[14] This interesting finding suggests that the decisionmaker's expectation of bias on the part of adversaries may lead him to discount the presented information. In an inquisitorial system, attributing balance to the information-presenter may leave the decisionmaker less critical and more ready to accept the parties' assertions.

The authors seem to consider this the most important study in the book, since it offers, in their view, empirical support for the claims made for the adversary system by legal scholars like Professor Lon Fuller.[15] Moreover, the findings are consistent with the psychological theories of reactance[16] and attribution.[17] Chapter seven, which examines the effects of changes in the sequence of evidence presentation (weak to strong or strong to weak) and gross order (defense or prosecution first), provides further support for some of the conclusions found in chapter six.[18]

The book's final section assesses the perceptions of participants in the legal process, since the impression of justice is almost as important as justice itself. The study discussed in chapter eight concerns a hypothetical case in which the participants were accused of illegal business espionage. They were either led to believe they were guilty or innocent, or not advised as to their culpability at all. They were then tried under an adversary or inquisitorial system and a guilty or not guilty verdict was reached. Participants and observers were later asked questions about their satisfaction with the proceedings and their perceptions of the procedure's fairness. Both participants and observers indicated that they favored the adversary mode of trial.[19]

A second study in this chapter found that the college student subjects, regardless of whether they were from the United States, England, France or Germany, all preferred the adversary mode of evidence presentation when given the choice of an inquisitorial, single investigator, double investigator or adversary system.[20] Such a preference by residents of countries not using an adversary system is impressive.

Chapter nine attempts to identify the qualities of the adversary system responsible for its appeal in earlier studies. Three elements are identified: first, two attorneys are involved instead of one; second, the attorney is

14. *Id.* 49.

15. *Id.*; Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961).

16. *See generally* J. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (1966).

17. *See generally* Jones & Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219 (L. Berkowitz ed. 1965).

18. PROCEDURAL JUSTICE 61.

19. *Id.* 73-74.

20. *Id.* 78-80.

aligned with the client rather than the adjudicator; and third, the attorney is chosen by the client rather than by the adjudicator.[21] For participants, addition of any of the above elements caused an equal increase in satisfaction.[22] For observers, the only increase was caused by the presence of two attorneys; alignment and selection had no further impact on them.[23]

The study discussed in chapter ten focuses on the role of the judge in an adversary mode by having him assume either a very active or a very passive posture. While the authors expected that participants would report less control over the procedure when confronting an active judge, it was instead discovered that such a condition had no impact on perceptions of justice.[24]

A suggestion by philosopher John Rawls[25] forms the basis for an evaluation of the preferences for various procedural systems, a study which is discussed in chapter eleven. Rawls defined principles of justice as those standards that are preferred by disinterested participants who do not know their own advantages and disadvantages, who are shielded by a "veil of ignorance" from having their sense of fairness colored by their own opportunity for gain.[26] The authors indicate in this study that the adversary mode is preferred by subjects assigned to either side, as well as by those who do not yet know to which side they will be assigned.[27]

The last chapter, chapter twelve, reviews the authors' overall findings and emphasizes their belief that at the heart of questions about procedural justice is the concern for distribution of control between the decisionmaker and the disputants.[28] They conclude with a few illustrations of how their findings might be applied: for example, their findings would support the use of adversarial proceedings in disputed federal disability benefit programs and in hearings on teacher dismissals and student suspensions.[29] The results of their studies are also offered as justification for criticism of procedural rules extending judicial control over litigants.[30] It is in an evaluation of these suggestions for practical application, however, as is often the case with simulated laboratory studies, that the major criticism of the book emerges most clearly. The comparison of laboratory experiments involving college students to the functioning of the real legal world is often strained, and hence can lead to distortions.

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21. *Id.* 82.
22. *Id.* 94.
23. *Id.* 95.
24. *Id.* 100-01.
25. J. RAWLS, A THEORY OF JUSTICE (1971).
26. *Id.* 136.
27. PROCEDURAL JUSTICE 113-15.
28. *Id.* 119.
29. *Id.* 122-23.
30. *Id.* 123-24.

The findings of the third section's experiments where the perceived justice of various legal procedures was tested, hinge on the ability of the student participants and observers to represent the more heterogeneous group of adult citizens. But do the two groups respond in the same fashion? Might not the college-educated group be less willing to give substantial decisionmaking power to a third party? The reader is therefore left wondering whether the findings presented here and in the rest of the book could be replicated with other subjects. To some extent this question can be raised in most controlled social science research, but where the intention is to draw conclusions about procedures that affect a broad constituency, the need for replication with more representative subjects should be stressed.

The authors believe that the confluence of their experimental findings indicates the superiority of the Anglo-American over the continental European system, and it is here that our major reservation lies. To achieve a differential outcome, the authors have contrasted versions of "adversary" and "inquisitorial" modes that differ more than the reality they were designed to stimulate.

The so-called inquisitorial system has of course nothing to do with the inquisition to which it has been linked linguistically.[31] As a matter of fact, the European system is basically adversary; in the criminal courts, prosecution and defense counsel oppose each other, and in the civil courts plaintiffs and defendants contest the issues with the help of their lawyers. In both the adversary and inquisitorial systems it is primarily the lawyers who suggest what evidence is to be presented and in both the judge has the ultimate power to admit or refuse the offered evidence. The difference in the mode of questioning, however, is greater: in the adversary system the lawyers do almost all the questioning, and under inquisitorial procedure the judge does most of it. Once the judge has finished, however, the lawyers always have the right to ask additional questions. In addition, even in the adversary system a strong judge, at crucial points, will occasionally inject himself into the questioning. Therefore, the inquisitorial mode in the experiment occasionally reaches extremes that are only parodies of the real world, such as

31. The derogatory "inquisitional" label probably derives from the universally accepted rule that the criminal trial begins with the examination of the defendant, who is just that, and not a witness. The charges or the indictment are read to the defendant by the judge, who first asks him whether he pleads guilty to these charges; then, depending on how he pleads, the judge continues the examination by probing into the alleged details of the critical events. As a rule, the defendant will answer these questions, but if he prefers to remain silent, he cannot be forced to talk and the court is entitled to draw its conclusions from such silence. The great or the small difference, then, is that an American court or jury is not entitled to such a conclusion but no way has yet been found to ban it effectively from their minds. *Cf.* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 179, 215 (1966) (analysis of effect upon juries of defendant's prior criminal record and decision to testify).

the judge who receives information only through questioning the parties and decides when he has all the facts necessary to reach a decision.

In summary, then, the differences between the two systems in operation are actually moderate, especially if we compare the European system with court proceedings before our more active and courageous judges, who far from being inactive umpires, are in firm control of the proceedings. Under these circumstances, the victory of the adversary mode in the experiment can hardly help us to decide which of the two modes as they are used in the real world is superior,[32] especially when a point somewhere between the extremes might provide the optimal solution.[33]

32. This confusion over the appropriate level of variables is referred to as the problem of "construct validity." *See* Cook & Campbell, *The Design and Conduct of Quasi-Experiments and True Experiments in Field Settings*, in HANDBOOK OF ORGANIZATIONAL PSYCHOLOGY (M. Dunette ed. 1976).

33. *Cf.* Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465 (1976) (judges should actively participate in adversary proceedings).