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**THE PROBLEM OF JUDGES' BIAS  
IN PRE-TRIAL HEARINGS**

**by**

**IRENE L. KUZYK**

**A dissertation submitted to the Graduate Faculty in Sociology  
in partial fulfillment of the requirements of the degree of  
Doctor of Philosophy, The City University of New York.**

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2/20/97  
Date

*John Humbly*  
Chair of Examining Committee

4/20/97  
Date

*Julie W. Wray*  
Executive Officer

Charles Winick

William Kornblum  
Supervisory Committee

THE CITY UNIVERSITY OF NEW YORK

**Abstract****THE PROBLEM OF JUDGES' BIAS IN  
PRE-TRIAL HEARINGS**

by

**Irene L. Kuzyk****Adviser: Professor Lindsey Churchill**

This study investigates the hypothesized presence of bias in the behavior and the decisions that judges render as a result of their participation in exclusionary rule hearings. A focused review of the literature indicated that judicial decision-making in exclusionary rule hearings maybe biased against the rights of criminal defendants. The behavior of judges in these hearings may depart significantly from the presumed norm of impartial trier-of-fact.

For the purpose of analyzing the influence of subjective factors in exclusionary rule hearing outcomes, two-data gathering methods were undertaken: (1) the administration of an author constructed opinion survey with three, role-distinguished groups of exclusionary hearing participants, i.e. judges, prosecuting attorneys and defense attorneys; and (2) the application of Bales' Interaction Process Analysis (IPA) methods to the transcripts for a set of exclusionary or pre-trial hearings.

The main finding of the opinion survey is that judicial behavior during pre-trial hearings is perceived to be less than completely impartial by both defense attorneys and prosecuting attorneys, while judges indicate no departure from the norm

of purely objective decision-making.

Transcripts from a sample of twenty-eight exclusionary rule hearings were subjected to the methods of Interaction Process Analysis. From the results, it was found that judges do not behave in a completely objective manner while presiding over pre-trial hearings. In general, judges tend to agree more with prosecutors than defense attorneys, to disagree less with prosecutors than with defense attorneys, and to express significantly more antagonism toward defense attorneys, their clients, and their witnesses than toward prosecuting attorneys and prosecution witnesses. It may be stated judges are more favorably disposed toward the prosecution than toward the defense in pre-trial hearings. Additional statistical analysis found that in cases in which evidence to suppress motions were granted, defense attorneys enjoyed far less expressive acts from judges during these hearings than those directed towards the prosecution side. These findings suggest that judges' bias against the defense appears to have an impact of judicial decisions in pre-trial hearings.

## Preface

I. Background

Until the twentieth century, the Aristotelian model of judicial decision-making as a purely objective, rational process remained an unchallenged cornerstone of Western legal thought. According to this paradigm, the outcome of any courtroom proceeding is determined exclusively through the establishment of the facts in a given case and their interpretation within the context of pertinent law by impartial judges. Whatever their individual beliefs or personal biases might be, within the predominant construction of legal decision-making, judges were presumed to conduct inquiries and arrive at rulings in a dispassionate, logical manner. From this theoretical perspective, any departures from this rational standard of judicial decision-making were viewed as violations of universal norms.

The advent of sociological jurisprudence at the turn of the century and its ramifications into legal realism during the 1920s brought with it a decidedly different understanding of how judges decide matters before them. A succession of prominent legal scholars and practitioners, including Oliver Wendell Holmes (1920), Karl Llewellyn (1930), Jerome Frank (1936, 1949), and Thurman Arnold (1962), advanced the position that judges are in fact influenced by the personal beliefs and biases which they bring with them to the bench, and that these subjective variables have an influence upon their seemingly "objective" decisions. Rather than

being a purely logical exercise, the legal realists argued that judicial decision-making is subject to psychological and social variables. Subsequent empirical research has generally affirmed the core propositions of the legal realists: over the past few decades, numerous studies have demonstrated that psychological and social factors intervene in judicial decision-making whether or not judges acknowledge this dimension of their behavior.

Since the United States Supreme Court's rulings in Mapp v. Ohio (1961), Miranda v. Arizona (1966), and United States v. Wade (1967), hearings on motions to suppress evidence in criminal trials under the "exclusionary rule" have become commonplace, comprising a distinctive type of criminal justice proceeding in which judges are obliged to issue "impartial" decisions. The criminal codes of all fifty states currently embody mechanisms through which defense attorneys can petition courts to hold pre-trial hearings for the purpose of determining whether prosecution evidence has been obtained in violation of their clients' Fourth, Fifth, and Sixth Amendment rights and should therefore be excluded from prospective trials. Based upon their interpretation of the facts presented by defense and prosecuting attorneys, presiding judges in these exclusionary rule hearings either grant or deny the defendant's petition for the suppression of evidence.

Although the Mapp, Miranda and Wade decisions remain in force, the suppression of evidence from criminal trials under the exclusionary rule has been a subject of continuing controversy. While its proponents claim that the exclusionary rule is an

essential safeguard against police misconduct that violates Constitutionally-guaranteed rights, its critics maintain that the chief effect of the exclusionary rule is to allow criminals to avoid convictions on charges that could have been proven had key evidence not been excluded from trial. Indeed, many prominent jurists, including former Supreme Court Chief Justice Warren Burger, have denounced the exclusionary rule as a "loophole" through which guilty individuals are able to circumvent criminal sanctions. Of even greater interest, consistent with the conception of judicial decision-making as a process that necessarily incorporates the biases of individual judges, there is evidence that an aversion on the part of at least some judges to suppress evidence in exclusionary rule hearings has caused them to deviate from standards of "objective" decision-making in these proceedings. Thus, for example, based upon his own experience Judge Malcolm Wilkey has candidly stated that many judges who preside over exclusionary rule hearing are inherently biased against granting motions to suppress (1979, p.356). Pre-trial hearings on motions to suppress evidence, then, constitute a type of legal proceeding in which we would expect to find expression of subjectivity biases reflected in judicial decision-making.

Applying the methods of sociological inquiry, researchers have attempted to discern the presence of judicial conduct that deviates from the ideal of rational, objective decision-making. Since the early 1960's, the techniques utilized by sociology in the study of small group interaction have been brought into American courtrooms

by, inter alia, Nagel (1962, 1964) and Gilsinian (1982). More specifically, many researchers exploring the social-psychological dynamics of judicial decision-making have focused on the analysis of statements made in court as linguistic acts (Walker, LaTour, Lind & Thibaut, 1974; Latour, Houlden, Walker, & Thibaut 1976, Lind, Erickson, Friedland, & Dickenberger 1978; and Lind, Kurtz, Musante, Walker & Thibaut, 1980; Danet 1980; O'Barr 1982; O'Barr & Conley 1985). These studies have found that patterns of social-psychological interaction that arise during judicial proceedings reflect an "expressive" dimension that is inherently different from purely rational decision-making and that exerts a powerful, if not altogether determinative, impact upon legal outcomes.

One potentially valuable approach for the analysis of small group interaction within judicial proceedings can be found in the work of the American sociologist Robert Freed Bales. Building on the foundation of the symbolic interactionist school established by George Herbert Mead and Herbert Blumer, Bales posited that all forms of "action," cognitive, expressive, and behavioral, are essentially social and interactive in nature. Within any small group, Bales wrote, we can distinguish between instrumental acts aimed at the completion of a common external or instrumental task that defines the group's purpose, e.g., the rendering of a judicial decision, and a shared internal or expressive task that furnishes the group with the requisite cohesion to accomplish its instrumental objective. Bales maintained that verbal and non-verbal "statements" by members of a small group can be classified

as being related to either the instrumental or the expressive facet of small group behavior. Indeed, Bales constructed a classification scheme that permits researchers to analyze any communication act in a small group as belonging to one of twelve interaction categories. By using this Interaction Process Analysis (IPA), Bales asserted that we can discover, discern, and measure subjective interactions that take place in virtually any small group setting. IPA has proven to be an extraordinarily versatile approach in terms of the types of research problems which it can be used to solve and the range of domains and settings to which it can be applied. Since its presentation in 1950, Interaction Process Analysis has been employed in the study of small group decision-making and problem-solving in a variety of research domains ranging from the classroom education process to the counseling of patients in nondirective therapy groups.

From the researcher's standpoint, Bales's IPA can be validly applied to the analysis of judicial-decision making in exclusionary rule hearings. These sessions are, at bottom, a form of small group behavior insofar as they plainly involve two or more persons who concurrently face a common task arising from their relation to an external situation and, at the same time, social and emotional relationships arising from contact with each other. The pre-trial hearing group exists in relation to a specific task, that is, the disposition of a motion to suppress. Regardless of the outcome, all of the members within the exclusionary rule hearing group have an interest in arriving at a resolution of the issues at hand.

Although the presiding judge is the formal leader of the group and exercises substantial control over the flow of communicative interaction, each of the participants in the hearing has an instrumental part in relation to the group's task. Moreover, in contrast to trial proceedings, exclusionary rule hearings are distinguished by a degree of informality, i.e. no jury, that permits a considerable proportion of expressive interaction to occur during these sessions. From what has been noted above, we can reasonably suspect that the formal leader of the group charged with primary responsibility for managing instrumental communication, i.e., the judge, may have strong ideological or emotional biases toward that task, e.g., at least some hearing judges may be predisposed to deny suppression motions as impediments to a "just" decision about the defendant's guilt or innocence at subsequent trial. Hence, by applying Bale's IPA to records of pre-trial hearings, we have a means of testing hypotheses concerning the presence and the strength of "subjective" factors in these small groups settings.

## II. Study Purpose and Research Questions

The purpose of the study at hand is to investigate the hypothesized presence of bias in the behavior and the decisions that judges render as a result of their participation in exclusionary hearing groups. The research problem that will control inquiry in this study can thus be stated in the form of the question: Does the behavior of judicial-decision makers during

pre-trial hearings conform to the model of purely objective fact-finding and interpretation? Based upon an extensive review of the literature, the researcher has ample cause to suspect that the answer to this question will be negative, that evidence of judicial bias during exclusionary rule hearings will be confirmed. If that "hunch" is supported by the study's data, then two further questions become relevant. First, assuming that bias is present, the question becomes: Are judges biased against the prosecution or the defense in these hearings? Again, consistent with a survey of the empirical literature on this topic, the researcher anticipates that study data will show bias against the defendant and his/her counsel. Lastly, if evidence of bias is discovered, the final question naturally becomes: Is this bias associated with hearing outcomes, i.e., with judicial decisions to grant or to deny motions to suppress evidence?

### III. Study Design and Methodology

This study utilizes multiple information-gathering techniques to generate the data necessary to formulate answers to its controlling research questions. It relies upon three separate sources of information, two of which entail original, field-work procedures.

The first source of data incorporated into this study is that of an extensive survey of the relevant published literature. The researcher has completed a review of theoretical and empirical works germane to the topic of bias in judicial-decision making as

a whole and to judicial conduct during exclusionary rule hearings in particular.

On the basis of the information contained in previously-published works, the researcher constructed an opinion survey consisting of sixteen forced-response items and one open-ended question. Its purpose is to elicit the opinions of three groups of exclusionary rule hearing participants concerning patterns of behavioral interaction displayed by judges during these proceedings. This instrument was administered by the researcher to two hundred and fifty subjects ( $N = 250$ ). The total number of instruments returned to the researcher numbered one-hundred and twenty-seven ( $N = 127$ ). Of these twenty-three were judges ( $N = 23$ ) who have presided over exclusionary rule hearings in the criminal courts of the State of New York; fifty assistant district attorneys ( $N = 50$ ) who have argued against evidence suppression motions filed in this venue; and, fifty-four ( $N = 54$ ) defense attorneys who have argued on behalf of evidence suppression motions in the criminal section of New York's court system. Data derived from the sixteen forced-response questions in the opinion survey were subjected to statistical analysis, while the responses to the instrument's open-ended question were analyzed for thematic contents. The purpose here is two-fold: to determine the entire sample's perceptions of judicial conduct during exclusionary rule hearings and to determine whether inter-group variations exist in these perceptions.

The second source of original data stems from the application of the Bales IPA method to transcripts from twenty-eight

exclusionary rule hearings held in New York State criminal courts. IPA permits the construction of "interaction profiles" for each of the participants involved in a small group. In this case, the researcher has followed Bales protocol instructions to develop profiles of judge interactions with representatives of motion petitioners (defense counsels, defendants, and defense witnesses) and representatives of the state (prosecuting attorneys and prosecution witnesses). These profiles are then compared against the norm-referenced distribution of communication acts developed by Bales and his colleagues. By comparing profiles constructed from the analysis of transcripts with profiles of leaders in small groups facing similar instrumental tasks, it is possible to determine whether judges engage in more or less expressive behavior than is common in similar small group settings. Moreover, close analysis of transcript-based interaction profiles has enabled the researcher to test for the existence of judicial bias against either the prosecution or the defense. Lastly, by correlating this data with hearing outcomes, the researcher will test the hypothesized relationship between judicial bias, on the one hand, and exclusionary hearing outcomes, on the other.

#### IV. Sequence of Presentation

Following this prefatory chapter, the body of this study is organized into four chapters. Chapter 1 presents the researcher's findings from a review of the relevant literature. The first portion of this chapter is dedicated to an investigation of Bale's

Interaction Profile Analysis (IPA), including the identification of its antecedents in the symbolic interactionist school of small group study; a delineation of the core theoretical assumptions underpinning IPA; an outline of the generic procedures common to the implementation of the IPA methodology; and a brief survey of studies that have utilized IPA. In the second part of Chapter 1, the researcher provides an overview of the literature concerning judicial decision-making. It traces the conceptual evolution of judicial decision-making from a rational, fact-finding process to the emerging conception of such decision-making as a small group process subject to personal and inter-personal variables, including prior efforts to analyze legal proceedings through IPA and IPA-like methodologies. The third and concluding segment of this review focuses upon exclusionary rule hearings in the American system of criminal justice. It includes case development of the exclusionary rule from Weeks v. United States (1914) to the present, an explication of the ongoing controversy concerning the exclusionary rule, and a description of what transpires at exclusionary rule hearings.

Chapter 2 is devoted to a presentation and discussion of study results derived from the administration of the researcher's opinion survey instrument. It begins with an account of the methodology followed in preparing and administering this opinion survey with three groups of exclusionary rule hearing participants. The bulk of the chapter consists of a discussion of opinion survey results for each item from which statistically meaningful results were

obtained.

Chapter 3 centers upon results and findings generated from the application of Bale's IPA to a sample of exclusionary rule hearing transcripts. The controlling aim here is to determine the conformity (or non-conformity) of judge interaction profiles with the reference-norm profile of objective small group leadership developed by Bales. Based upon IPA, the chapter presents and discusses findings about the hypothesized presence of judicial bias in these hearings, the "slant" of this bias (pro-prosecution or pro-defense) and the possible connection between such judicial bias and the substantive results of these hearings, i.e., the suppression or non-suppression of evidence in dispute.

The concluding Chapter 4 contains a summary of the study's principal findings and a synthesis of these findings into conclusions for each of the study's research questions. This chapter also encompasses recommendations for future study of possible bias in judicial decision-making through sociological methods of inquiry.

#### V. Study Significance and Limitations

The findings of this study are significant in three, overlapping ways. They are of value for our understanding of how judges decide matters of law in group settings. From a theoretical perspective, study findings lend additional support to the governing assumptions of the sociological/legal realist school insofar as they demonstrate that judicial decision-making embodies

inherently a subjective group interaction variables. In this same context, the study's findings have descriptive value in that they provide insight into how judges actually behave on the bench and how they arrive at their decisions.

The study's findings are also significant within the context of the exclusionary rule as a matter of policy debate. Given the evident importance of the exclusionary rule as a means for enforcing the basic constitutional rights of criminal defendants, an assessment of how exclusionary rule hearings are actually conducted is plainly significant. In light of the continuing controversy over the exclusionary rule, what the study's findings have to say about its current implementation in American courts is clearly relevant to judicial policy.

Lastly, although a number of researchers have applied IPA or close variants of it to judicial settings (Strodtbeck & Mann 1956; Saks 1971; Davis, Kerr, Holt & Meek 1975; Nemeth, Endicott, and Wachtler 1976; Nementh 1983; Hastie, Penrod, & Pennington 1983; Penrod 1986), all of these previous endeavors have focused upon interactions among simulated juries in mock trials. To date, there have been no Interactional Process Analyses using actual proceedings in which the judge and members of the prosecution and defense teams are conceptualized as a small group. That being the case, it goes without saying that there are no IPA studies in which the subject group is comprised of exclusionary rule hearing participants. From a methodological standpoint, the study's findings are significant in that they furnish feedback on the

feasibility and value of studying the judicial decision-making processes through IPA methodology.

## TABLE OF CONTENTS

COPYRIGHT PAGE	ii
APPROVAL PAGE	iii
ABSTRACT	iv
PREFACE	vi
TABLE OF CONTENTS	xix
LIST OF TABLES	xxii
LIST OF CHARTS	xxiii
LIST OF CASES	xxiv
<b>CHAPTER 1 REVIEW OF THE LITERATURE</b>	<b>1</b>
Introduction	
Interaction Profile Analysis	3
Theoretical Antecedents	3
Bales' Theoretical Orientation	7
The Basic Methodology of Interaction Process Analysis	11
Application of the Interaction Process Analysis Method	17
Judicial Decision Making	21
Judicial Decision-Making as a Rational, Fact-Finding Process	21
Sociological Jurisprudence and Legal Realism	23
Post-World War II Conceptions of Judicial Decision-Making	27
Language "Act" Studies of Legal Proceeding	30
Empirical Studies of Legal Proceedings Using Interaction Process Analysis Methods	35
Exclusionary Rule Hearings	37
Introduction	37

	xx
Case Development of the Exclusionary Rule	38
The Ongoing Debate Over the Exclusionary Rule	43
Exclusionary Rule Hearings	48
Chapter Conclusion	52
<b>CHAPTER 2 OPINION SURVEY OF PRE-TRIAL HEARING PARTICIPATION: METHODOLOGY, RESULTS, AND DISCUSSION FINDINGS</b>	<b>53</b>
Introduction	53
Methodology	54
Description of the Opinion Survey Instrument	54
Survey Sample	54
Survey Administration	55
Response and Item-Completion Rates	56
Data Coding and Analysis	57
Presentation and Discussion of Survey Results	58
Question #1	58
Question #4	59
Question #5	62
Question #6	63
Question #7	65
Responses to Survey's Open-Ended ("Comments") Item	69
Summary	73
Opinion Survey Tables	75
<b>CHAPTER 3 JUDGES' INTERACTION WITH PROSECUTION AND THE DEFENSE</b>	<b>80</b>
Introduction	80
Method	80
Tables	96
<b>CHAPTER 4 SUMMARY AND CONCLUSIONS</b>	<b>105</b>
Study Summary	105
Principal Findings of the Opinion Survey	106
Principal Findings of the Interaction Process Analysis	108

Findings and Conclusions 110

Recommendations for Further Research 110

**BIBLIOGRAPHY** 112

## LIST OF TABLES

Chapter 2	Opinion Survey Response Results: Tables 1A, 1B, 2A, 2B, 3A, 3B, 4A, 4B, 5A, 5B.	75
Table 1	Question #1: How many years have you been a(n) Judge, ADA, Defense Attorney?	75
Table 2-A	Question #4-A: In the last 5 years have you found the number of cases where suppression was granted: (1) increased (2) decreased?	76
Table 2-B	Question #4-B: Response levels to increased/decreased suppression and "years of experience" by judges, assistant district attorneys and defense attorneys.	76
Table 3-A	Question #5-A: If increased, do you think this is due to: (1) changes in the law; (2) changes in personal views with respect to search and seizure; (3) better preparation of the witness?	77
Table 3-B	Question #5-B: Response levels to increased changes and "years of experience" by judges assistant district attorneys and defense attorneys.	77
Table 4-A	Question #6-A: In your experience, would you say J's participation is pre-trial hearings is generally: (1) active; (2) minimal?	78
Table 4-B	Question #6-B: Response levels to degree of participation and "years of experience" by judges, assistant district attorneys and defense attorneys.	78
Table 5-A	Question #7-A: Do you think the amount of participation depends of: (1) skill of counsel; (2) type of hearing; (3) type of witness: or (4) type of judge?	79
Table 5-B	Question #7-B: Response levels to amount of participation and "years of experience" by judges, assistant district attorneys an defense attorneys.	79

Chapter 3 Tables 1-9	96
Table 1 Aggregate Bales IPA Profile for 28 Judges, Compared with a Profile of Leader in a Democratic-directive Role	96
Table 2 Bales IPA Profiles for Prosecution and Defense, all cases	97
Table 3 Bales IPA Profiles for Attorney and Witness Roles, by Prosecution and Defense, all cases	98
Table 4 Bales IPA Profiles, Non-Suppressed and Suppressed Cases By Prosecution and Defense	99
Table 5 Bales IPA Profiles, Type of Case by Adverserial Side by Type of Role	100
Table 6 Summary of Comparisons in Tables 1-5	101
Table 7 Judges' Responses to Attorneys' Objections	102
Table 8 Averages of Affect Indexes = (Cat 1 + Cat 3)% - (Cat 10 + Cat 12)% by Type of Attorney and Type of Case	103
Table 9 Differences between Assistant District Attorney's Affect Index and Defense Attorney's Affect Index, All Cases (Ordered)	104

#### LIST OF CHARTS

Chart 1 Bales Interaction Process Analysis (IPA) Twelve Interaction Categories	83
--	----

## LIST OF CASES

Harris v. New York, 401 U.S. 222, 91 S. Ct. (1971)	43
Mapp v. Ohio, 367 U.S. 643 (1961)	41, 43, 47
Miranda v. Arizona, 384 U.S. 436 (1966)	41
Olmstead v. United States, 277 U.S. 438 (1928)	41
People v. Defore, 242 N.Y., 13, 150 N.E. 585 (1926)	45
Stone v. Powell, 428 U.S. 465 (1976)	46
United States v. Wade, 388 U.S. 218 (1967)	42
Weeks v. United States, 232 U.S. 383, 34 S. Ct. (1914)	39, 40
Wolf v. Colorado, 338 U.S. 25 (1949)	40

## Chapter 1

### Review of the Literature

#### I. Introduction

The application of Interaction Process Analysis to exclusionary rule hearings requires an examination of theoretical and empirical studies contained within three distinct bodies of literature. The logical starting point for a survey of works relevant to this study's purposes is Interaction Process Analysis itself. Developed by Harvard sociologist Robert F. Bales in the late 1940s, Interaction Process Analysis is a means for analyzing patterns of social interaction within small groups.

The heart of Interaction Process Analysis is a twelve category classification system for recording and subsequently analyzing group activity. Since its initial presentation in 1950, Bales' method has been utilized to generate and test hypotheses across a wide range of research domains including the experimental study of mock jury deliberations.

For more than two millennia, the predominate view of judicial decision-making was based on rationalist, "natural law" precepts ultimately sourced in the legal philosophy of Aristotle. It was not until the twentieth century that sociological jurisprudence arose in the United States to challenge conventional assumptions about how judges render decisions in cases brought before them. During the inter-war years (and chronologically parallel to the

development of symbolic interactionism), an even more radical view of judicial decision-making was advanced by adherents of legal realism. Starting in 1920 with the publication of Oliver Wendell Holmes's now-classic essay, "The Path of the Law," several eminent American jurists put forth an alternative account of what actually transpires in judicial determinations. They rejected the notion that cases are decided by completely objective fact-finding judges weighing evidence against the criteria of immutable legal rules. Instead, the legal realists argued, cases at law are ultimately judged by social actors who are heavily influenced in their decisions by psychological and sociological variables. Although the extremism of the legal realists provoked a strong counter-reaction, the idea that judicial decision-making is a sociological phenomenon prompted scholars from the "action research" movement to investigate legal proceedings as a form of group interaction. Since the early 1950s, researchers have adopted Field Theory, Dramaturgical, and Interaction Process Analysis perspectives and methods to American courtrooms. Of late, considerable empirical work has been conducted by sociolinguists in analyzing communicative interactions which occur within juridical settings. As mentioned above, this emerging corpus encompasses a handful of exploratory studies in which the methods of Interaction Process Analysis have been used.

To date, no sociological studies of hearings on motions to exclude evidence from criminal trials have been published. Indeed, aside from standard procedural manuals, most of what has been

written about such hearings has been addressed to the unresolved issue of whether the "exclusionary rule" should be retained. Nevertheless, it is apparent that participants in exclusionary hearings do constitute a social group from the standpoint of Interaction Process Analysis, and these proceedings display all of the essential features necessary for analysis through Bales's method.

## II. Interaction Profile Analysis

### A. Theoretical Antecedents

It is from the work of American sociologist Talcott Parsons (1954) that Interaction Profile Analysis derives its basic theoretical orientation. Parsons, following Weber, conceptualized human behavior as a series of interchanges in which units (institutions, small groups, and individuals) send performances and receive sanctions from each other. It was from such processes, he asserted, that the structural characteristics of any given society came into being and were maintained over time.

Bales was also influenced by American sociologist George Herbert Mead (1934a, 1934b). According to Stryker & Statham, Mead is "clearly the single most important influence shaping symbolic interactionism" (1985, p.316). Mead maintained that such seemingly primary phenomena as mind, self, and society are actually derived from social processes. Hence, in Mind, Self, and Society (1934b) Mead explained that, "the individual experiences himself as such, not directly, but only indirectly from the particular standpoint of

other individual members of the same social group, or from the generalized standpoint of the social group as a whole to which he belongs" (p.57). In his understanding, it is through a process of socialization individuals learn to use and elaborate a generalized set of verbal and non-verbal codes which interrelate a conception of specific others with generalized categories and collectivities, much of this socialization taking place in small groups such as the family.

Mead wrote about two "levels" of human interaction, non-symbolic and symbolic. Herbert Blumer (1966) later summarized Mead's distinction on this count:

In non-symbolic interaction human beings respond directly to one another's gestures or actions; in symbolic interaction they interpret each other's gestures and act on the basis of the meaning yielded by the interpretation....Symbolic interaction involves interpretation, or ascertaining the meaning of the actions or remarks of the person, and definition, or conveying indications to another person as to how he is to act. Human association consists of a process of such interpretation and definition (p.539).

Two key tenets of Mead's theory were especially critical in the further development of symbolic interactionism. First, he argued that the personality cannot be understood apart from social interaction. Second, Mead proclaimed the reality of social groups as distinct entities, rather than mere collectivities of individuals. These assumptions were subsequently embraced by Sherif (1936) and Parsons (1937) who, like Mead, asserted that human behavior in groups is "more" than the additive outcome of individual motivations and actions.

The term "symbolic interaction" is customarily ascribed to

Herbert Blumer, who is credited with introducing this designation into the parlance of social psychology in 1937. In Blumer's gloss, "symbolic interaction" is defined as "the process by which individuals relate to their own minds or the minds of others; the process, that is, in which individuals take account of their own or their fellows' motives, needs, desires, means and ends, knowledge, or the like" (Ibid., p.145). The most prominent member of the so-called "Chicago School" of symbolic interactionism (Stryker & Statham 1985, p.317), Blumer shared Mead's theoretical assumption that society is not a structure or an organization, but rather the actions of individuals arising in social situations, actions that are construed by the persons "reading" the situation who identify and assess the relevance of situational variables and then act on the basis of that evaluation (Blumer 1962). For Blumer, this view furnished grounds for adopting a new standpoint on the study of sociological phenomena, i.e., symbolic interactionism, which he would describe as "a down-to-earth approach to the scientific study of human group life and human conduct" (Blumer 1969, p.3). From his highly pragmatic perspective, it is not necessary to have a completely articulated theory of society to investigate social interaction, symbolic interactionism being an approach "for examining certain features of the empirical world that are likely to be significant in the development of eventual theory" (Stryker & Statham 1985, p.312).

In the immediate aftermath of World War II, symbolic interactionism ramified into several discrete strands, each of

which focused upon group behavior. One major branch was the "group dynamics approach" formulated by Kurt Lewin (1948). Alternatively referred to as Field Theory, Lewin's approach took interdependence among its members to be the definitive attribute of the group, with Lewin contending that "it is not similarity or dissimilarity of individuals that constitutes a group, but interdependence of fate" (Lewin 1948, p.165). Lewin stressed the malleability of individual behavior under the influence of group processes. He is also credited as the originator of the term "action research" (Ibid., p.203). While "action research" has been taken to connote Lewin's aim of altering behavior in desirable ways through group participation (Deutsch 1949a, 1949b), it also expresses his identification of the "act" as the irreducible datum of social life.

The concept of the "act" was central to a second line of development arising from symbolic interactionism, i.e., the Dramaturgical perspective on social behavior associated with Erving Goffman (1959, 1967). Analyzing behavior in small groups, Goffman employed the terminology of the theater, concentrating upon discrepancies between the self-image which an individual actor presents to others during social interaction, on the one hand, and that same actor's underlying attitudes, motives, and preoccupations, on the other. Goffman was not the only scholar to adopt the language of drama as means for explaining how individuals act in groups. Kenneth Burke (1966) asserted that the language of drama was not simply a useful metaphor for social interaction, but

that social interaction is, in fact, a drama (Hare & Blumberg, 1988, p.11).

Before delineating the fundamentals of Bales' Interaction Process Analysis, it must be noted that over the past two decades a great deal of cross-fertilization has occurred among Field Theory, Dramaturgical Analysis and Interaction Process Analysis. For example, A. Paul Hare, a close colleague of Bales, has analyzed social interaction in dramaturgical terms (Hare & Secord 1972), and has recently analyzed the potential value of combining the basic methods of the dramaturgical perspective with Lewin's Field Theory under the rubric of "contextualism" (Hare & Blumberg 1988, p.5). At the same time, Olmstead and Hare (1978, p.118) have attempted to synthesize Interaction Process Analysis with Field Theory, while Bales (1985) himself, has lent his imprimatur to this union

#### B. Bales' Theoretical Orientation

Bales' 1950 text Interaction Process Analysis: A Method for the Study of Small Groups follows an unorthodox sequence of presentation in that the author dedicates the first chapters of this work to his method, deferring discussion of background theory to the second half of the book. This structure reflects Bales's "bottom-up," inductive approach to the study of behavior in small groups. Instead of attempting to deduce a comprehensive theory of group behavior and then test it against findings from the field, Bales opted to concentrate upon developing empirical generalizations about group behavior which might subsequently

furnish grounds for "middle level" theoretical constructs. Along with Parsons and Shils, Bales (1953) presented some "working concepts" related to a theory of action, but he remained more a field researcher than a theoretician, convinced that the investigation of behavior in small groups could proceed without a fully articulated theoretical framework.

Despite the comparatively atheoretical stance adopted by Bales, his work was influenced by the cardinal concepts of symbolic interactionism. Chief among these was an assault on the "depth" psychology notion that variations in human behavior are exclusively, or even primarily, consequences of personality differences. Hence, Bales stated that "the process of action, from its genesis in the personality in any given individual, and its very nature, logically and ontologically is a social process" (Bales 1950, p.53). For Bales, every action, including what is normally considered purely "internal" thought, is an interaction, with the act, rather than the individual actor, being his fundamental unit of analysis. Indeed, Bales went so far as to opine that:

What is usually regarded as individual problem-solving, or the process of individual thought, is essentially in form and in genesis a social process; thinking is the re-enactment by the individual of the problem-solving process as he originally went through it with other individuals. It can probably be maintained with considerable success that the best model we have for understanding what goes on inside the individual personality is the model of what goes on between individuals in the problem-solving process (Bales 1950, p.62).

Hence for Bales, all forms of "action," cognitive, expressive, and

behavioral, are fundamentally social and interactive in nature.

Congruent with the controlling premises of symbolic interactionism, Bales identified the distinguishing characteristic of human behavior to be the capacity to manipulate symbols. On this count he wrote that,

The manipulation of symbols is conceived not simply as an epiphenomenon, but as an aspect of action as 'real' as any other in its causal role. The manipulation of symbols, we assume, can operate to steer the ongoing act; it is through the manipulation of symbols that the present act can bear a meaningful as well as a causal relation to what has gone before, and that the anticipated future can play a causal as well as a meaningful role in the present (Bales 1950, p.50).

The process of action, Bales maintained, requires that some form of communication occur; this is true whether such interaction takes place between individuals or between the individual's self and his or her role as an actor in any given situation. Hence, it is through communicative interactions (verbal and nonverbal) that meaningful social activity takes place.

Bales defined the "small group" in an extremely loose fashion, asserting at one juncture in his 1950 text that a small group is any assembly of individuals who engage in face-to-face meetings through which individual members receive distinct impressions or perceptions of each other "even though it be only to recall (upon later questioning) that the other was present" (p.33). Absent from this gloss is any cognitive precondition that the members of a "small group" consider themselves to comprise a group (Turner 1982, p.11). A considerably more useful "working definition" of a "small group" is presented by Bales in the course of his instructions to

prospective users of his Interaction Process Analysis method, as he observes that, "all small groups are similar in that they involve a plurality of persons who have certain common task problems arising out of their relation to an outer situation, and certain problems of social and emotional relationships arising out of their contact with each other" (Bales 1950, p.34). As will be elaborated below, the social structure of a small group is determined by solutions to the functional problems of interaction, notably the need to perform a common task while reducing tensions stemming from uncertainty about the actions of others (Bales 1950, p.68).

It is essential to note that Bales takes the basic reason for the existence of any small group to be the achievement of some task. Like Lewin, Bales posited that what "makes" a small group is not commonalities in the personalities or background characteristics of its members, but the interdependence of members in relationships to a task. Yet task performance comprises only one dimension of group behavior for Bales. As Olmstead and Hare succinctly put it, according to Bales, "group life is characterized by an external or task aspect on the one hand and by an internal or social aspect on the other" (Olmstead and Hare 1978, p.127). As previously mentioned, it is Bales who is credited with making the elementary distinction between task-related or "instrumental" group behavior and socio-emotional or "expressive" behavior.

From this core distinction Bales derived the idea of a generalized tendency toward equilibrium within small groups (Bales 1950, 1953; Bales & Strodtbeck 1951). As reflected in his

methodology for the study of small groups, Bales discovered that in carrying out a common task, groups must maintain a balance between instrumental and expressive acts. He believed that all members in a small group are in the "same boat" insofar as "all of them, even those who wish to exploit others, have some interest in bringing about stability" (1950, p.56). From the results of early studies utilizing his method, Bales noted that group processes tend to unfold in distinct phases. By definition, groups are oriented toward task performance, but to carry out their work, they must be sensitive to the needs and motives of individual members. Hence, following an initial spurt of task-related activity, the social disequilibria generated by task performance demands that the group focus on its social aspect through expressive activity. Such interpersonal concern, however, detracts from task performance, so that in a subsequent stage of group problem solving, instrumental behavior once again predominates (Bales and Strodtbeck, 1951, Brown 1988). This homeostatic principle lies at the bottom of Bales' conception of group dynamics and, as discussed below, it is directly reflected in the structure of his twelve-category instrument for recording and analyzing interaction within small groups.

### C. The Basic Methodology of Interaction Process Analysis

When Bales first began work on the development of an instrument for analyzing small group behavior, he was motivated by a perceived gap in the existing empirical literature on this

subject. He asserted in the preface to his 1950 text, "as yet, we have very little systematic data in the form of rate occurrence of any phenomenon whatever for small groups of any kind" (Bales 1950, p.iv). Responding to this gross shortcoming, Bales sought to develop a "general-purpose set of categories for observation and analysis" of behavior in small groups in contrast to reliance upon "special lists of categories, each particularly fitted for a particular kind or group of particular hypothesis" (Ibid., p.iii). Therefore, Bales sought to develop a descriptive index of small group behavior which could be validly and reliably applied to all types of small groups.

Bales initiated field work toward the construction of a universal descriptive index of acts in small groups in 1946 as part of a study of a small group consisting of seven members of the Department of Social Relations at the Harvard Psychologic Clinic which had been assigned the task of appraising diagnostic protocols (Steinzor 1949, pp.104-105). Observing the council's face-to-face interaction, Bales disaggregated it into separate "acts," e.g., requests for information (Bales 1947). During the next two years, Bales labored to develop a taxonomy of social acts that was sufficiently articulated and yet cohesive enough to permit meaningful analysis across groups. As Olmstead and Hare (1978) recount, at various junctures in its development, Bales' core classification instrument included as many as eighty-seven and as few as five categories (p.122). Ultimately Bales concluded that all acts within social groups could be classified under twelve

distinct headings (1950). Since that time, Bales has periodically revised definitions of his original twelve categories (e.g., Bales 1970, pp.99-135), and appended ancillary analytical schemes to it, many of them adopted from Field Theory. In fact, by 1979, in association with Cohen, Bales devised a far more complex methodology for the multiple level observation of groups which they refer to as SYMLOG. Nevertheless, his original instrument retains its basic descriptive and analytical power and, when set alongside subsequent elaborations, it possesses the key practical advantages of being relatively easy to understand and use.

According to Bales, interaction process analysis is "an observational method for the study of the social and emotional behavior of individuals in small groups---their approach to problem solving, their roles and status structure, and change in these over time" (p.465). It is instructive to note that Bales once designated his emerging technique for the study of small groups as "interaction content analysis" (1947), but subsequently discarded this label. Interaction Process Analysis resembles content analysis insofar as it is used to measure the relative strength of various factors which are believed to determine observed behavior. Unlike content analysis, however, Bales' method is concerned with the forms and patterns of communication among individuals in small groups rather than with the thematic content embodied in those messages. Consistent with symbolic interactionism, through Bales' method observed behavior is broken out into a series of microscopic "acts," each of which can be assigned to one of the twelve

categories in his classification system.

The basic procedure for using Bales' method is straightforward and comparatively simple. After an observer has familiarized himself with the twelve interaction categories (see below), he then assigns and memorizes coded designations for each member of a small group under observation. Thereafter, the observer classifies each act as fitting into one of the twelve interaction categories, noting which actor within a group initiates the act and the person or persons to whom that act is addressed. Although first-hand observation allows for the recording of non-verbal acts, in most instances an "act" amounts to a single simple sentence (dependent clauses being scored as separate acts). As a general rule of thumb, then, an observer will score between ten to twenty "acts" per minute (Bales 1968, p.466).

In its original formulation, Bales classification system consists of the following twelve categories of acts initiated:

- |             |                          |
|-------------|--------------------------|
| (Section A) | 1. Show solidarity       |
|             | 2. Shows tension release |
|             | 3. Agrees                |
| (Section B) | 4. Gives suggestion      |
|             | 5. Gives opinion         |
|             | 6. Gives orientation     |
| (Section C) | 7. Asks for orientation  |
|             | 8. Asks for opinion      |
|             | 9. Asks for suggestion   |
| (Section D) | 10. Disagrees            |
|             | 11. Shows Tension        |
|             | 12. Shows antagonism     |

As can be seen in the left-hand-column of the chart, the twelve categories are arranged in sections labelled A, B, C, and D.

Section C may be characterized as "questions" while Section B consists of attempted "answers." The three elements of section A may be thought of as positive reactions, with Section D comprising negative reactions. From a slightly different angle, the six categories encompassed in Sections B and C represent task-oriented activity, while the six categories at the poles of the spectrum designate a socio-emotional area of activity.

Employing a modified terminology, Bales also speaks of the middle six-element portion of the instrument as being primarily "Adaptive-Instrumental" in significance, with the outlying six-categories being "Intergrative-Expressive" in significance. On this basis, Bales provides us with the rudiments for analyzing group dynamics through recorded observations, stating that:

The necessity of adaptation to the outer situation leads to instrumentally oriented activity, which in turn tends to create strains in the existing integration of the group. When these strains grow acute enough, activity turns to the expression of emotional tensions and the reintegration of the group. While re-integration is being achieved, however, the demands of adaptation wait, and activity eventually turns to the adaptive-instrumental task (1950, p.10).

Hence, as he subsequently confirmed from studies using his method, one can discern alternating phases in group problem-solving activity, spurts of scores in the middle section of the classification device normally being followed by phases of increased scores in its polar categories.

Each of the twelve interaction categories has been finely delineated by Bales, but he did not insist that field observers be thoroughly familiar with these detailed glosses, stating that "one

can probably do fairly well with only a passing knowledge of the detailed definitions" (1970, p.99). At the same time, while Interaction Process Analysis is geared toward on-the-spot concurrent recording of behavior, Bales maintained that his method could be applied on a post hoc basis to tape recordings of group interactions or to written transcript of same, stating that "there are many sorts of problems for which an analysis of the sound recording or written transcripts should prove quite adequate" (Bales 1950, p.5). Indeed, several studies, e.g., Landsberger (1955), have followed the procedure of scoring interactions from written transcripts.

Owing in part to the latitude of Bales' procedural protocol, both the validity and, above all, the reliability of his instrument have been the subject of considerable discussion. As Olmstead and Hare note, some critics have questioned whether Bales' classification system is truly comprehensive in the sense that it allows for the classification of all types of distinct acts within small groups (1978, p.124). Far more seriously, inter-rater reliability has been viewed as a significant source of distortion for results derived through Interaction Process Analysis methods. Plainly, different observers may vary in how they classify a given act. Bales implicitly acknowledged this potential shortcoming in admitting that classification of a given act by an observer is a "matter of interpretation" which necessarily entails "the imputation of meaning, the 'reading' of content, the inference that the behavior has functions(s), either by intent or by effect"

(Bales 1950, p.6). Inter-rater reliability was deemed to be acceptably high by Borgatta and Bales (1953) as well as by Heinicke and Bales (1953). Nevertheless, Waxler and Mishler (1966) questioned this sanguine appraisal in their discussion of the three basic modes of scoring (ongoing, tape recorded, and written transcript), finding inter-rater reliability to be as low as 61.8 (pp.30-32).

#### D. Application of the Interaction Process Analysis Method

In generic terms, Bales's method can be used to describe recurrent patterns of interaction, to generate hypotheses about group behavior, and/or to test hypotheses concerning group processes (Hare 1976). Each of these general applications is furthered by the construction of what Bales terms "interaction profiles." When observations for a group session have been recorded, the observer can then collate all of the observations in each category and derive an interaction profile for the group as a whole. Moreover, similar profiles can be constructed for individuals within the group as well as for interactions between particular members and other specified actors. Such profiles are usually expressed as percentage of all recorded interaction instances broken out by the twelve categories. On this count, Olmstead and Hare (1978) explain:

A profile is a straightforward summary of how much an individual---or all individuals in a group gives and receives in various categories; it can be portrayed numerically or graphically. Inspection of group profiles can show differences between types of groups---children's groups, adult groups, therapy groups, 'satisfied' and 'unsatisfied' groups,

and so forth...Inspection of individual profiles can show that those who talk most in a group tend to have a different pattern of communicative behavior from those who talk least (p.125).

Comparisons among groups is facilitated through the existence of interaction profile category norms prepared, inter alia, by Bales and Hare (1965) and by McGrath (1984). For example, in synthesizing profiles obtained from the observation of fifteen diverse small groups, McGrath noted that task activities accounted for a median of two-thirds of all recorded acts, with one-quarter being classified in the positive emotional reaction portion of the recording spectrum and the remaining one-sixth falling under the negative emotional reaction section. Disaggregating group profiles into the acts of individual group members, Slater (1955) found that groups typically have two leaders, one of whom is task oriented (an "idea person") and the other of whom is socio-emotional in orientation (typically the member of the group most "liked" by his or her colleagues).

Since its presentation in 1950, Interaction Process Analysis has been employed in the study of small group decision-making and problem-solving in a variety of research domains ranging from the classroom education process to the counseling of patients in nondirective therapy groups (Bales & Hare, 1965). Indicating the potential extent of subject groups suitable for analysis through his method, Bales stated that they should include between two and twenty members, and continued on to maintain:

Included in the referent are groups such as those formed for group discussion and group therapy, for counseling, planning, training programs, and experimental teaching procedures.

Policy forming committees, board and panels, diagnostic councils in clinical work, problem-solving groups in experimental social psychology and sociology, teams and work groups, family and household groups, children's play groups, adolescent gangs, adult cliques, social and recreational clubs, and small associations of a great many kind fall within this classification, as do groups of two, such as interviewer and interviewee, therapist and patient, teacher and pupil, and professional specialist and client, to name only a few (Bales 1950, p.i)

Although the earliest studies using Bales's method concentrated upon "formal" groups charged with making decisions or solving problems, Bales soon found that even the most informal groups, children at play, for example, could be studied through Interaction Process Analysis. Indeed, in 1956, Bales and Talcott Parsons published a text in which interaction within the nuclear family was constructed as a small group phenomenon and analyzed through Bales's twelve-category classification system, work in this area being subsequently extended by Slater (1961).

A handful of specific studies illustrated the type of study problems and results which can be respectively addressed and generated through Interaction Process Analysis. In one very early study, Bales completed an interaction profile for an academic discussion group. He then compared that profile to norms derived from profiles of other types of groups and found that the former displayed an inordinately high percentage of task-related activity and an inordinately low proportion of negative socio-emotional behavior (Bales 1950, p.26). In a second study, Bales sought to discern differences in the interaction profiles of leaders in non-directive training groups, on the one hand, and their counterparts in directed training groups, on the other. He found that in the

former the designated leader of the group accounted for only 14 percent of total recorded activity, as compared to 52 percent for the formal leader of the directed training group. Bales also noted that the directive training group exhibited lower rates of tension symptoms (category 11) but higher rates of tension release (category 2) than the non-directive group (Ibid., pp.19-20). Lastly, Bales compared the profiles of two decision-making groups, one characterized as being satisfied with the group's handling of a case discussion task, the other characterized as being dissatisfied with the group activity related to that same task. As might be anticipated, Bales found that "the 'satisfied' group attained a higher rate of suggestions, more often followed by positive reactions, and less often by negative reactions and questions than did the 'dissatisfied' group" (p.447).

In sum, Bales' Interaction Process Analysis provides a unique means for describing and analyzing small group activity. Its comparative simplicity and purported universality represent its chief assets, while scoring reliability and the absence of a full-fledged theoretical framework are its principal shortcomings. The instrument is extraordinarily versatile in terms of the types of research problems which it can be used to solve and the range of domains and settings in which it can be applied.

### III. Judicial Decision-Making

#### A. Judicial Decision-Making as a Rational, Fact-Finding Process

Rieke and Stutman (1990) have traced the orthodox view of judicial decision-making to the writings of the Greek philosopher Aristotle (pp.31-32). Aristotle's conception of the trial as a rational, fact-finding process, they observe, was an outgrowth of his faith in human reasoning as a means for attaining truth and justice, with Rieke and Stutman asserting that, "Aristotle believed that truth and justice are by nature stronger than their opposites, and if arguments for them are allowed to compete fairly with those of all other kinds, truth and justice will inevitably prevail" (Ibid., p.32). Nevertheless, Aristotle was keenly aware that jurors and judges could be swayed in their decisions by both the presentation of misleading evidence and the use of rhetorical sophistry. Hence, he established rules of evidence which have persisted to this day, e.g., the exclusion of hearsay testimony, and developed the rhetorical syllogism as a communication form for the accurate and effective presentation of legal arguments.

By contrast, Rieke and Stutman assert, the Romans "were concerned not just with procedures for finding truth and justice; they cared about being effective advocates for a cause" (Rieke and Stutman 1990, p.34). Hence, in his delineation of case oration into exordium, narratio, confirmatio, refutatio, and peroration, Cicero showed less regard for arriving at a just outcome than he did for winning a case through the most persuasive forms of argumentation available. Although both of these competing strains

contributed to the development of the modern conception of judicial decision-making, it was the Aristotelian approach, with its emphasis on an abstract natural order, which had a greater impact upon the highly influential writings of St. Thomas Aquinas and Hugo Grotius, both of whom saw the law originating in man's divinely-appointed capacity to discern truth through reason (Ibid., p.36).

This conception of the law was transported to the New World by the Puritans who retained the notion that, at bottom, the law is the product of the All Mighty's infallible will. Despite the secularization of American society in the eighteenth and nineteenth centuries, the image of the trial as a rational exercise in fact-finding went virtually unchallenged until the current era. Thus Purcell writes,

As late as the 1920s the predominant legal theory still claimed that judicial decisions were made on the basis of rules and precedents defined historically and applied mechanically. The eighteenth-century concept of natural law served vaguely as the moral foundation for legislative and judicial actions, while Sir William Blackstone's statement of the common law provided many of the supposed first principles on which judicial decisions were based. The old legal theory claimed that reasoning proceeded syllogistically from those rules and precedents through the particular facts of a case to a clear decision. The sole function of the judge was to discover the proper rules and precedents and to apply them to the case as first premises. Once he had done that, the judge could decide the case logically with certainty and uniformity (Purcell 1988, p.360).

Indeed, in many quarters of the American legal community, vestiges of this "rationalist" or "mechanistic" conception of the law persisted long after the 1920s (Miller & Boster, 1977).

## B. Sociological Jurisprudence and Legal Realism

In the United States, the first salvo against this rational edifice was fired at the turn of the century by advocates of sociological jurisprudence. As Eikema Hommes (1979) has noted, for the members of this "movement" in legal philosophy, legal norms were "mere" social facts which exerted an influence upon human behavior, acting as motivational factors in judicial conduct, similar to that of other social facts. Purcell summarizes the thought of these critics, in stating that from their perspective, "law was not an abstract problem of logic, but a practical question of social management. Judges did not settle cases by deductive reasoning; rather they necessarily decided cases according to their personal and class beliefs" (1988, p.361). In the view of those arguing for the adoption of sociological jurisprudence, the law was not based on the application of immutable rules to clear-cut facts educed through purely rational inquiry; it was, instead, shaped by contemporary social circumstances and by the biases of judicial decision-makers. The eminent jurist Roscoe Pound championed the cause of sociological jurisprudence as an alternative to mechanistic conceptions of the law, proclaiming that "the sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law" (1908, p.605).

Between the end of World War I and the onset of the Great Depression, the movement on behalf of sociological jurisprudence segued into what would come to be known as "legal realism." In his classic essay "The Path of the Law," Supreme Court Justice Oliver

Wendell Holmes put his understanding of the law into reductionist terms by stating that, "the prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law" (1920, p.173). From Holmes's standpoint, the "law is what judges say it is." The legal realists divested law of its abstract normative character altogether, identifying its true source in the conduct of people in general and of judges in particular (Rieke and Stutman 1990, p.42).

Throughout the 1920s, legal realism gained momentum with Columbia University's law school serving as an epicenter for the dissemination of this radically innovative understanding of how judges decide cases. Writing in a 1930 issue of the Columbia Law Review, Karl Llewellyn complained that the veneration of abstract legal rules and judicial rationality was untenable given contradictions among actual case determinations (p.439). In his text The Bramble Bush (1930), Llewellyn emphasized the need to study law from the perspective of individual cases, stating that "the significance of the particular rule will appear only after the investigation of the vital, focal phenomenon: the behavior" (p.12). For Llewellyn and his cohorts, the proper focus of legal scholarship is the study of human behavior, the law being essentially a phenomenon of social psychology.

During the 1930s, a number of pioneering researchers applied the methods of sociological inquiry to the investigation of judicial decision-making. For example, Frederick Gaudet undertook an extensive survey of over 7,000 cases assigned to six judges in

a New Jersey County Court over a decade-long period (1949, pp.449-461). Gaudet concluded that personality variables such as a judge's social background, education, religion, and social attitudes were the primary determinants of differential sentencing patterns. Later, in the same vein, Winick, Gerver & Blumberg (1961, p. 127) state that "a judge who just assumed his robe of office may perceive his duties and responsibilities differently from the way an older judge perceives his." Summarizing the collective findings of this field work, Purcell states that,

It became clear that law was not a rational whole, nor even largely logical. In addition to personal prejudices, judicial objectivity was further deflected by the necessity of relying on secondhand evidence concerning the facts, relayed by lawyers, parties to the case, and witnesses who distorted the facts through prejudice, misunderstanding, ignorance, or simple falsification (1988, p.365).

To pretend that judicial decision-making was anything more than "garden variety" human behavior was to obscure its real workings and to prevent urgent reform of legal procedures.

Among the legal realists, Justice Jerome Frank pursued a psychoanalytical approach to judicial decision-making in his text Law and the Modern Mind (1936). Here Frank concentrated upon the deep-rooted motivations of judges to explain the disparity between what courts actually do and what they purport to do. Frank would continue with his critique of judicial fact-finding in his 1949 opus Courts on Trial.

From the standpoint of this study's specific interests, the work of Frank's colleague, Thurman Arnold, is especially relevant. In his book The Symbols of Government, Arnold acknowledged the

prospective pertinence of symbolic interactionism to the analysis of judicial conduct. He explicitly stated that in approaching the analysis of legal theories, scholars must jettison such abstractions as "truth" and view them "as symbolic thinking and conduct which conditioned the behavior of men in groups" (2nd ed., 1962 p.xiv).

By the onset of World War II, legal realism came under a concerted attack from "orthodox" juridical scholars, including Pound and Holmes who had tempered their earlier ideas and embraced a more "rationalist" conception of what the law is and how courts operate. Nevertheless, according to Purcell (1988), legal realism left an indelible mark on the study of the law.

The movement helped established the importance of factual research in law, the necessity of empirical studies of the legal process, the legitimacy of a more flexible constitutional interpretation, and the acceptance of a pragmatic, operational concept of the law...The alliance which the realists helped to forge between legal theory and empirical analysis fortified the trend toward sociological jurisprudence that had begun forty years before and that was to become a commonly accepted part of the American Law in the years after the Second World War (p.374).

As we shall see shortly, by reorienting the study of the law toward the observation of human behavior, the legal realists provided an extraordinarily fruitful field in which the successors of Mead and Blumer could apply empirical approaches grounded in the principles of symbolic interactionism.

### C. Post-World War II Conceptions of Judicial Decision-Making

The end of the legal realism movement did not negate the idea that courts could be analyzed through the same sociological methods that were being applied to less exalted types of small groups. As early as 1950, F.S. Cohen explored prospects for the use of Field Theory in the study of judicial logic, while Toulmin (1958, 1972) instructed lawyers to discard syllogistic argument in favor of adversarial presentations geared to the social and psychological background characteristics of judges and juries. More recently, Keeton (1974) has described the criminal trial as "a competition of inconsistent versions of facts and theories of law" (p.xi).

In the late 1970s, Professor Donald Black (1976, 1979) revived the sociological jurisprudence argument that the law is conditioned by sociological circumstances and that its basic purpose is to serve as an instrument of social control (Gottfriedson & Hindelang 1979, p.3). Indeed, Black defined "law" as "governmental social control" (1976, p.2), arguing that it is a quantitative variable which varies across time and space as well as across characteristics of individuals, with high-ranking individuals (e.g., the wealthy) having "more law" than individuals on the lower rungs of the stratification hierarchy.

In Doing Justice (1982), Gilsinan followed a sociological approach to judicial decision-making. He first observed that while sociological analysis has frequently been used to study the behavior of law enforcement officers and criminals (including several field works prepared from a symbolic interactionist

perspectives), far less inquiry has been devoted to judges and lawyers. He argued that there is an as yet unmet need "to determine factors affecting judicial decision making, in part... due to the wide discrepancies found in both judicial case determination and sentencing practices" (Gilsinan 1982, p.123). In his account of how judges and juries render verdicts, Gilsinan drew upon the conceptual terminology of symbolic interactionism and Dramaturgical theory, asserting that:

Case determination is the result of compromise between the various world views and consequent moldings of quasi-law of the legal actors involved. Police officers, witnesses, victims, judges, lawyers, probation officers, and others all bring their idiosyncratic blueprints of how the world should look to the building materials presented by legal statutes. Each takes the law and shapes it according to his or her own blueprint. The constructs are then compared with one another, parts of the various structures are discarded, and the resulting structure is law in a particular case (p.127).

Congruent with the premises of both legal realism and symbolic interactionism, Gilsinan asserted that the socialization experience of the participants in a criminal trial is the ultimate source of the law, rather than abstract legal theories and rules. He also stated that this does not render judicial decision-making chaotic or unpredictable, that "legal actors attempt to shape and apply law to fit unique circumstances, but in the course of doing that they have created patterns that are, upon analysis, not unique but regularized" (Id). Consequently, Gilsinan's analysis of how the courts actually operate implied that there are discernible behavioral regularities in the interactions of legal participants which can be discovered and measured through sociological methods.

During the 1960s, while symbolic interactionists concentrated

upon police units and criminal gangs, most sociological investigations of judicial decision-making focused on correlations between judge demographic and background variables, on the one hand, and differences in their disposition of cases, on the other. Stuart Nagel's work (1962, 1964) is representative of this approach. Nagel found statistically meaningful correlations between the conviction rates and sentencing practices of judges with their party affiliations (Democratic/Republican), religious affiliations (Catholic/Protestant), and ethnic backgrounds (Anglo Saxons vs. other ethnic groups). A similar analysis of voting behavior on the part of U.S. Supreme Court justice was conducted by Schmidhauser (1964). Reviewing this body of work, Schur (1968) observed that most sociological studies carried out in the 1960s had focused on the upper levels of the judicial system, and predicted that "it is likely that the work of sociologists will center mainly on the trial courts and on general processes rather than on specific doctrinal outcomes and trends" (p.150).

Blumberg's (1967) study reported that "lower level" court judges differ substantially from their appellate counterparts in terms of their respective socialization experiences, and that these differences pointed to a greater potential for the use of small group study techniques with the former than with the latter. He distinguished among three levels of judicial career paths, each with its own distinct socialization process: (1) lower-level (e.g., municipal court); (2) middle-level (e.g. intermediate appellate court); and, (3) upper-level (e.g., candidates for

Supreme Court). Blumberg speculated that while upper-level court judges can remain comparatively free of small group influences, their lower-level counterparts "cannot avoid the legal, interpersonal and emotional dynamics of the small group" comprised of court "regulars" (p.123).

Full-fledged dramaturgical studies of the courts became more abundant during the 1980s. Most of these, however, (e.g. Jones & Pitman 1980; Ball and Lohn, 1982) focused on lawyer behavior during criminal trial proceedings. Jones and Pitman (1980), for instance, utilized a Dramaturgical perspective to classify the self-presentation styles of courtroom lawyers under five headings: (1) ingratiation, (2) intimidation, (3) self-promotion, (4) exemplification, and (5) supplication. Analyzing the rhetorical behavior of lawyers in criminal trials, they found that individual lawyers exhibited one of these five self-presentation styles as their dominant orientation toward juries and judges. Similarly, Ball and Lohn (1982) rejected the metaphor of "warfare" as a descriptor of appellate pleading by lawyers, asserting that "dramatic performance" more closely captures adversarial behavior during appeals proceedings.

#### D. Language "Act" Studies of Legal Proceeding

Forensic rhetoric has always been a salient discipline in the education of trial lawyers (Probert, 1972), an intimate knowledge of effective argumentation being essential to courtroom advocates. Most of what has been written on this topic, however, e.g. Keeton

(1973), has overlooked the interactional dimension of forensic rhetoric, thereby neglecting the conception of language in court as one type of communicative act. Nevertheless, empirical studies of language interaction in courts have become increasingly numerous of late.

As suggested by Bales, in any small group task performance, certain actors will account for a disproportionate share of language acts, and there is a demonstrated tendency for one participant in a small group decision-process to dominate task-oriented communications, while another member "leads" in socio-emotional activities. In a set of studies initiated in the mid-1970s, (Walker, LaTour, Lind & Thibaut, 1974; LaTour, Houlden, Walker, & Thibaut 1976, Lind, Erickson, Friedland, & Dickenberger 1978; and Lind, Kurtz, Musante, Walker & Thibaut, 1980), researchers attempted to discern how the distribution of control over task-oriented communication acts affects participation perceptions of a criminal trial's procedural fairness. These studies concluded that litigants are more satisfied with the judicial outcomes when they have greater control over the flow of the fact-finding process. In national courts in which an inquisitorial mode of fact-finding is the procedural norm, e.g., France, with the judge controlling the flow of communication acts in the task-performance area, both prosecutors and defense attorneys are less satisfied with case determinations than in courts which follow adversarial procedures, i.e., in which lawyers from both sides have a greater opportunity to steer the fact-

finding process.

Among those contributing to this set of studies was William O'Barr (O'Barr & Conley, 1985), a legal scholar attached to Duke University's law School. Parallel to the studies noted immediately above, O'Barr and his colleagues extensively investigated variations in witness testimony style (O'Barr & Lind, 1978; Erickson, Conley, & O'Barr 1979; Lind & O'Barr 1979). The main findings of these research teams were presented in O'Barr's 1982 text Linguistic Evidence: Language, Power and Strategy in the Courtroom. O'Barr and his associates reported that the specific speech forms which witnesses use have differential effects in the credibility attributed to them by judges and juries. Hence, for example, witnesses who hesitate in making statements to the court, who use "hypercorrect" speech, and who frequently interrupt the speech of other courtroom participants, are generally perceived to be less credible than those who employ a straightforward speech style, avoid linguistic formalisms, or remain silent during interjections by an opposing counsel.

Brenda Danet has published several analyses of communication forms in criminal courts. In concert with Hoffman, Kermish, Rafn, and Stayman, Danet (1980) developed and applied a typology of question forms used in direct and cross-examination of witnesses in criminal proceedings. She found that such questions can be classified under one of five mutually-exclusive categories: (1) declarative statements; (2) interrogative questions calling for a dichotomous yes or no answers, (3) interrogative questions

concerning who, what, when, where, and why matters (4) re-questions, and (5) imperatives.

In an extremely relevant study, Danet (1980) approached communication acts in courts from the standpoint of symbolic interactionism. Adopting a sociological model of dispute resolution first proposed by Hymes, Danet described trial proceedings according to eight generic features of speech situations: (1) setting and scene, (2) participants, (3) ends (both goals and results of interaction), (4) act sequences, (5) key (tone classified as play, ritual or serious), (6) instrumentalities (communication channels and style of expression), (7) norms (of both interaction and interpretation), and (8) genres (opening statements, testimony, judicial instructions, ect) (pp.464-465). She also divided the speech acts in court under five rubrics, (1) representatives, (2) directives, (3) commissives, (4) expressives, and (5) declarations (Ibid., pp.458-459).

In discussing her findings, Danet explicitly recognized the connection between the theories of legal realists such as Frank and Arnold and the assumptions of symbolic interactionism. Regarding this nexus, she asserted that "both stress the symbolic rather than the referential or representational aspects of language. They highlight the idea that legal language is meant to be experienced not understood" (1980, p.545). Congruent with the premise of legal realism, her own sociolinguistic study results indicated to Danet that "the 'facts' of a case do not pre-exist but are constructed through interaction" (p.509) among actors in courts.

The notion that reality is "reconstructed" in court through the transmutation of language is central to an emerging image of the trial as narrative recreation first advanced by Bennett (1978, 1979) and subsequently presented in Bennett and Feldman's Reconstructing Reality in the Courtroom (1981). These studies argued that jurors do not use syllogistic reasoning in evaluating the meaning and the credibility of evidence presented to them in criminal trials. Instead, they organize and process information presented to them as a "story" and assess the resultant narration in terms of its plausibility and internal consistency.

Since then, Hastie and Pennington (1983) have used the "narrative recreation" approach in their analysis of what takes place in the minds of individual jurors. Call (1986) has written on the practical potential of conceiving a trial as "story-telling," asserting that:

Through trial-story analysis, lawyers can quickly and easily dissect their opponent's cases and more readily perceive the strengths and weaknesses of their lawsuits. Trial-story analysis also provides a logical procedure to help interpret the result of behavioral science litigation research techniques (Call 1986, p.87).

Rieke and Stutman (1990) have also noted the prospective utility of approaching communication acts within judicial settings as elements of a "story" which jurors subsequently "critique" in rendering case decisions.

E. Empirical Studies of Legal Proceedings Using Interaction Process Analysis Methods

As mentioned in the previous section of this review, only a handful of researchers have attempted to apply Bales' Interaction Process Analysis, or modified versions of it, to small group decision-making in courts of law. All of these efforts have concentrated on simulated jury deliberations pursuant to mock trials (Penrod 1986, p.492).

Strodtbeck and Mann (1956) employed Bales' twelve-category communication act instrument in seeking to distinguish the role behavior of males and females in mock juries. They assembled a total of twelve twelve-member juries who were exposed to a mock auto negligence case and used an audio transcript of deliberations to construct interaction profiles. Strodtbeck and Mann found significant differences along gender lines, with male jurors registering more responses in the task-orientated or instrumental portion of Bales' instrument, while females accounted for an inordinately high share of acts in the social-oriented or expressive poles of the spectrum. On the basis of this data, Strodtbeck and Mann concluded that "men pro-act, that is, they initiate relatively long bursts of acts directed at the solution of the task problem, and women tend more to react to the contributions of others" (p.635).

These results were subsequently challenged in a pair of replication studies conducted by Nemeth, Endicott, and Wachtler (1976) and by Nemeth (1983). In the first of these, Nemeth et al. implemented twenty-eight mock trials. They basically confirmed the

findings of Strodtbeck and Mann as reported twenty years earlier, with male jurors posting a higher median rate of task-oriented acts in categories 4, 5, and 6 of the Bales classification system (respectively, makes suggestion, gives opinion, and gives information) than females. Seven years later, however, Nemeth (1983) reported that, under conditions more closely approximating "real" trial procedures, there were no statistically significant variations in the aggregated interaction profiles of male and female jurors (p.74).

In his study of correlations between jury verdicts and both jury size and decision-making rule, Saks (1971) used a modified version of the Bales twelve-category instrument "to accommodate the kind of communication we have learned is peculiar to jury deliberation" (p.67). Saks scored interactions within simulated juries under thirty-seven separate communication act categories, including such highly particularized forms as expression of choice for conviction or acquittal, procedural statement, statement made on the basis of inferred information, (Ibid., p.68).

Another set of studies applying Interaction Process Analysis to mock jury deliberations concentrated upon differences in the interaction profiles of juries under variable decision-making rules. Davis, Kerr, Holt and Meek (1975) first noted that mock juries charged with reaching a unanimous (12-0) decision engaged in a higher percentage of task-oriented communication acts than a matched group charged with rendering decisions on the basis of two-thirds majority rule. This generalization was subsequently

confirmed by Nemeth (1977), by Hastie, Penrod, and Pennington (1983), and by Brown (1986). Like Saks (1971), Hastie et al. (1983), however, also found it necessary to modify Bales' interaction profile method, scoring jury interactions under three basic categories, (1) conveying information, (2) asking for information, and (3) urging the group to take action as in a vote (direction).

What we find, then, is that while the legal realists overturned the customary notion of judicial decision-making and explicitly advocated the use of sociological methods to analyze courtroom proceedings, only a very limited number of empirical investigations have been undertaken along these lines. More specifically, although symbolic interactionist principles have guided some researchers in their study of how courts render their determinations, these studies have all focused on simulated jury deliberations. In the next section of this chapter, the potential utility of Bales' Interaction Process Analysis method for describing and analyzing pre-trial hearings on motions to exclude evidence from criminal trials will be suggested through a survey of the historical background and the relevant literature concerning the controversial exclusionary rule.

#### IV. Exclusionary Rule Hearings

##### A. Introduction

Exclusionary rule hearings are pre-trial proceedings in which a state or federal judge determines the admissibility of evidence

into prospective criminal trials. In making these decisions, judges are guided by the principle that evidence obtained by the prosecution in violation of a criminal defendant's Fourth, Fifth, and/or Sixth Amendment rights should be suppressed. Although the Constitution is silent on this particular matter, the exclusionary rule has been mandated as a means for fulfilling "the promise" of the Bill of Rights by deterring unconstitutional actions on the part of law enforcement and criminal justice system personnel. Katsaris (1975, pp.63-75) has provided a concise overview of the exclusionary rule, initiating his discussion with the observation that "probably no other rule of law has achieved the impact upon modern criminal justice system as the rule of exclusion" (1975, p.63). As will be demonstrated in what follows, the exclusionary rule is extremely controversial, with many legal scholars and working judges alike advocating its abolition.

#### B. Case Development of the Exclusionary Rule

Although the scope of the exclusionary rule encompasses evidence gathered in violation of a criminal defendant's Fifth Amendment right against self-incrimination and Sixth Amendment guarantee of a right to counsel, its principle line of development stems from the Fourth Amendment's protections against unreasonable searches and seizures. While the validity of a search warrant occasionally serves as an issue in exclusionary rule hearings, in most instances a defense motion to suppress evidence is made in response to warrantless searches undertaken by the police on the

basis of a "probable cause" for belief that a criminal offense has taken place.

The exclusionary rule has its origins in the Supreme Court's ruling in Weeks v. United States 232 U.S. 383, 34 S.Ct.341 (1914). Prior to that decision, the admissibility of evidence into both federal and state criminal trials was governed by common law precepts. Although certain narrow types of evidence-gathering practices, e.g., coerced confessions, were recognized at common law as being inadmissible, relevant tangible evidence could be submitted at trial regardless of how it had been attained.

In Weeks, federal law enforcement officers executed a warrantless search of a criminal suspect's home and seized incriminating personal letters which were eventually introduced as evidence in a federal court trial. Upon his conviction, the defendant appealed his case to the Supreme Court. The Court overturned Week's conviction on the grounds that the officers had violated his Fourth Amendment rights. Writing for the majority, Justice Day stated that: "the tendency of those who execute the criminal laws in this country to obtain conviction by means of unlawful seizures and enforced confessions...should find no sanction in the judgments of the courts" (Cushman & Cushman 1965, p. 459). The remedy for such practices, the Court opined, was to bar evidence obtained in violation of the Fourth Amendment from federal criminal trials. This established the basic rationale for conducting pre-trial hearings in federal jurisdictions on motions to suppress evidence garnered through tainted searches.

The impact of Weeks, however, was comparatively limited. The Weeks Court stated that this newly-fashioned "exclusionary rule" applied only to officers acting under the color of federal authority. Even though the Supreme Court issued a series of decisions in the 1920s which implied that the constitutional protections of the Bill of Rights were enforceable through the Fourteenth Amendment (Creamer 1988, p.94), the exclusionary rule was not extended to evidence garnered by non-federal law enforcement officers. The Court did enlarge the force of the exclusionary rule through the "fruit of the poisonous tree" and "silver platter" doctrines (Grano 1984, pp.316-317), but it did not extend its decision in Weeks to the states. In the wake of Weeks, seventeen states enacted their own exclusionary rule statutes (Lewis & Peoples 1978, p.192), yet in the 1949 case of Wolf v. Colorado, 388 U.S. 25, 69 S.Ct. 1359, the Supreme Court refused to impose an exclusionary rule on the states.

In 1961, the Supreme Court issued its landmark decision in the case of Mapp v. Ohio, 376 U.S. 643, 81 S.Ct. 1684. Although three members of the Mapp Court dissented in arguing that the mandatory extension of the exclusionary rule to the states represented an unwarranted abridgment of states' rights, the majority was firm in holding that the Fourth Amendment protection against unreasonable searches and seizures was of sufficient priority for the Court to compel its adoption by state judiciaries. Citing the opinion of Justice Brandeis in Olmstead v. United States, Justice Clark propounded that "government-sanctioned law breaking breeds contempt

for the law; it invites every man to become a law unto himself; it invites anarchy" (Cited in Lewis and Peoples, 1978 p.195). In the wake of Mapp, all states were constrained to adopt the exclusionary rule and to devise provisions in their criminal codes for the conduct of hearings on motions to suppress evidence obtained in violation of the Fourth Amendment.

Shortly after issuing its decision in Mapp, the Supreme Court turned its attention to police violations of a criminal suspect's Fifth and Sixth Amendment rights. The key case heard by the Court in this area was Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) (Young 1993, p.280). In this instance a criminal suspect confessed to rape without being apprised of his Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel. The Supreme Court overturned Miranda's conviction, with Chief Justice Earl Warren asserting that an individual placed into custody must be advised of his right to remain silent and his right to have an attorney present during interrogations. This, in turn, led to the adoption of the now-familiar "Miranda Warnings" as standard practice by federal and state law enforcement officers to ensure the admissibility of statements made by suspects into criminal trials.

Lastly, one year after hearing the Miranda case, the Supreme Court extended the reach of the exclusionary rule still further through its rulings in United States v. Wade 388 U.S. 218 (1967). The Wade Court ruled that pre-trial lineups were a "critical stage" in the criminal justice process. As such, a criminal suspect has

a right to have an attorney present at pre-trial lineups, and the failure to satisfy this right rendered such identification evidence inadmissible under the exclusionary rule. In Wade and subsequent cases, the Supreme Court prescribed further rules to which line-ups procedures must conform.

By 1967, then, the Supreme Court had opined that evidence gathered in violation of a criminal defendant's Fourth, Fifth, or Sixth Amendment rights could not be admitted into federal or state trials. Since the admissibility of such evidence is frequently a matter of contention, all states now permit defense counsels to request pre-trial hearings for the suppression of evidence based on the exclusionary rule. Among working criminal attorneys, distinctions are often made among "Mapp," "Miranda," and "Wade" hearings, but the standard for conducting these proceedings are fairly uniform within each state jurisdiction. In practical terms, "Mapp" issues comprise the greatest percentage of all exclusionary rule hearings, with narcotics and weapons offenses being the most common charges associated with Fourth Amendment motions to suppress evidence.

On the whole, since the late 1960s, the Supreme Court has marginally expanded the reach of the exclusionary rule on Fifth and Sixth Amendment grounds. On the other hand, while the Supreme Court has been reluctant to reverse Mapp and dismantle the exclusionary rule in application to the Fourth Amendment, judicial dissatisfaction with the practical effects of the rule has led the Court to narrow its impact substantially. One of the most

important contractions of the exclusionary rules' s Fourth Amendment scope arose in the 1971 case of Harris v. New York 401 U.S. 222, 91 S.Ct. In this case, the Court ruled that otherwise inadmissibly obtained evidence could be introduced into trial if a judge decided that law enforcement officers had acted in "good faith" and merely "blundered" into violations of a criminal suspect's Fourth Amendment rights. The 1971 ruling left states free to determine the validity of "good faith" exceptions to the exclusionary rule.

### C. The Ongoing Debate Over the Exclusionary Rule

Since its amplification through Mapp, the exclusionary rule has been a subject of controversy within the judiciary and the public at large. Proponents of the rule assert that it is a necessary deterrent against police misconduct violative of fundamental individual rights and a bulwark of judicial integrity. Its critics, on the other hand, contend that the rule has not been effective in deterring police violations of the Bill of Rights and that it has merely served to free defendants who would otherwise be convicted of crimes.

The primary criticism of the exclusionary rule is that it has not achieved its stated purpose of reducing police abuses of suspect rights. At the outset of his argument against the exclusionary rule, Dallin Oaks asserts:

The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task (Oaks 1970, p.667).

Oaks based this assessment on data derived from field studies conducted in the 1960s, including his own survey of police practices. Taken collectively, these studies infer that the vast majority of unreasonable, warrantless searches and seizures never come to the attention of the courts since they do not lead to formal charges or are absolved via plea bargaining. More recently, a 1984 study prepared by the National Center for State Courts found that the overwhelming percentage of searches and seizures made in the United States were warrantless and undertaken by the police presence without serious intention of prosecution, i.e., to display police presence, seize contraband and the like (Levy 1986, p.664). Opponents charge that the exclusionary rule is misdirected in that it fails to impose educative punishment upon police officers who often remain unaware that their misconduct has caused evidence to be excluded. Since Heffernan and Lovely (1991) have reported that even extensively trained law enforcement officers are "mistaken about a quarter of the time" about specific rules of search and seizure (p.369), it may be inferred that the rule's mechanism is askew in not hitting its target directly. We note here that that rule itself does not demand that police officers be disciplined by their superiors when they fail to abide by departmental procedures, nor does it expose the police to any civil liabilities.

The second major argument against continued use of the exclusionary rule is that it inadvertently allows the guilty to escape punishment. It was on this basis that Benjamin Cardozo voiced his dissatisfaction with the rule as it applied to federal

prosecutions in the 1926 case of the People v. Defore 242 N.Y. 13, 150 N.E. 585. Cardozo condemned the rule in allowing patently guilty suspects to escape justice "simply because the constable has blundered" (Cited in Singer 1984, p.44). This point has been raised most frequently with reference to purported violations of the Fourth Amendment in which tangible evidence has been seized, many rule critics reminding us that the mere fact that evidence is obtained illegally does not substantially affect its reliability. In a study of 457 narcotics and 188 concealed weapons cases heard by two Chicago circuit courts in 1969, Oaks (1970) found that over one-third evoked motions to suppress evidence, and that 97 percent of the narcotics motions and 68 percent of the weapons motions were granted (p.685). Similar results were subsequently obtained by Spiotto (1973) in his survey of nearly 3,000 narcotics and weapons cases heard by three branches of the Chicago circuit court in 1971 (p.251). By the mid-1970s, critics of the exclusionary rule could point to an array of empirical investigations reaching the same conclusions, i.e., that "a substantial number of otherwise guilty criminals escape likely conviction because of the application of the exclusionary rule" (Schlesinger 1977, p.2). Consequently, in the 1979 case of Stone v. Powell 428 U.S. 465, 96 S.Ct. 303, Justice Powell joined a growing chorus of critics in his complaint that the exclusionary rule operates to "deflect the truth finding process," while Chief Justice Warren Burger labelled it a "discredited device" (Cited in Chandler, Enslin, and Renstrom 1985, p.174). Prescribed as a remedy for police misconduct, the

exclusionary rule has generated side-effects that are worse than the original malady that it was meant to cure.

The rule's proponents respond to these tandem criticisms with two counter-arguments of their own. First, regardless of its influence upon the behavior of the police, the rule serves to enhance the integrity of the courts by ensuring that tainted evidence is not used in criminal cases. As Leonard Levy puts it, "a court that allows the government to profit from unconstitutional police action sullies the judicial process itself, by becoming an accomplice in an unlawful course of conduct" (1986, p.663). The courts must either respect the intentions of the Constitution with reference to individual rights or they will necessarily undermine the basic charter upon which their existence is founded.

A lively exchange on the value of the exclusionary rule can be found in a 1979 issue of Judicature. There Yale Kamisar disputed the methods used by Oaks (1970), Spiotto (1973), and Schlesinger (1977), particularly the content validity of their survey instruments and the validity of their sampling procedures. In a second article, Bradely Canon (1979), reported the results of his own nationwide survey of police officials, prosecutors, and public defenders. Contrary to the findings of Oaks and Spiotto, Canon's data indicated to him that since the Mapp decision, the behavior of law enforcement personnel has come into closer compliance with the Fourth Amendment safeguards (pp.400-401).

In that same issue, however, Judge Malcolm Wilkey (1979, pp.351-356) contended that the practical defects of the

exclusionary rule argue for its replacement by statutes which would permit the criminal prosecution of police officers who violate a suspect's constitutional rights and/or the initiation of civil suits against those officers, tainted evidence remaining admissible in court. Wilkey raised a crucial observation from the standpoint of this study's interests. On the basis of personal experience and anecdotal accounts, Wilkey concluded that many judges who preside in exclusionary rule hearings are inherently biased against motions to suppress. "Time and time again," he complains, "judges are blatantly hypocritical in constructing the Fourth Amendment's definition of an unreasonable search and seizure because they know full well that the illogical penalty of total exclusion of evidence is damaging to the cause of justice" (1979, p.356). Tacitly acknowledging the perverse effects of the exclusionary rule, judges bend the Fourth Amendment while disguising pre-set intentions to deny suppression motions.

At present, defenders of the exclusionary rule, such as Green (1985), and Heffernan and Lovely (1991), have concentrated their focus on preventing any further erosion of its force. Much of their recent effort has been dedicated to criticizing decisions which uphold "good faith" exceptions to the exclusionary rule. Critics, for their part, continue to press their case for the rule's nullification and for further exceptions to its application.

#### D. Exclusionary Rule Hearings

Considerably greater scholarly attention has been extended to the ongoing doctrinal debate than to the process through which the exclusionary rule is implemented. Nevertheless, since pre-trial hearings on motions to suppress are now institutionalized, basic texts in legal procedure delineate their format and workings. In Modern Criminal Procedure, for example, Kamisar, LaFare and Israel dedicate a full chapter to the administration of the exclusionary rule (1974, pp.729-746). Kamisar et al. have enumerated several rationales for addressing constitutional issues related to the admissibility of evidence in hearings prior to trial, e.g., enhancing the orderly presentation of evidence during trial (p.729). In the remainder of the chapter, the authors discussed such matters as whether a trial judge should be bound by an exclusionary hearing judge's ruling, whether the defense or the prosecution should bear the burden of proof in Fourth Amendment motions to exclude evidence from trial, and the like.

Hanely and Schmidt (1979) have distinguished among seven separate grounds for Fourth Amendment exclusionary rule motions: (1) defective search warrant; (2) extension of warrant beyond scope; (3) improper execution of search warrant; (4) warrantless entry of premises; (5) extension of protective search; (6) lack of probable cause; and (7) defective consent to police search. They then discussed causes for the rule's application to intangible evidence, e.g., evidence obtained through unauthorized wiretaps, "stacked" line-up, "Miranda" warning violations, coerced

testimonial evidence, and the like (pp.326-327). Hanely and Schmidt also presented general guidelines for the proper and effective questioning of witnesses in evidence suppression hearings. In many instances, they noted, exclusionary hearing decisions pivot on the judge's perception that the testimony of either the defendant or of a police officer is false (1979, p.329). Since judges share the general public's presumption that law enforcement personnel are more credible than criminal suspects, Hanely and Schmidt noted, petitioner's counsel must concentrate upon eliciting inconsistencies in the statements of prosecution witnesses (p.329).

Creamer (1980) has presented a full account of exclusionary rule hearings in The Law of Arrest, Search, and Seizure, including separate "anatomies" of Fourth Amendment (pp. 92-103) and Fifth Amendment (pp.103-105) suppression hearings. Creamer emphasized key differences between exclusionary rule hearings and criminal trials; the absence of a jury, a more casual approach to procedure, departures from the traditional rule of evidence (e.g., consideration of hearsay testimony) (p.96). In his analysis of defense and prosecution strategies in the "suppression battleground" of Fourth Amendment hearings, Creamer instructed lawyers seeking evidence exclusion to probe into the original intent of police witnesses in using unconstitutional means to gather incriminating evidence. As for prosecuting attorneys, Creamer advised them to emphasize and "develop all the facts known or observed by the officer that would justify the seizure of

incriminating evidence" (p.98).

Eldefonso and Coffey (1981) have provided another useful contrast in their comparison of grand jury and exclusionary hearings. In the former, they noted, decisions are made by laymen: the prosecutor is present, but neither the defendant nor his counsel are privy to the proceedings. In the latter, decisions are rendered by professional judges, both prosecution and defense attorneys are present (along with the defendant and witnesses), and the defense has an opportunity to cross-examine witnesses while challenging the existence, validity, and sufficiency of probable cause evidence (pp.133-134).

Although the Supreme Court has required states to exclude tainted evidence from criminal trials, individuals states retain the right to establish their own rules for the conduct of suppression hearings (Hanley and Schmidt 1979, p.330). The specific procedural standards followed in New York State can be found in Bender's compendium (1986 sec.710.10-710.70). New York's procedural code establishes a separate pre-trial hearing as a forum for determining the admissibility of evidence in dispute, it permits the consideration of hearsay testimony during these hearings, it places the burden of moving forward on the petitioner (the criminal defendant), and the ultimate burden of proving that evidence in dispute was obtained constitutionally on the respondent (the prosecution).

As conducted in the criminal justice system of the State of New York, pre-trial hearing exhibits several features which

recommend it as a an appropriate subject for Interaction Process Analysis. While they may not think of themselves as such, the participants in these hearings comprise a small group when assessed against Bales' definitional criteria. They meet in face-to-face sessions of sufficient duration and intensity for individual members to form impressions of other group members. The "group" as a whole exists in relation to a specific task, i.e., the disposition of a motion to suppress. Regardless of the outcome, all of the members of the group have an interest in arriving at a resolution of the issues at hand. Although the hearing judge is a formal leader of the group and exercises substantial control over the flow of communicative interaction, each of the participants in the hearing has an instrumental part in relation to the group's task. Moreover, in contrast to trial proceedings, exclusionary rule hearings are distinguished by a degree of informality that permits a considerable proportion of expressive interaction to occur during these sessions. Lastly, we can reasonably suspect that the formal leader of the group charged with primary responsibility for managing instrumental communication, i.e., the judge, may have strong ideological or emotional biases toward that task, e.g., at least some hearing judges may be predisposed to deny suppression motions as impediments to a "just" decision about the defendant's guilt or innocence at subsequent trial.

## V. Chapter Conclusion

A synthesis of the relevant literature of Bales' Interaction Process Analysis, judicial decision-making, and the exclusionary rule strongly suggests that Bales' method can be used to either generate or test hypotheses about the actual workings of exclusionary rule hearings. The need for such study is underscored by the absence of any sociological studies of these hearings in the published literature. More specifically, the literature indicates that a comparison of interaction profiles in cases in which motions to suppress are granted with those in which they are denied may offer insight into how judges reach these differential hearing outcomes.

## Chapter 2

### Opinion Survey of Pre-Trial Hearing Participation: Methodology, Results, and Discussion of Findings

#### I. Introduction

The main data for the study at hand are transcripts from pre-trial hearings on evidence suppression motions. These transcripts were subjected to Bales Interaction Profile Analysis (IPA). The results were interpreted within the over-arching framework provided by the literature reviewed in Chapter 1 of this study. Nevertheless, it was believed that a greater understanding of the results derived from the IPA study design could be enhanced through a complementary field research approach. Toward this end, a survey instrument was constructed and administered with the aim of eliciting opinions and perceptions of knowledgeable informants about judicial behavior during pre-trial hearings.

In this chapter, the methodology followed in the administration and data analysis of this survey will be described. Results will be presented and explanations for these results will be provided on an item-by-item basis. Lastly, the researcher will discuss the findings which were construed from an integration of results from each survey question into general response patterns for three designated groups within the survey sample, i.e., judges, assistant district attorneys, and defense attorneys.

## II. Methodology

### A. Description of the Opinion Survey Instrument

The instrument used for this component of the study's field research was an author-constructed opinion survey which consisted of seventeen questions, sixteen close-ended items and a concluding open-ended question. The open-ended question provided respondents with an opportunity to make extended remarks about the topics covered in the survey. The opinion survey's close-ended format, enabled the researcher to derive quantitative data for subsequent analysis. The items included in the instrument were intended to elicit the opinions and perceptions of three group participants---judges, assistant district attorneys, and defense attorneys---about behavioral patterns exhibited during pre-trial hearings. Since these responses were experience related, the results reflect observations, impressions and opinions of what transpires during evidence suppression hearings. Indeed, on several items, the observations, impressions and opinions of each sub-group sharply differed from those of the other two participant sub-groups. A copy of the original opinion survey instrument is attached to this study as Appendix A.

### B. Survey Sample

The initial sample for the opinion survey consisted of two-hundred-and-fifty informants (N=250), all of whom had direct first-hand experience as participants in evidence suppression motion proceedings heard by criminal courts in the State of New York. The

sample was divided into three groups: (1) fifty judges (N = 50); (2) one hundred assistant district attorneys (N = 100); and, (3) one hundred defense attorneys (N = 100). Prospective study participants were identified and selected by the researcher through non-random means. The researcher visited field settings, i.e. courtrooms, in which pre-trial hearings on evidence suppression motions was scheduled. Field settings were selected on the basis of convenience of access. All of the participants in the opinion survey volunteered to complete the instrument when requested to do so.

### C. Survey Administration

As noted in the section above, copies of the opinion survey were physically distributed to two-hundred-and-fifty potential study participants. Fifty of these copies were designated with the code "J" (indicating that respondents were judges), one hundred copies bore the code designation "ADA" (denoting that respondents were district attorneys), while the final one hundred copies were coded "Def.A" (indicating that respondents were defense attorneys). Given the content of the items contained in the instrument and its purpose, identical survey forms were used with all three survey sample groups. All survey participants were supplied with a stamped envelope addressed to the researcher and were asked to complete the survey instrument at their convenience for return via the means provided. The researcher was not physically present during the completion of the survey by the participants, but with

each instrument, a cover letter was enclosed describing the purpose of the research.

#### D. Response and Item-Completion Rates

From the initial two-hundred-and-fifty prospective participants, a total of one-hundred-and-twenty-seven ( $N = 127$ ) completed response sheets were returned to the researcher. The overall response rate was slightly more than 50 percent of the original sample. The number of completed responses was large enough for both the sample as a whole and for each of the subgroups to permit meaningful data analysis. Of the 127 participants in the final sample, 23 were judges, 50 were assistant district attorneys, and 54 were defense attorneys, with the response rate for subgroups ranging from 46 percent to 54 percent. Because a sufficient number of prospective participants was achieved for all three categorical groups, a second round of instrument distribution was believed unwarranted.

The final sample consisted of 127 returned forms. Meaningful results for this study were obtained for five of the instrument's close-ended items and for the open-ended "comments" question. In what follows, the results from a total of six opinion survey questions will be reported.

### E. Data Coding and Analysis

After assembling the 127 returned forms the response sheets were separated according to the three sub-groups included in the opinion survey, i.e., into stacks classified as "J," "ADA," or "Def.A". Responses to each closed-ended item were counted to yield numerical sums. These, in turn, were then transformed into percentage terms enabling the researcher to determine the pattern of responses to each item for each of the three opinion survey groups and for inter-group comparisons. Of particular interest was the identification of divergent views held by members of different sub-groups, e.g., the extent to which the response patterns of judges on a specific item differed from those in the "ADA" and "Def.A" groups.

As will be explained below, the first item in the opinion survey consisted of a straightforward question about respondent's professional experience as participant in pre-trial hearings. On the basis of their responses to this item, each of the three sub-groups were further divided into "more experienced" and "less experienced" sets. This permitted the researcher to determine whether or not respondent level of experience was a significant factor that might account for variations in item responses within each of the survey's three constituent participant groups.

The responses to the open-ended question posed at the conclusion of the survey instrument were content analyzed. They were then organized according to topical "themes." For this portion of the data analysis, no attempt was undertaken to discern

the possible variable influence of the respondent's level of experience.

### III. Presentation and Discussion of Survey Results

#### A. Question #1

The first item appearing on the opinion survey instrument asked respondents to give an indication of their level of experience in pre-trial hearings: How many years have you been a judge, assistant district attorney, or defense attorney? Study respondents were classified as either having: (1) less than ten years experience or (2) more than ten years experience. Numerical and percentage summaries are presented in Table 1. (page numbers will be inserted).

All 127 of the opinion survey sheets returned included a response to this background question. Of the three groups, assistant district attorneys reported the least professional experience: only five of the fifty ADA group members indicated that they had worked as assistant district attorneys for more than ten years. Based on working knowledge of career paths among district attorney's staff, the researcher was not surprised by the relatively small percentage of "more experienced" members in this survey. The position of assistant district attorney is often an entry-level position for law school graduates, many of whom gain experience in hearing/trial settings by working as prosecutors under the supervision of the district attorney's office before "moving on" to higher ranks in that organization, law firms or into

private practice. In contrast, of the 54 defense attorneys in the final survey sample, more than half (54 percent) indicated that they had served in this capacity for at least ten years. The professional experience of the judges included in the survey fell between these polar extremes: 65 percent of those in the "J" group reported less than ten years experience on the bench; 35 percent indicated more than ten years of experience as judges. That "less-experienced" participants might predominate in the "J" group was also anticipated. Sitting judges in the Criminal Part of the New York State Court System are normally elected or appointed for set terms, and, consequently, personnel turn-over rates tend to be fairly high.

Following the discussion of the results for the substantive questions presented below, it will be indicated whether any significant divergences were found between "less experienced" and "more experienced" participants in the item responses given by each of the three study groups.

#### B. Question #4

As the first of the substantive items for which meaningful results were derived, and identified according to its original designation as Question #4, study participants were asked about their perceptions of trends in pre-trial hearing outcomes. Study participants were asked to indicate their perceptions about whether the number of cases in which motions to suppress evidence were granted by judges had increased or decreased during the five years

prior to the opinion survey's administration.

As shown in Table 2-A, this item elicited an acute and significant difference in reported perceptions held by judges and assistant district attorneys, on the one hand, and defense attorneys, on the other hand. Of the 23 judges in the final survey sample, 18 (or 78 percent of this group) indicated that the number of pre-trial hearings that resulted in suppression of evidence had increased during the past five years. The opinion that the number of suppression motions had increased in the recent past was even more pronounced among those in "ADA" survey group. Of the fifty assistant district attorneys included in the sample, 42 (or 84 percent of this group) indicated that the number of suppressed cases had increased. In sharp contrast, of the remaining 52 of 54 defense attorneys who answered this question, only 20 (38 percent) were of the opinion that the number of suppression motions had increased during the past five years. Indeed, a substantial majority, 32 participants (62 percent) of the "Def.A" group indicated that, in their view, the number of suppression motions had decreased.

The results for each of the responses were then broken down along the lines of "less experienced"/"more experienced" (see Table 2-B). As a result of this procedure, it was found that while a majority of both less-experienced and more-experienced judges indicated an increase in suppression, the former were more likely to express this opinion (87% vs. 62.5%). The "more-experienced" participants in the Def.A group were more likely to indicate that

number of cases in which suppression was granted had decreased than those defense attorneys with less experience. Or that less experienced judges tended to believe that suppression had increased even as those defense attorneys with more experience tended to indicate that suppression had decreased more often than defense attorneys in the less experienced sub-group. The very small number of "more-experienced" assistant attorneys, i.e., five, precluded intra-group comparison on the basis of respondent experience for this item, yet the pattern was the same as for J's.

At this point, on the basis of the results for this item, there are three findings that merit presentation and discussion. First and foremost, Table 2-A shows that there was an unmistakable divergence in the perceptions of groups of respondents divided by their respective roles within suppression hearing. Judges and assistant district attorneys saw the trend in hearings disposition favoring the defendant; defense attorneys saw the trend going in the opposite direction, i.e., toward state's interest in the denial of evidence suppression motions filed by the defense. Second, Table 2-A shows that both assistant district attorneys and defense attorneys indicated that the trend in hearing outcomes was adverse to their clients. It may be speculated that both groups are essentially arguing for measures that would re-direct the trend in per-trial hearings. On that premise, the "ADA" respondents may perceive laws, and, perhaps, hearing judges as leaning toward "favorable" treatment of defense motions, while the "Def.A" respondents may be contending that rules, laws, and judges are more

adversely "biased" against their clients. Lastly, Table 2-B shows that more of the "less-experienced" respondents in all three groups felt that the number of suppression cases had increased in the last five years, compared to "more-experienced" respondents.

### C. Question #5

Question #5 was meant to probe into the underlying causes behind any increased tendency for courts to grant evidence suppression motions in criminal cases. Participants were asked to select among three response categories each identifying a different hypothesized cause of recent increases in the number of suppression motions granted: (1) changes in the law; (2) changes in personal (judicial) views with respect to search and seizure; and, (3) better preparation of the witness. Table 3-A shows that those responding to this question, judges (22%), assistant district attorneys (18%) and defense attorneys (15%) agreed that "better preparation of the witness" was why the number of suppression motions granted had increased in the last five years. The majority of respondents, J's (48%), ADA's (74%) and Def.A's (78%) chose not to answer this question.

The results for this question are informative insofar as they underscore the perceived importance of better witness preparation by all three survey groups. Additionally, the findings for this item tend to run in the direction contrary to those derived in Question #4. Rather than a sharp division of opinions along role-defined lines seen in table 2-A, there was a fairly close

resemblance in the response profiles for judges, assistant district attorneys and defense attorneys in Table 3-A. Perhaps the most intriguing result of all, for Question #5, was that almost half the judges and approximately three quarters of the assistant district attorneys and defense attorney chose not to answer this question. It may be that the identification of "causes" was perceived to be a potentially threatening inquiry.

The results to this question suggest that increased suppression is partly due to the better preparation of the witness. For the most part, the witnesses in pre-trial hearings are police officers. It follows then that the better prepared they are as witnesses, the more damaging their testimony is to the defense. Judges, especially, may have avoided responding to this question because they did not want to be perceived as favoring the prosecution.

#### D. Question #6

The next item from which meaningful results were obtained asked survey respondents to indicate their perception of the extent to which the judges actively participate in pre-trial hearings. From her own observations the researcher noted that while some judges may exercise "minimal" intervention in such hearings, others will participate more actively. Thus, in Question #6, respondents were asked the question: "In your experience, would you say that judicial participation in pre-trial hearings is (1) active or (2) minimal?"

The results for this item are shown in Table 4-A, and, as was the case for Question #4, there is a very powerful division of opinion on this matter among the three study groups. The judges in the sample reported that, in their experience, pre-trial hearings featured active judicial participation; 21 (91 percent) of the "J" group members checked "active," while only 2 (9 percent) respondents in this group checked "minimal." Contrary to the response pattern for Question #4, however, judges were joined in this assessment by defense attorneys, while assistant district attorneys saw the matter differently. Among, the former, 38 out of 54 (70 percent) "Def. A" group members indicated that judges do, in fact, participate actively in pre-trial hearings. Yet, within the assistant district attorney group, 37 (i.e., 74 percent) asserted that judicial participation in such hearings is minimal and only 13 "ADA's" checked "active."

As presented in Table 4-B, comparison of groups according to respondent experience shed very little additional light on the response profiles for the "J" and "Def.A" groups. Among judges and defense attorneys there was only a modest change in percents when experience was introduced as a control variable. While the small number of "more-experienced" members in the "ADA" groups limits its significance, an anomaly does appear in the "ADA" column of Table 4-B: while the ADA group as a whole sees judicial participation in pre-trial hearings to be minimal, those with more experience are more likely to see judicial participation as active.

The results for Question #6 reinforce previous findings of

very sharp differences in the perceptions of the three groups. Nevertheless we may recall that in response to Question #4 there was a close resemblance between the "J" and "ADA" group responses. In this instance, however, judicial perceptions approximated those of defense attorneys as opposed to "ADAs." Thus, while sharply-etched differences among the three groups are once again apparent, "alliances" in inter-group opinions seem subject to variations according to question content. This, in turn, may suggest that judges and district attorneys do not necessarily share the same perceptions of pre-hearings. By the same token, judges and defense attorneys do not necessarily share the same perceptions of pre-trial hearings. Lastly, in this instance, the experience factor tended to push "ADA" members toward a perception that was at odds with the "less-experienced" members of their group (and, in fact, consistent with perceptions of "non-ADA" group members).

#### E. Question #7

As a follow-up to Question #6, the next item on the survey asked respondents to indicate which of four factors had the greatest influence upon the degree of judicial participation in pre-trial hearings: (1) skill of counsel; (2) type of hearing; (3) type of witness; or (4) type of judge.

As shown in Table 5-A, a striking division emerged in the views of the three survey group concerning determinants of active judicial participation in pre-trial hearings. The response category "skill of counsel" was checked by a majority of judges (16

participants or 70 percent of the "J" group) and defense attorneys (39 participants or 72 percent of the "Def.A" group). But barely a third of assistant district attorneys (18 participants or 36 percent of the "ADA" group) gave this response. Conversely, "ADA" group participants were much more likely to cite "type of witness" as a fact (with 17 ADAs or 34 percent of that group checking this response category), than either the judges (3 participants or 13 percent of the "J" group) or defense attorneys (5 participants or 9 percent of the "Def.A" group). A comparatively small, but still significant, number of respondents chose "type of hearing" as a factor affecting judicial participation in pre-trial hearings, with 4 judges (17 percent of "J") and 8 assistant district attorneys (16 percent of "ADA") selecting this response. Curiously, only 1 defense attorney (2 percent of the "Def.A" group) saw "type of hearing" as a factor influencing the level of judicial participation in pre-trial hearings. Of equal significance, while none of the 23 judges in the sample felt that the "type of judge" influenced the degree of participation, 14 percent of the assistant district attorneys (7 participants) and 17 percent of the defense attorneys (9 participants) cited variations in the "type of judge" as a force determining the level of involvement in pre-trial hearings.

When the data for Question #7 was broken out according to the variable of respondent's experience as in Table 5-B, no major differences can be discerned in the responses of "less experienced" and "more experienced" judges; the majority of both sub-groups

checked "skill of counsel" response category; again, none of the "J" group members gave a "type of judge" response. Experience was found to be a strong correlate of the views of assistant district attorneys. None of the participants in the "ADA" group with more than 10 years of experience checked "skill of counsel" as a factor influencing the level of judicial activity in pre-trial hearings; all five of the "more experienced" assistant district attorneys indicated that "type of witness" was the strongest determinant of judicial participation. In reciprocal manner, all of the assistant district attorneys who checked the "type of judge" response category had less than ten years of experience. Congruent with the "J" group, a majority of both "less experienced" and "more experienced" defense attorneys found "skill of counsel" to be a key causal factor for judicial participation in pre-trial hearings. In a pattern which ran directly opposite to that of the "ADA" group, defense attorneys with more experience were more likely to check "type of judge" in response to this question than the "less experienced," members of the "Def.A" group.

The results obtained from Question #7 are centrally relevant to this study's primary analytical aims, for there appears to be a sharp divergence of perceptions among the study groups as to the interactional focus of judicial participation. Judges and defense attorneys saw the skill of counsel as the chief determinant of active judicial involvement in pre-trial hearings. This response may be interpreted as a critical observation on the variable quality of presentations made in pre-trial hearings by assistant

district attorneys, defense attorneys, or both. It appears that when presentations are procedurally defective, argumentative, unfounded or illogical, active judicial participation is more likely to occur. We find, then, that judge and defense attorney respondents tended to focus on bench-counsel exchanges as the primary source of judicial activity.

From the perspective of the assistant district attorney in the survey sample, judicial participation is a function of witness credibility and therefore pivots on a bench-witness axis. When witnesses present less than credible testimony, judges are likely to intervene. From the standpoint of ADAs, it can be reasonably surmised, the degree of judicial participation in pre-trial hearings is partly determined by poorly-selected and poorly-prepared witnesses for the defense, who can incur a judicial response to both themselves and to defense counsel. At the same time, when prosecution witnesses, e.g., arresting police officers, are well-prepared, the need for judicial intervention is minimized. From two different angles, then, district attorneys focus on witness-bench interactions as a cause of judicial activism in pre-trial hearings.

The results for the "type of judge" item are also relevant to the study's IPA analysis of judicial behavior. A significant number of both Def.A and ADA groups cited "type of a judge" as an explanatory variable for judicial participation in pre-trial hearings. Yet none of the judges in this sample concurred with this view. This uniform denial of judicial participation as a

function of personality or stylistic variance among hearing judges may be indicative of an inherent bias on their part toward preserving the image of the bench as a dispassionate trier-of-fact. Whatever the cause, two points stand out: (1) attorneys from both "sides" believe that subjective, personal variables have an influence upon the behavior of judicial decision-makers in pre-trial hearings; and, (2) these same judicial decision-makers do not acknowledge any correlation between the judge's personal characteristics, on the one hand, and his or her degree of participation in such hearings, on the other.

#### F. Responses to Survey's Open-Ended ("Comments") Item

The last item on the Opinion Survey form was prefaced by the heading "Optional Comments," and was intended for study participants to provide any remarks which they wished to make concerning pre-trial hearings. Of the study sample, seventeen respondents chose to answer this item. From the rate of completion for this item, what is striking is that of these seventeen, fourteen were defense attorneys, three were assistant district attorneys, and none were judges. As will be shown below, members of the "Def.A" group expressed a number of criticisms about possible sources of judicial bias against their clients.

Content analysis of the observations supplied by study participants in response to the opinion survey's open-ended item reveals strong disagreement between ADAs and Def.As on the matter of how judges "screen" defense petitions for hearings on evidence

suppression. Representative of the prosecution's position, one ADA group member asserted that, "judges too often grant a hearing when there is no legal or factual basis for a hearing." As may be anticipated, ADAs believed that pre-trial hearing judges are often too "liberal" in permitting defense attorneys to raise groundless arguments for the suppression of evidence. As might also be expected, their views on this topic were in diametric opposition to those of defense attorneys. One Def.A group member expressed this view on the subject:

I think judges should be more liberal in allowing pre-trial hearings, as long as the practice is not abused. Pre-trial hearings should be automatically held in all cases where the facts warrant it. This would result in...more intelligent pleas, more dispositions before trial, fewer cases over-turned on appeal because of denial of hearings, and more openness in discovery materials.

Plainly, then, ADAs and Def.As viewed the same phenomenon in completely different lights: ADAs believed that judges display bias toward granting motions for pre-trial hearings; defense attorneys believed that judges are inherently biased against granting such motions.

Those members of the Def.A group who elected to complete this item reserved the bulk of their criticism for judicial conduct during pre-trial hearings. Several of them used this chance to assert that pre-trial hearing judges are unfairly disposed toward the prosecution's side. Thus, one defense attorney complained that, "the Court has unfettered discretion within the pre-trial hearing, in many instances at the expense of the defendant, "while another stated that:

I think (that) many times the Court gives the prosecution greater leeway during the proceedings. Sometimes I think it is intended and sometimes unintended. But whatever the case may be, it is unfair to the defense.

It is evident from these remarks that at least some of the defense attorneys in the study sample saw the less stringent procedural requirements of pre-trial hearings (when compared to those governing trials) as a source of judicial "latitude" arrayed against the interests of the criminal defendants whom they represent.

This defense attorney perception of judicial bias against defense motions to suppress evidence received strong reinforcement through a set of remarks in which Def. A group members argued that judges take the gravity of the criminal offense into question in their handling of evidence suppression motions. Several study participants from this group indicated that while the seriousness of the offense should not impact upon judicial decision-making in pre-trial hearings, judges, do, in fact, take this factor into account. Reproduced below, the comment of one defense attorney captures the basic complaint lodged by Def. A members on this aspect of judicial bias.

On serious crime matters, judges will strain to deny defendant's pre-trial motion, e.g, if a defendant is charged with possession of a very small amount of marijuana, the Court will often grant the defendant's motion. However, the same factual situation, but the amount of marijuana is ten pounds, the Court will deny the defendant's motion. Judges fear newspaper coverage such as: 'Judge grants defendant's motion allowing big-time drug dealer to go free.' There are some exceptional judges, however, who will call it as they see it regardless of the severity of the crime.

This statement strongly suggests that judges "normally" consider

extraneous factors in their handling of pre-trial motions to suppress evidence, and these extraneous variables lead them to adopt a seemingly biased position against those charged with major crimes.

Consistent with this observation, one defense attorney asserted that judges are especially reluctant to view the testimony of police officers as less than credible. In his estimation, not only does this reluctance influence hearing outcomes, it contributes to abuses on the part of the police.

Most trial judges are reluctant to suppress contraband (e.g., drugs and guns) on the grounds that the police officer's testimony was not credible. This encouraged police officers to tailor future testimony and reinforces the idea that a police officer could testify to almost anything without a sanction whatsoever.

The allegation here implies that judicial prejudice fuels misbehavior on the part of the prosecution witnesses who may feel they can be untruthful on the stand with impunity.

Defense attorneys were highly critical of their counterparts across the aisle. Resonating with their responses concerning "skill of counsel" as a factor associated with judicial participation, one Def.A group member complained that assistant district attorneys often come to pre-trial hearings without adequate preparation, resulting in numerous and unnecessary delays. At least three defense attorneys leveled a slightly different charge against the ADA's. They asserted that the prosecution routinely uses pre-trial hearings as a discovery device to gain a "peek" at the evidence which defense will present at trial. Thus, one defense attorney spoke for several of his colleagues by writing

that, "pre-trial hearings in New York are used as a discovery device for the most part," and then adding, that, "this should not be the norm."

#### IV. Summary

From the response profiles of the participants taken collectively, we have derived some findings that possess considerable value for the interpretation of the study's IPA results.

First and foremost, it is apparent that role-defined groups, i.e., judges, assistant district attorneys, and defense attorneys, differ substantially in their views of judicial behavior during pre-trial hearings on motions to suppress evidence. All of the items reported above have generated contrasts in the aggregated responses of the three opinion survey groups. There was a slight tendency for the "J" group's view to overlap with those of the assistant district attorneys; however, there was no conclusive evidence of an identity between judges and ADAs. Indeed, for some items, the perception of judges were more closely aligned with those of defense attorneys. From the data presented and discussed in this chapter, it may be concluded that an individual colors his/her view of the judicial behavior in those hearings.

Second, both ADA and Def.A groups in the study sample indicated that the general trend in pre-trial hearings outcomes has run against their interest. Prosecutors indicated that judges are too liberal in granting hearings and in their determination of

hearing outcomes, while defense attorneys indicated that judges are overly conservative on both these fronts.

Third, role position appears to exert influence upon how participants in pre-trial hearings conceptualize sources of judicial activity. Defense attorneys ascribe judicial activity to the interplay between the bench and attorneys on both sides of the case. By contrast assistant district attorneys attributed judicial activity to the inherent quality of the testimony provided by defense and prosecution witnesses.

Lastly, while judges denied that the personality or "style" of judicial decision-makers has an impact upon their behavior in pre-trial hearings, both assistant district attorneys and defense attorneys indicated that judicial behavior during such hearings is at least partially a function of subjective variables. Indeed, defense attorneys appeared to believe that the pre-trial hearings judges bend the law in favor of the prosecution.

In sum, the data derived for the study's Opinion Survey underscores the probable influence of interpersonal and subjective forces in the ultimate disposition of pre-trial motions to suppress evidence. This, in turn, reinforces the study's basic premise that judicial decisions in pre-trial hearings are not completely "objective," and that through the application of IPA to hearing transcripts we can identify behavioral patterns which have little to do with the law but nevertheless exert a strong influence on hearing outcomes.

Table 1

## Question #1:

How many years have you been a(n) Judge, ADA, Defense Attorney?

	Judge		ADA		Def A	
	N	%	N	%	N	%
0-10 years	15	65.0	45	90.0	29	54.0
10+	<u>8</u>	<u>35.0</u>	<u>5</u>	<u>10.0</u>	<u>25</u>	<u>46.0</u>
Total	23	100.0	50	100.0	54	100.0

Table 2-A

## Question #4:

In the last 5 years have you found the number of cases where suppression was granted: (1) increased; (2) decreased?

	Judge		ADA		Def A	
	N	%	N	%	N	%
increased	18	78.0	42	84.0	20	38.0
decreased	<u>5</u>	<u>22</u>	<u>8</u>	<u>16.0</u>	<u>32</u>	<u>62.0</u>
Total	23	100.0	50	100.0	52*	100.0

Table 2-B

## Question #4:

Response levels to increased/decreased suppression and "years of experience" by judges, assistant district attorneys and defense attorneys.

Years of experience	Judge				ADA				Def A			
	0-10		10+		0-10		10+		0-10		10+	
	N	%	N	%	N	%	N	%	N	%	N	%
increased	13	87.0	5	62.5	39	87.0	3	60.0	12	43.0	8	33.0
decreased	<u>2</u>	<u>13.0</u>	<u>3</u>	<u>37.0</u>	<u>6</u>	<u>13.0</u>	<u>2</u>	<u>40.0</u>	<u>16</u>	<u>57.0</u>	<u>16</u>	<u>67.0</u>
	15	100.0	8	100.0	45	100.0	5	100.0	28*	100.0	24*	100.0

\* 2 respondents did not answer this question, one did not respond in the 0-10 years experience category and one did not respond in the 10+ years experience category.

Table 3-A

## Question #5:

If increased, do you think this is due to: (1) changes in the law; (2) changes in personal views with respect to search and seizure; (3) better preparation of the witness?

	Judge		ADA		DefA	
	N	%	N	%	N	%
changes in law	1	4.0	3	6	4	7
changes in views	2	9.0	1	2	0	0
better prep of witness	5	22.0	9	18	8	15
no* response	11	48.0	37	74	42	78
other**	<u>4</u>	<u>17</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
	23*	100.0	50	100	54	100

Table 3-B

## Question #5:

Response levels to increased changes and "years of experience" by judges, assistant district attorneys and defense attorneys.

Years of experience	Judges				ADA's				Def A			
	0-10		10+		0-10		10+		0-10		10+	
	N	%	N	%	N	%	N	%	N	%	N	%
changes in law	1	7	0	0	3	7	0	0	1	3.4	3	12
changes in views	2	13	0	0	1	2	0	0	0	0	0	0
better prep of witness	6	40	0	0	8	18	1	20	3	10.4	5	20
no* response	6	40	3	38	33	73	4	80	25	86.2	17	68
other**	<u>0</u>	<u>0</u>	<u>5</u>	<u>62</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0.0</u>	<u>0</u>	<u>0</u>
	15	100	8	100	45	100.0	5	100.0	29	100.0	25	100

\*TABLE 3-A and TABLE 3-B Question #5. A "no response" category was added because a large number of participants did not respond to this question.

\*\*TABLE 3-A and TABLE 3-B Question #5. An "other" category was added because a number of judges in the 10+ category added a variety of responses.

Table 4-A

Question #6:

In your experience, would you say J's participation in pre-trial hearings is generally: (1) active; (2) minimal

	Judge		ADA		Def A	
	N	%	N	%	N	%
active	21	91	13	26	38	70
minimal	<u>2</u>	<u>9</u>	<u>37</u>	<u>74</u>	<u>16</u>	<u>30</u>
Total	23	100	50	100	54	100

Table 4-B

Question #6:

Response levels to degree of participation and "years of experience" by judges, assistant district attorneys and defense attorneys.

Years of experience	Judge				ADA				Def A			
	0-10		10+		0-10		10+		0-10		10+	
	N	%	N	%	N	%	N	%	N	%	N	%
active	14	93	7	87.5	10	22	3	60	19	65	19	76
minimal	<u>1</u>	<u>7</u>	<u>1</u>	<u>12.5</u>	<u>35</u>	<u>78</u>	<u>2</u>	<u>40</u>	<u>10</u>	<u>35</u>	<u>6</u>	<u>24</u>
Total	15	100	8	100	45	100	5	100	29	100	25	100

Table 5-A

## Question #7:

Do you think the amount of participation depends on: (1) skill of counsel; (2) type of hearing; (3) type of witness; or, (4) type of judge?

	Judge		ADA		Def A	
	N	%	N	%	N	%
skill of counsel	16	70	18	36	39	72
type of hearing	4	17	8	16	1	2
type of witness	3	13	17	34	5	9
type of judge	<u>0</u>	<u>0</u>	<u>7</u>	<u>14</u>	<u>9</u>	<u>17</u>
Total	23	100	50	100	54	100

Table 5-B

## Question #7:

Response levels to amount of participation and "years of experience" by judges, assistant district attorneys and defense attorneys.

Years of experience	Judge				ADA				Def A			
	0-10		10+		0-10		10+		0-10		10+	
	N	%	N	%	N	%	N	%	N	%	N	%
Skill of Counsel	11	73	5	63	18	35	0	0	23	80	16	64
type of hearing	3	20	1	12	8	18	0	0	0	0	1	4
type of witness	1	7	2	25	12	27	5	100	3	10	2	8
type of judge	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>7</u>	<u>20</u>	<u>0</u>	<u>0</u>	<u>3</u>	<u>10</u>	<u>6</u>	<u>24</u>
	15	100	8	100	45	100	5	100	29	100	25	100

## Chapter 3

### Judges' Interaction with the Prosecution and the Defense

#### I. Introduction

As discussed earlier, in both Chapters 1 and 2, it struck us that light would be shed on the matter of J's possible "subjectivity" by examining the interaction of J with the prosecution and the defense in a sample of pre-trial hearings.

We focus our analysis around three questions:

(a) Since we could find no study of J's interaction, our first question is for descriptive purposes: How does J interact with the prosecution and the defense in pre-trial hearings? Specifically, does his/her courtroom behavior meet the expectations of J's role?

(b) Is the interaction biased toward ADA and against Def A in any way?

(c) If yes to (b), does the bias affect the impartiality of J's decision to suppress or not to suppress evidence?

#### II. Method

(a) Pre-trial hearings. Data for J's interaction with prosecution and defense is drawn from 28 transcripts of pre-trial hearings.

A pre-trial hearing is a prelude to a criminal trial, conducted when the defense claims that some constitutional right of

the defendant was violated in arresting him/her. Our 28 hearings include search and seizure cases (Did the police have probable cause to stop and search the defendant, thereby finding incriminating evidence?); line-up cases (Was the defendant fairly presented for identification in the line-up the police conducted?); and self-incriminating statement cases (Did the defendant make any self-incriminating statement voluntarily?). If the answer to the relevant question above is "Yes," the evidence based on that procedure will be allowed to be presented in the trial to follow. If the answer is "No," then the evidence will be suppressed from the trial to follow.

These hearings are conducted by a judge without a jury. Ordinarily, there are six people present at any given time, the judge, the prosecuting attorney, the defense attorney, the defendant, a witness, and the court stenographer. Occasionally, a translator for the witness is present. In our 28 cases all judges, ADA's, and Def A's are different.

As usual, the prosecuting attorney puts on his/her case first, followed by the defense. The prosecuting attorney always calls at least one police officer as a witness. The complainant and other civilian witnesses for the prosecution are called by the prosecuting attorney if they have been involved in the constitutional right at issue. Normally, that occurs when the fairness of a line-up is being contested, where they identified the defendant. The defense attorney usually has fewer witnesses to call. While s/he always has the defendant to call, the defendant

is not often called. Sometimes there is a civilian witness for the defense; sometimes the defense attorney calls a police officer as his/her own witness. But by and large, the defense attorney conducts his/her case through cross-examination of the witnesses called by the prosecuting attorney.

(b) Bales Interaction Process Analysis (IPA).

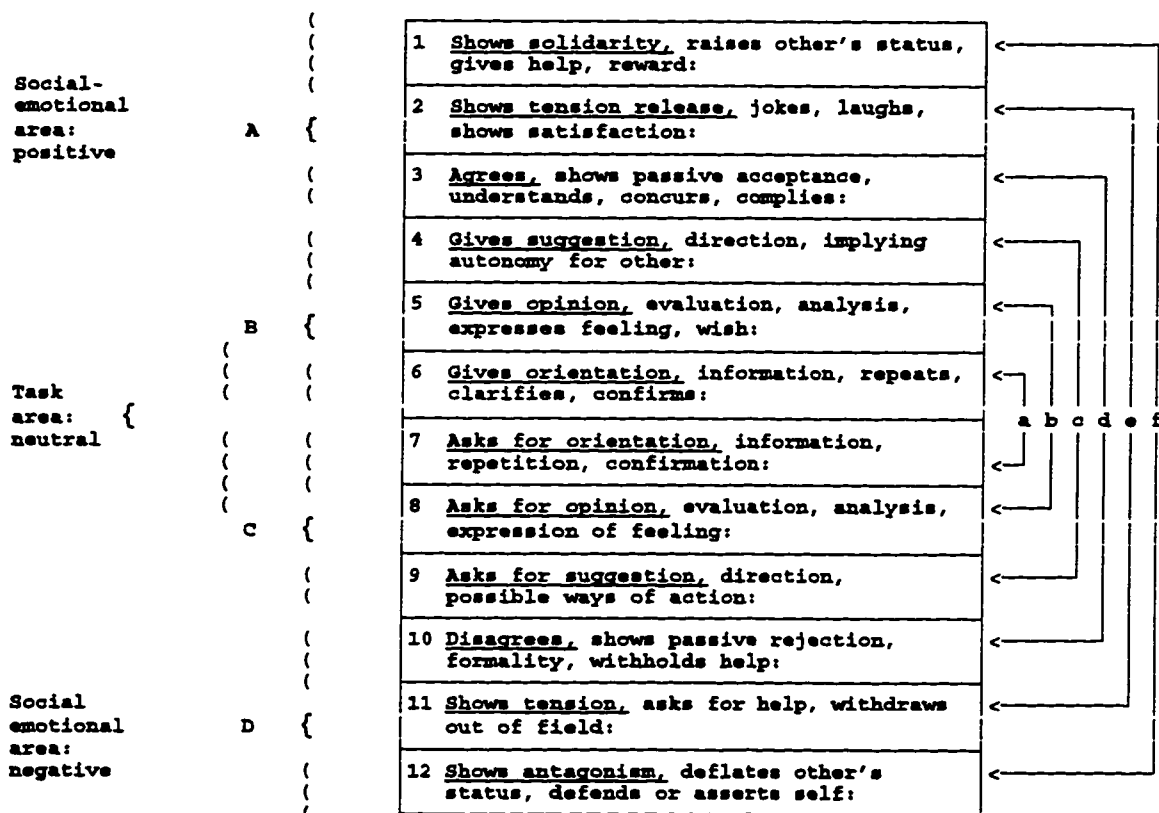
Interaction Process Analysis is a coding system developed by Bales (1951) to help understand the dynamics of small problem-solving groups. It is still the most prominent and most reliable system of its kind in sociology. Bales, from his research on small group process, decided that every problem-solving group has two major problems to solve, the task at hand and the socio-emotional issues raised as the group tries to meet its task. These two problems led Bales to the following category system for coding interaction.

The twelve interaction categories shown in Chart 1 are the center of Bales' Interaction Process Analysis method. The distinction between the task and emotional activity is shown in the organization of the categories into positive and negative emotional activity and task activity. Categories 1 through 3 identify positive socio-emotional units; Categories 10 to 12 indicate negative emotional categories; and Categories 4 to 9 contribute to the solution of the task problems.

Bales' most important finding was that the task process and the socio-emotional process tended to be led by different group members (Bales, 1950:152). While one would drive the group forward

Chart 1

<p><b>Positive</b> socio-emotional categories Shows solidarity Shows tension release Agrees</p> <p><b>Task categories</b> (Questions) Asks for orientation Asks for opinion Asks for suggestion</p>	<p><b>Negative</b> socio-emotional categories Shows antagonism Shows tension Disagrees</p> <p><b>Task categories</b> (Answers) Gives orientation Gives opinion Gives suggestion</p>
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**KEY:**

- |                                 |                      |
|---------------------------------|----------------------|
| a Problems of communication     | A Positive reactions |
| b Problems of evaluation        | B Attempted answers  |
| c Problems of control           | C Questions          |
| d Problems of decision          | D Negative reactions |
| e Problems of tension reduction |                      |
| f Problems of reintegration     |                      |

Reprinted from *Interaction Process Analysis* by Robert F. Bales. The University of Chicago Press, 1950.

on its task, another would smooth over any emotional "damage" done by the first. In essence, Bales discovered that there were two major dimensions of group leadership, not just one, as had been previously assumed.

While Bales confined his work, for the most part, to coding the interaction of problem-solving groups at sight, his system has been widely used in other ways. For example, Theodore M. Mill's (1967:33) summary of the IPA method lists "...the kind of problem the group is working on; the personalities of members, taken individually and as a figuration; the size of the group; sex, age, and social class of the members; age of the group; relation of the group to other groups, and its relation to the observer." Indeed, the restrictions to problem solving groups is not essential; task problems and socio-emotional problems are found in all types of small group interaction.

Interaction Process Analysis is used here on the transcripts of pre-trial hearings. The court proceeding is envisioned as an interacting small group, consisting, usually, of the judge, the defense attorney, the prosecution attorney, and the witness. In relation to the central hypothesis of the present study, if the judge should interact in different ways with the two lawyers, this coding system will detect it.

(a) The first question of this chapter is the following: Does the courtroom behavior of J meet the expectation of the J's role? We expect J's to act in a rational, non-emotional manner while directing the hearing and evaluating testimony from W's.

Thus, we expect J to use Category 4 and Category 6, primarily. We do not expect him to use any other categories more than incidentally, based on what is expected judicial behavior.

We found the following aggregate Bales IPA profile for our 28 pre-trial hearings; see Table 1. We present a Bales profile of a leader in a democratic role for comparison.

As expected, J uses Cat. 4 heavily, and much more than the leader, 25.7% vs. 6.7%. J also uses Cat. 6 extensively, but not as much as Bales' leader (24.6% vs. 47.1%). That we also expected: since J has authority, he does not have to explain his actions, while Bales' leader does (so far as we can tell from what Bales means by "democratic-directive"). J also uses Cat. 3 about the same as Bales' leader (4.4% vs. 4.8%), but also uses Cat. 10 more than does Bales' leader (4.3% vs. 1.0%).

Surprisingly to us was the large amount of questioning that J does, far more than does Bales' leader (35.5% in Cat. 7 vs. 8.7% in all three question categories). All of it is asking for information (Cat. 7), generally directed to W's. The lack of a jury lends an informal air to the hearing, and J takes over the questioning of a W from either ADA or Def A whenever s/he wishes. Simply put, J does not rely on the adversarial process to bring out the relevant facts. Since J must make the decision here (no jury), we believe that J intrudes into the interrogation of W's at any point to clarify points of the case that will later enter his/her decision process.

Finally, J is not unemotional in his/her behavior. J produced

2.1% of Cat. 1 acts and 1.6% of Cat. 12 acts, slightly more in each case than did Bales' leader. We are not surprised by these findings, even though judicial conduct concerns itself with the rational rather than the emotional. To think that J is nothing more than a justice-dispensing machine is to have a vision of the social world as a utopian world. J's do seem to get caught up in interactions and respond to these interactions more as ordinary members of the culture making positive and negative comments as s/he feels appropriate.

The remainder of J's profile is as expected. J produces essentially no Cat. 2, very little Cat. 5, and essentially no Cat. 8, no Cat. 9, and no Cat. 11.

From all this we conclude that "No" is the answer to our first question. (Table 6 gives a summary of these results.) J's profile is significantly different from the profile for Bales' leader. Specifically, J produces significantly more Cat. 10, Cat. 4, and Cat. 7 than did Bales' leader and significantly less Cat. 5, Cat. 6, Cat. 8, and Cat. 9 than Bales' leader. As we discussed above, we expected the results for Cat. 4, 6, 8, and 9, but not for Cat. 10 and Cat. 7.

The next task under the first question above is to see how J acts toward the prosecution and the defense separately, i.e., to split the profile given in Table 1 into two profiles, one for the prosecution and one for the defense. By "prosecution" we mean the ADA and any ADAW; by "defense" we mean the Def A and Def W's. Table 2 gives the results.

While more similar to each other than the profiles in Table 1, there are enough differences to make them significantly different. In particular, the profiles differ significantly on three affect categories, Cat. 3, 10, and 12, where the prosecution received more agreement, less disagreement and less antagonism than the defense. In addition, the profiles differ significantly on three "task" categories, Cat. 4, 6, and 7, where the prosecution receives fewer orders, fewer pieces of information, and more questions seeking information than does the defense. These findings are summarized in Table 6.

Among the task category differences, we do not have a good explanation for Cat. 4 and Cat. 6. We surmise that the Def A has generally less familiarity with pre-trial hearings than the ADA and needs more direction through it. These two categories would carry such comments from the J. The third difference, Cat. 7, we can explain: the large bulk of these questions is addressed to ADAW when J takes over the interrogation from the ADA. Since there are many more ADAW's than Def W's a surplus piles up on the prosecution side, leading to the finding. This point will be clarified when we go to Table 3.

However, it is the affect category differences that are the most interesting. J clearly is warmer toward the prosecution and colder to the defense. Put simply, J is biased toward the prosecution and against the defense. However, there may be an innocent explanation for it, e.g., J's irritation with Def A's general lack of familiarity with pre-trial hearings may lead

him/her into relatively cold treatment of Def A. For present purposes, the problem will be innocent if there are no differences between J's profiles in the Not Suppressed group of cases and the Suppressed group of cases. We deal with that below.

Finally, we point out that there is a significant difference in the total number of acts that J directs to the prosecution and defense (1,884 vs.1,189). We think that this "bias" is innocent, in the sense that the prosecution takes up most of the time of the hearing, and J interacts with them more than s/he does with the defense.

The final step under the first question is to break down the profile in Table 2 into profiles for the role within each adversarial position. That is, profiles are given separately for ADA and ADAW on the prosecution side, and separately for Def A and Def W on the defense side. Table 3 shows these results.

Statistical comparisons were made of four different pairs of roles. The profile for ADA was found to be significantly different from the profiles for ADAW, and also from the profile for Def A. The profile for Def A was found to be significantly different from the profile for Def W. Finally, no differences were found between the profiles for ADAW and Def W. Again, Table 6 summarizes these results.

More specifically, ADA differs from ADAW in six categories. Among the affect categories, ADA receives significantly more Cat. 3, 10, and 12 than does ADAW. Ordinarily, J addresses his affect to an attorney, not a witness. ADA also differs significantly from

ADAW in three task categories, Cat. 4, 5, and 7. Again, J gives his orders and opinions (on the rare occasions when s/he expresses them) to an attorney, not a witness. But not in Cat. 7. Table 3 shows a large volume of questions directed to ADAW, many, many more than addressed to ADA. This result confirms what we claimed earlier, that J interrogates ADAW any time s/he wants for any length whatever. In effect, J joins ADA and Def A as a third interrogator of ADAW.

The difference in profiles between Def A and Def W is not so dramatic as the differences between ADA and ADAW. There are no significant affect categories. There are three significant task categories, Cat. 4, 6, and 7. The explanation is the same as above: J addresses orders and information to an attorney, not a witness, and s/he addresses relatively many more questions to the Def W than Def A. It would appear that Def W (and ADAW) are not full interactants here. Rather, they are limited to information giving when called upon by the attorney or the J.

Seemingly, the most important of these comparisons is the one between the ADA and Def A. Table 6 shows that they differ in three affect categories, Cat. 3, 10, and 12, and one task category, Cat. 6. Specifically, ADA receives more agreement, less disagreement, and less antagonism than does the Def A. Table 2 showed the same results for the prosecution vs. defense. Here the results are more restricted: the differences are specifically between ADA and Def A. Only one task category remains here; Cat. 4 and 7, significant in Table 2, have dropped away. As noted above, Cat. 7 makes a

difference between attorneys and their witnesses, but not between attorneys. That Cat. 4 has disappeared here shows that J gives about the same relative number of orders to each attorney. Only Cat. 6 remains: J gives more information to the Def A than ADA, specifying the result found in Table 2. We explain it in the same way: Def A needs more information than does the ADA because s/he is less familiar with pre-trial hearings than is the ADA.

The important point, a specification of the same point made when discussing Table 2, is that J agrees more with ADA than Def A, disagrees less with ADA than with Def A, and expresses less antagonism toward ADA than toward Def A.

(b) We now proceed to address the second question raised above: Is J's interaction biased toward ADA and against Def A in any way? The analysis above shows that the answer is Yes: J is "biased" toward ADA and against Def A in three of the four relevant affect categories, Cat. 3, 10, and 12. J is also "biased" against ADA and toward Def A in terms of task category, Cat. 6: Gives information. However, as noted above, we consider this bias an innocent one, probably resting in Def A's relative unfamiliarity with pre-trial hearings.

Before continuing the analysis, however, we note that the results already presented confirm what defense attorneys told us in the survey. It appears that J and ADA are members of a "club" of court insiders who know each other and routinely work with one another on pre-trial hearings. Even if J is ultimately seen as unbiased in his/her decisions, the appearance of bias is

undesirable and should be avoided.

We now proceed to an analysis that will address the third question raised above.

(c) Since the answer to the second question was Yes, the third question becomes relevant: Does the bias found above affect the impartiality of J's decision to suppress or not to suppress evidence? We divide our analysis here into two parts: (i) an extension of the analysis of Table 2 and 3, holding constant Suppressed vs. Not suppressed cases; and (ii) two more fine-grained analyses of J's interaction.

(i) Table 4 is similar to Table 2. The only difference is that Prosecution and Defense are compared within J's two decision groups, Not Suppressed cases and Suppressed cases. If the reader will examine the summary in Table 6, it will be seen that there is absolutely no difference between the total comparison in Table 2 and the comparison for the Not Suppressed cases in Table 4. In each case the prosecution differs significantly from the defense in three affect categories, Cat. 3, 10, and 12, and three task categories, Cat. 4, 6, 7.

There is a slight difference in results when we compare the profiles in Table 2 with the Suppressed profiles in Table 4. Table 6 shows that in the Suppressed profiles Cat. 3, 10, and 12 among the affect categories are still significant, while Cat. 1 become significant here. Among task categories Cat. 6 and 7 continue over from Table 2, while Cat. 4 drops out.

In short, the results here do not show any great differences

from the results found in Table 2. Thus, J appears to treat the prosecution and defense in essentially the same way within each outcome group. That is, whatever the reason for J's differential behavior toward the prosecution and defense continues here. An additional charge of bias in decision cannot be made.

We turn now to Table 5, companion to Table 3 above. Essentially the same results are found. Table 6 shows that the results are exactly the same for the Not Suppressed ADA vs. ADAW profiles, exactly the same for the Not Suppressed ADAW vs. Def W profiles, and slightly different for the Not Suppressed Def A vs. Def W profiles. In the most important comparison, ADA vs. Def A, we see only one difference between the two tables: Cat. 10 was significant in Table 3, but not for the Not Suppressed cases in Table 5.

Similar results are found for the Suppressed cases. The results are slightly different for the Suppressed ADA vs. ADAW profiles, exactly the same for the ADAW vs. Def W profiles. In the most important cases, ADA vs. Def A, the differences are slight: Cat. 3 and Cat. 7 drop out in the Suppressed cases.

We must conclude from this evidence that J acts essentially the same way towards the ADA and the Def A in both the affect and task categories. Hence, the most likely explanation so far is the "irritation" hypothesis, i.e., that J is sufficiently irritated by Def A's lack of familiarity with pre-trial hearings to behave more coldly toward him/her than to the ADA.

However, two further fine-grained analyses do not support this

conclusion, and we turn to them now.

(ii) In the first of these two analyses we investigate how J responded to objections made by the attorneys during the hearings. In advance, we see no reason why J should respond differently, i.e., give more "Sustained" or "Overruled" responses, to one or the other. Possibly, following the "irritation" hypothesis, J might overrule Def A more than ADA.

Table 7 shows the results. For the total set of cases (N=28) J sustained ADA on 61.3% of the cases, while sustaining Def A in only 50.0% of the cases, a statistically significant difference. This result supports the "irritation" hypothesis. However, the analysis for the Not Suppressed cases separately from the Suppressed cases shows a different result. In the Not Suppressed cases J sustains ADA 61.5% of the time, but sustains Def A only 44.8% of the time, a statistically significant difference. But no difference is found for the Suppressed cases. J does sustain ADA in a greater percentage of cases than Def A, 61.0% vs. 53.9%, but the results are not statistically significant.

For the first time, type of outcome makes a clear difference in J's behavior. Further, the difference is the way one would expect if J were biased toward ADA and against Def A: it is the Not Suppressed cases where the ADA "wins" and Def A "loses", where J allows the evidence in question to be used in the trial to come.

A similar result is found in the second fine-grained analysis. For each attorney an index of affective acts received from J was constructed. Specifically, an attorney's percent of positive acts

(Cat. 1 + Cat. 3) and percent of negative acts (Cat. 10 + Cat. 12) were calculated, and then the percent of negative acts was subtracted from the percent of positive acts. The index, then, gives the net affect score for the attorney, and will be positive if s/he received more positive acts than negative acts from J, and will be negative if s/he received more negative acts than positive acts from J.

The average of these indexes were than calculated separately for ADA and Def A in the Not Suppressed cases and the Suppressed cases. Table 8 gives the results. In the Not Suppressed cases the average for the ADA is +10.4% vs. -3.8% for Def A. This difference is statistically significant. The same result for the Suppressed cases is not statistically significant (ADA: -0.6% vs. Def A: -2.6%). Again, the result takes the same form as the one above: the difference is found only in the Not Suppressed cases, and in the direction that suggests bias in decision-making on the part of the J. The result here may be made crystal clear by examining Table 9. For each of the 28 cases the affect index (defined in Table 8) for Def A was subtracted from the affect index for ADA. The resulting statistic will be positive when the ADA's index is positive and Def A's index is negative, the case where J appears to be biased in favor of ADA and against Def A. The resulting statistic will be negative when ADA's index is negative and Def A's index is positive, the opposite case, where J appears to be biased against ADA and toward Def A. These statistical values were then put in rank order from most positive to most negative (Column 1 of Table

9). Finally, the decision outcome of each was listed in the second column of Table 9, next to its statistical value.

A glance at the two columns of Table 9 shows that the high positive values are associated with Not Suppressed decisions, while the low positive values, the zero values, and the negative values are associated with Suppressed decisions. This result is statistically significant. Since the interaction reflected in the affect values comes before the decision, it is not possible to rule out the bias hypothesis, that J made his/her decision based on the degree to which s/he was warm toward ADA and cold toward Def A.

These two results show that J's "irritation" is higher in the Not Suppressed cases than in the Suppressed cases. That means that the hypothesis of biased decision-making cannot be ruled out.

Unfortunately, our data do not permit us to make a crucial test of the bias hypothesis. That would require having other judges review the work of these judges to see if they agree with the original decisions. If they believed that J was wrong in the number of Not Suppressed cases, then that would be more convincing evidence for the bias hypothesis.

If a thorough replication of this study, based on a larger number of cases matched better in terms of time period and kind of hearing, shows the same result, then we will carry out the more crucial study outlined here.

In conclusion, and to mix metaphors, we have found "smoke" but not yet a "smoking gun."

TABLE 1

Aggregate Bales IPA Profile for 28 Judges, Compared with a Profile of a Leader in a Democratic-directive Role\*

Category	Judges		Bales' Leader*		Total
	N	%	N	%	
1	65	2.1	13	1.9	78
2	6	0.2	0	0.0	6
3	136	4.4	32	4.8	168
4	791	25.7	45	6.7	836
5	49	1.6	192	28.8	241
6	756	24.6	314	47.1	1070
7	1098	35.5	19	2.9	1108
8	1	0.0	19	2.9	20
9	0	0.0	19	2.9	19
10	131	4.3	7	1.0	138
11	0	0.0	0	0.0	0
12	<u>49</u>	<u>1.0</u>	<u>7</u>	<u>1.0</u>	<u>56</u>
	3,073	100.0	667	100.0	3,740

\*Adapted from Bales, pp. 18-19. Each percent in chart 5, p. 18 is multiplied by the group's total number of acts (1,282) to produce the "N" column.

$$\chi^2 = \sum \frac{f^2}{f.} - N = 4935.5 - 3,740 = 1,195.5 \text{ (Highly Significant)}$$

Note: A reliability check was done on three, or 10%, of the 28 transcripts. After training, two coders coded the three. Bales' chi-square test for reliability was used (Bales, op. cit., p.120). The test showed that in each case the coders' profiles were not statistically different from each other ( $p > 0.05$ ). Hence, it was concluded that the coding throughout was reliable.

TABLE 2

## Bales IPA Profiles for Prosecution and Defense Attorneys, all Cases

Category	Prosecution		Defense		Total
	N	%	N	%	
1	46	2.4	19	1.6	65
2	3	0.2	3	0.2	6
3	98	5.2	38	3.2	136
4	442	23.5	349	29.4	791
5	27	1.4	22	1.8	49
6	389	20.6	367	30.9	756
7	817	43.5	272	22.9	1089
8	1	0.0	0	0.0	1
9	0	0.0	0	0.0	0
10	51	2.7	80	6.7	131
11	0	0.0	0	0.0	0
12	<u>10</u>	<u>0.5</u>	<u>39</u>	<u>3.3</u>	<u>49</u>
	1,884	100.0	1,189	100.0	3,073

$$\chi^2 = \sum \frac{f^2}{f.} - N = 3,273.0 - 3,073 = 200.0 \text{ (Highly Significant)}$$

TABLE 3

Sales IPA Profiles for Attorney and Witness Roles, by Prosecution and Defense, all Cases

Category	Prosecution					Defense				
	ADA		ADAW		Total	DefA		DEF w		Total
	N	%	N	%		N	%	N	%	
1	17	1.9	29	2.9	46	15	1.4	4	3.2	19
2	3	0.3	0	0.0	3	3	0.3	0	0.0	3
3	94	10.7	4	0.4	98	38	3.6	0	0.0	38
4	304	34.8	138	13.7	442	335	31.5	14	11.1	349
5	25	2.9	2	0.2	27	22	2.1	0	0.0	22
6	194	22.3	195	19.3	389	344	32.3	23	18.2	367
7	183	20.9	634	62.8	817	187	17.6	85	67.5	272
8	1	0.1	0	0.0	1	0	0.0	0	0.0	0
9	0	0.0	0	0.0	0	0	0.0	0	0.0	0
10	44	5.0	7	0.7	51	80	7.5	0	0.0	80
11	0	0.0	0	0.0	0	0	0.0	0	0.0	0
12	<u>10</u>	<u>1.1</u>	<u>0</u>	<u>0.0</u>	<u>10</u>	<u>39</u>	<u>3.7</u>	<u>0</u>	<u>0.0</u>	<u>39</u>
	875	100.0%	1009	100.0%	1884	1063	100.0%	126	100.0%	1189

TABLE 4

## Bales IPA Profiles, Non-Suppressed and Suppressed Cases By Prosecution and Defense

Category	Non-Suppressed				Suppressed			
	Prosecution		Defense		Prosecution		Defense	
	N	%	N	%	N	%	N	%
1	17	1.5	15	2.0	29	3.9	4	0.9
2	2	0.2	3	0.4	1	0.1	0	0.0
3	87	7.6	31	4.2	11	6.5	7	1.6
4	230	20.3	205	27.7	212	28.5	144	32.0
5	13	1.1	11	1.5	14	1.9	11	2.4
6	213	18.7	219	29.6	176	23.6	148	32.9
7	533	46.9	180	24.4	284	38.2	92	20.4
8	0	0.0	0	0.0	1	0.1	0	0.0
9	0	0.0	0	0.0	0	0.0	0	0.0
10	38	3.3	53	7.2	13	1.7	27	6.0
11	0	0.0	0	0.0	0	0.0	0	0.0
12	<u>6</u>	<u>0.5</u>	<u>22</u>	<u>3.0</u>	<u>4</u>	<u>0.5</u>	<u>17</u>	<u>3.8</u>
	1139	100.0	739	100.0	745	100.0	450	100.0

$\chi^2$  (Not Suppressed Prosecution v. Defense) =

$$\Sigma \frac{\phi^2}{f} - N = 2,014.0 - 1,878 = 136.0 \text{ (Highly Significant)}$$

$\chi^2$  (Suppressed Prosecution v. Defense) =

$$\Sigma \frac{\phi^2}{f} - N = 1,275.6 - 1,195 = 80.6 \text{ (Significant)}$$

TABLE 5

## Sales IPA Profiles, Type of Case by Adversarial Side by Type of Role

Category	Non-Suppressed Cases								Suppressed Cases							
	Prosecution				Defense				Prosecution				Defense			
	ADA		ADAM		Def A		Def W		ADA		ADAM		Def A		DEF W	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
1	9	1.8	8	1.2	12	1.9	3	3.0	8	2.1	21	5.8	3	0.7	1	4.0
2	2	0.4	0	0.0	3	0.5	0	0.0	1	0.2	0	0.0	0	0.0	0	0.0
3	86	17.6	1	0.2	31	4.8	0	0.0	8	2.1	3	0.8	7	1.6	0	0.0
4	143	29.3	87	13.4	195	30.6	10	10.0	161	41.9	51	14.2	140	32.9	4	16.0
5	13	2.6	0	0.0	11	1.7	0	0.0	12	3.1	2	0.6	11	2.6	0	0.0
6	91	18.6	122	18.8	203	31.9	16	16.0	103	26.8	73	20.3	141	33.2	7	28.0
7	108	22.0	425	65.5	108	16.9	72	71.0	75	19.5	209	58.0	79	18.6	13	52.0
8	0	0.0	0	0.0	0	0.0	0	0.0	1	0.2	0	0.0	0	0.0	0	0.0
9	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
10	32	6.5	6	0.4	53	8.3	0	0.0	12	3.1	1	0.3	27	6.4	0	0.0
11	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
12	<u>6</u>	<u>1.2</u>	<u>0</u>	<u>0.0</u>	<u>22</u>	<u>3.4</u>	<u>0</u>	<u>0.0</u>	<u>4</u>	<u>1.0</u>	<u>0</u>	<u>0.0</u>	<u>17</u>	<u>4.0</u>	<u>0</u>	<u>0.0</u>
	490	100.0	649	100.0	638	100.0	101	100.0	385	100.0	360	100.0	425	100.0	25	100.0

Table 6

Summary of Comparisons Made in Tables 1-5

Table	<u>Comparison of Profiles'</u>		<u>Comparison of Categories''</u>	
		Diff. in Affect Categories'''		Diff. in Task Categories'''
1		Different Cat. 10(+)		Cat. 4(+),5(-),6(-),7(+),8(-),9(-)
2		Different Cat. 3(+),10(-),12(-)		Cat. 4(-),6(-),7(+)
3	ADA v. ADAW	Different	Cat. 3(+),10(+),12(+)	Cat. 4(+),5(+),7(-)
	ADAW v. DefW	Same	None	None
	DefA v. DefW	Different	None	Cat. 4(+),6(+),7(-)
	ADA v. DefA	Different	Cat. 3(+),10(-),12(-)	Cat. 6(-)
4	NS:Pros. v. Defs.	Different	Cat. 3(+),10(-),12(-)	Cat. 4(-),6(-),7(+)
	S:Pros. v. Defs.	Different	Cat. 1(+),3(+),10(-),12(-)	Cat. 6(-),7(+)
5	NS:ADA v. ADAW	Different	Cat. 3(+),10(+),12(+)	Cat. 4(+),5(+),7(-)
	NS:ADAW v. DefW	Same	None	None
	NS:DefA v. DefW	Different	Cat. 3(+),10(+)	Cat. 4(+),6(+),7(-)
	NS:ADA v. DefA	Different	Cat. 3(+),12(-)	Cat. 6(-)
	S:ADA v. ADAW	Different	Cat. 1(-),10(+)	Cat. 4(+),5(+),6(+),7(-)
	S:ADAW v. DefW	Same	None	None
	S:DefA v. DefW	Differen	None	Cat. 7(-)
	S:ADA v. DefA	Different	Cat. 10(-),12(-)	Cat. 4(+),6(-)

'Determined by 2x12 contingency chi-square tests. "Different" means statistically significant with  $p < 0.05$ . "Same" means not statistically significant  $P \geq 0.05$ .

''Determined by difference of proportion tests. A category is listed if it was statistically significant,  $P < 0.05$ , using this test.

'''In ADA v. ADAW cases, "+" means ADA has a higher percent than ADAW, while "-" means the opposite. In DefA v. DefW cases, "+" means DefA has a higher percent than DefW, while "-" means the opposite. In ADA v. DefA cases, "+" means ADA has a higher percent than DefA, while "-" means the opposite.

NS - Not Suppressed

S - Suppressed

Table 7

Judges' Responses to Attorneys' Objections\*

## Total cases (N=28)

	<u>ADA</u>		<u>DEfa</u>		
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>	
Sustained	157	61.3	78	50.0	
Overruled	99	38.7	78	50.0	
	<u>256</u>	<u>100.0</u>	<u>156</u>	<u>100.0</u>	Significant, P<0.05

## Not Suppressed Cases (N=14)

Sustained	110	61.5	30	44.8	
Overruled	69	38.5	37	55.2	
	<u>179</u>	<u>100.0</u>	<u>67</u>	<u>100.0</u>	Significant, P<0.05

## Suppressed Cases (N=14)

Sustained	47	61.0	48	53.9	
Overruled	30	39.0	41	46.1	
	<u>77</u>	<u>100.0</u>	<u>89</u>	<u>100.0</u>	Not Significant

\*There were 37 objections during Not Suppressed cases where judge made no response that could be classified as "sustained" or "overruled". Similarly, there were 18 such cases during suppressed cases, making a total of 55. These cases were dropped from the table presented here.

Table 8

Averages of Affect Indexes = (Cat1 + Cat3)% - (Cat10 + Cat12)%

By Type of Attorney and Type of Case

	Not Suppressed	Suppressed	Total
ADA	+10.4%	-0.6%	+4.9%
DefA	-3.8%	-2.6%	-3.2%

Comparisons

ADA (NS{+10.4%} v. S{-0.6%}): Significant,  $P < 0.05$ \*

Not Suppressed (ADA{+10.4%} v. DefA{-3.8%}): Significant,  $P < 0.05$ \*\*

DefA (NS{-3.8%} v. S{-2.6%}): Not Significant\*

Suppressed(ADA 0.6%} v. DefA{-2.6%}): Not Significant\*\*

Total(ADA{+4.9%} v. DefA{-3.2%}): Not Significant\*\*

\*using a t-test for difference of means

\*\*using a t-test for correlated samples

Table 9

Difference between Assistant District Attorney's Affect Index and Defense Attorney's Affect Index, All Cases (Ordered).

<u>Difference</u> (Assistant District Attorney - Defense Attorney)	<u>Decision</u>
+42.5%	NS
+32.1%	NS
+30.1%	NS
+26.7%	S
+22.7%	NS
+20.4%	NS
+18.6%	NS
+16.0%	NS
+15.9%	S
+15.0%	NS
+13.3%	NS
+11.8%	NS
+ 7.7%	S
+ 7.6%	S
+ 6.2%	NS
+ 5.4%	S
+ 1.4%	S
+ 0.6%	S
0.0%	S
0.0%	S
0.0%	S
0.0%	S
- 7.7%	S
- 8.3%	NS
-10.3%	NS
-10.6%	S
-11.0%	NS
-20.0%	S

	Highest 14	Lowest 14	Total
NS	10	4	14
S	4	10	14
	14	14	28

$$\chi^2 = \sum \frac{f^2}{f.} - N = 33.14 - 28 = 5.14 \text{ (Significant)}$$

## Chapter 4

### Summary and Conclusions

#### I. Study Summary

A focused review of the literature indicated that judicial decision-making in exclusionary rule hearings may be biased against the rights of criminal defendants. The behavior of judges in these sessions may depart significantly from the presumed norm of a dispassionate, impartial trier-of-fact. This survey also revealed the existence of numerous empirical studies in which judicial decision-making has been construed as a small group process and taken as the subject of sociological analysis. Among the specific methods that have been utilized to investigate group interaction in judicial settings, Robert Bales' Interaction Process Analysis (IPA) was seen to be a valuable method for determining the presence, strength, and direction of judicial bias in exclusionary rule hearings. For the purpose of analyzing the influence of subjective factors in exclusionary rule hearing outcomes, two data-gathering exercises were undertaken: (1) the administration of an author-constructed opinion survey with three, role-distinguished groups of exclusionary hearings participants; and, (2) the application of IPA methods to the transcripts for a set of exclusionary rule hearings.

## II. Principal Findings of the Opinion Survey

From a universe of 250 survey subjects, a total of 127 completed opinion survey response sheets were collected. The 127 respondents were divided into three groups: 23 judges, 50 assistant district attorneys, and 54 defense attorneys. Of the seventeen items in the opinion survey instrument, five forced-response items yielded statistically significant results while the open-ended question drew responses from 17 subjects (14 defense attorneys, 3 assistant district attorneys, and no judges).

From the response evoked by an item which asked about the subject's perceptions concerning trends in exclusionary rule hearing outcomes, it was found that while both judges and prosecutors believed that an increasing proportion of suppression motions had been granted in the five-year period preceding instrument administration, defense attorneys felt that this proportion had actually declined. Not only was there a marked divergence of opinion among members of the three survey groups, prosecuting attorneys indicated that the trend in exclusionary hearings outcomes was adverse to the interests of the state while defense attorneys indicated that the trend was adverse to the interests of the clients. It is noteworthy that the subjects in the "judge" sample concurred with the prosecution group subjects, in effect taking the state's point of view on this question. When asked for their views as to why there was an increased tendency for judges to grant evidence suppression motions as a result of exclusionary rule hearings, majorities from all three opinion

survey groups cited better witness preparation as the predominant factor.

The opinion survey also found very sharp disagreement among the three survey groups with regard to the extent to which judges actively participate in the exclusionary rule hearings over which they preside. On this count, the vast majority of both judges and defense attorneys reported that judges actively intervene during these proceedings, but a strong majority of prosecuting attorneys indicated that judicial participation in exclusion rule hearings is actually minimal. As to the chief determinants of judicial activity in evidence suppression hearings, both judges and defense attorneys indicated that the "skill of counsel" is the main factor. The finding suggests that when attorneys for both sides are well-prepared and qualified, then judges are free to adopt a posture of minimal intervention in the proceedings, but when the counsel is less than able, judges must increase their level of participation in such hearings. By contrast, prosecuting attorneys cited "type of witness" as a factor associated with variations in judicial activity during exclusionary rule hearings. A potentially significant result generated from this item was that while both defense attorney and prosecuting attorney groups reported that "type of judge" had an influence upon judicial activity in exclusionary rule hearings, no representative from the survey's judge group cited this as a causal variable. This implies that while attorneys for both sides acknowledge that personality factors influence judicial behavior during pre-trial hearings, judges fail

to discern and acknowledge this influence.

The open-ended question displayed an acute difference in the perceptions held respectively by defense attorneys and prosecuting attorneys on the "fairness" of exclusionary rule hearings. As might be expected, representatives from both the prosecuting attorney group and the defense attorney group complained that judges were disposed against their respective causes. The former wrote that judges were "too liberal" in granting hearings and ruling favorably on evidence suppression motions while the latter asserted that judges are "too conservative" in denying hearings and motions to suppress evidence.

The main finding of the opinion survey, then, is that judicial behavior during exclusionary rule hearing is perceived to be less than completely impartial by both defense and prosecuting attorneys, while judges indicate no departure from the norm of purely objective decision-making. Hence, it is likely that subjective factors do have a role in judicial decision-making on evidence suppression motions, indeed, a substantially greater power than judges themselves are likely to acknowledge.

### III. Principal Findings of the Interaction Process Analysis

Transcripts from a sample of twenty-eight exclusionary rule hearings were subjected to the methods of Interaction Process Analysis. All of the transcripts reflected proceedings in the criminal court system of the State of New York. Judge interaction profiles were constructed for subsequent comparison with the

reference norm of Bales' "democratic leader." Profiles were then divided into two groups: those in which judges had granted evidence suppression motions and those in which judges had denied such motions.

From the results, it was found that judges do not behave in a completely objective manner while they preside over exclusionary rule hearings. Delving a bit deeper, the results here indicate that judges tend to agree more with prosecutors than with defense attorneys, to disagree less with prosecutors than with defense attorneys, and to express significantly more antagonism toward defense attorneys, their clients, and their witnesses than toward prosecuting attorneys and prosecution witnesses. From this, it can be concluded that judges are, in fact, biased in their behavior toward the prosecution and away from the defense in exclusionary rule hearings.

An initial statistical analysis, however, failed to reveal that judges' bias toward the prosecution had any impact upon actual hearing outcomes. However, subsequent rounds of analysis found that in cases in which evidence to suppress motions were granted, defense attorneys enjoyed far less favorable expressive communications from judges during hearings than those extended to the prosecution side by the judge. By contrast, in hearings in which suppression motions were denied, the net affect scores for defense attorneys and prosecuting attorneys were virtually identical.

#### IV. Findings and Conclusions

In relation to the study's governing research questions, a synthesis of the results derived from the multiple data-gathering techniques used in the study indicated that:

1. Judges do not uniformly adhere to the "norms" of purely objective behavior during exclusionary rule hearings and that subjective, inter-personal variables influence their behavior on the bench;
2. That judges are more favorably disposed toward the prosecution than toward the defense in exclusionary rule hearings; and,
3. That judges' bias against the defense appears to have an impact on judicial decisions in exclusionary rule hearings.

These findings support the views of the legal realist school on how judges actually decide matters before them. They also tend to support the critics' claims that judges harbor negative views of the exclusionary rule and that these predispositions exert an influence upon their decisions in evidence suppression cases.

#### V. Recommendations for Further Research

This study has shown that Robert Bales' Interaction Process Analysis can be successfully used to investigate practice in actual courtroom settings. By applying IPA to hearing transcripts, the study generated results that accord with previously-published research and the findings of an opinion survey of exclusionary rule hearings participants. Nevertheless, given the exploratory nature of this study, neither the utility of its methodology nor the validity of its substantive conclusions regarding judicial decision-making can be confirmed. Hence, it is recommended that

additional research be conducted into exclusionary rule hearings and other legal proceedings through the implementation of an IPA methodology.

## Bibliography

- Aronld T. (1962). The Symbols of Government. New York: Harcourt, Brace & World, 2nd Ed.
- Asch, S.E. (1952). Social Psychology. Englewood Cliffs, NJ: Prentice-Hall.
- Bales, R.F. (1947). "Interaction Content Analysis," Preliminary Report of the First National Training Laboratory on Group Development. Cambridge, MA: National Education Association and Research Center for Group Dynamics.
- \_\_\_\_\_. (1950a). Interaction Process Analysis: A Method for the Study of Small Groups. Chicago: University of Chicago Press.
- \_\_\_\_\_. (1950b). "A Set of Categories for the Analysis of Small Group Interaction," American Sociological Review, Vol.15, pp.257-263.
- \_\_\_\_\_. (1953). "The Equilibrium Problem in Small Groups," Working Papers in the Theory of Action. Eds. T. Parsons, R.F. Bales, and E. Shils. New York: Free Press.
- \_\_\_\_\_. (1958). "Task Roles and Social Roles in Problem-Solving Groups," Readings in Social Psychology. Eds. E.E. Maccoby, T.M. Newcomb, and E.L. Hartely. New York: Holt, Rinehart & Winston, pp.437-447.
- \_\_\_\_\_. (1968). "Interaction Process Analysis," International Encyclopedia of the Social Sciences. Ed. D.L. Sim. New York: MacMillan & Free Press, Vol.7, pp.465-471.
- \_\_\_\_\_. (1970). Personality and Interpersonal Behavior. New York: Holt, Rinehart and Winston.
- \_\_\_\_\_. (1984). "The Integration of Social Psychology," Social Psychology Quarterly, Vol.47, pp.98-101.
- \_\_\_\_\_. (1985). "The New Field Theory in Social Psychology," International Journal of Small Group Research, Vol.1, pp.1-18.
- Bales, R.F. & Cohen, S.P. (1979). SYMLOG: A System for the Multiple Level Observation of Groups. New York: Free Press.
- Bales, R.F. & Hare, A.P. (1965). "Diagnostic Use of the Interaction Profile," Journal of Social Psychology, pp.239-258.

- Bales, R.F. & Strodtbeck, F.L. (1951). "Phases in Group Problem-Solving," Journal of Abnormal and Social Psychology, Vol.46, pp.485-459.
- Ball, M. & Lohn, D.R. (1982). "Legal Advocacy, Performance, and Affection," Georgia Law Review, Vol.16, pp.845-857.
- Bavelas, A. (1969). "Communication Patterns in Task-Oriented Groups," Group Dynamics: Research and Theory. Eds. D. Cartwright and A. Zander. New York: Harper & Row, 3rd. Ed.
- Bender, M. (1986). New York Criminal Law: Penal Law. New York: Mattew Bender.
- Bennett, W.L. (1978). "Storytelling in Criminal Trials," Quarterly Journal of Speech, Vol.64, pp.1-22.
- \_\_\_\_\_. (1979). "Rhetorical Transformation of Evidence in Criminal Trials: Creating Grounds for Legal Judgment," Quarterly Journal of Speech, Vol.65, pp.311-322.
- Bennett, W.L. & Feldman, M.S. (1981). Reconstructing Reality in the Courtroom. New Brunswick, NJ: Rutgers University Press.
- Black, D. (1976). The Behavior of Law. New York: Academic Press.
- \_\_\_\_\_. (1979). "Common Sense in the Sociology of Law," American Sociological Review, Vol.44, pp.18-27.
- Blumberg, A. (1967). Criminal Justice. New York: New Viewpoints.
- Blumer, H. (1937). "Social Psychology," Man and Society. Ed. Emerson P. Schmidt. New York: Prentice-Hall, pp.144-198.
- \_\_\_\_\_. (1966). "Sociological Implications of the Thought of George Herbert Mead," American Journal of Sociology, vol.71, pp.535-544.
- \_\_\_\_\_. (1969). Symbolic Interaction: Perspectives and Method. Berkely, CA: University of California Press.
- Borgatta, E.F. (1954). "Analysis of Social Interaction and Sociometric Perception," Sociometry, Vol.17, pp.7-52.
- Borgatta, E.F. & Bales, R.F. (1953). "The Consistency of Subject Behavior and the Reliability of Scoring in Interaction Process Analysis," American Sociological Review, pp.566-569.
- Borgatta, E.F.; Cottrel, L.S. & Meyer, H.J. (1956). "On the Dimensions of Group Behavior," Sociometry, Vol.19, pp.223-240.

- Brown, R. (1986). Social Psychology. New York: Free Press, 2nd. Ed.
- \_\_\_\_\_. (1988). Group Process: Dynamics Within and Between Groups. London: Basil Blackwell.
- Brown, R. & Turner, J.C. (1981). "Interpersonal and Intergroup Behavior," Intergroup Behavior. Eds. J.C. Turner and H. Giles. Oxford: Basil Blackwell.
- Burke, K. (1966). Language as Symbolic Action: Essays on Life, Literature, and Method. Berkeley: University of California.
- Call, J.A. (1986). "The Trial as Story: How Jurors Perceive What They See and Hear During Trial," Trial, pp.84-87.
- Canon, B. (1979). "The Exclusionary Rule: Have Critics Proven That It Doesn't Deter police?" Judicature, Vol.62, pp. 398-403).
- Carter, L.H. (1984). Reason in Law. Boston: Little, Brown and Company, 2nd.Ed.
- Chandler, R.C.; Enslin, R.A.; & Renstrom, P.G. (1985). The Constitutional Law Dictionary: Volume 1, Individual Rights. Santa Barbara, CA: ABC-CLIO.
- Cohen, F.S. (1950). "Field Theory and Judicial Logic," Yale Law Journal, Vol.59, pp.238-272.
- Conley, J.M; O'Barr W.M. & Lind, E.A. (1978). "The Power of Language: Presentational Style in the Courtroom," Duke Law Journal, Vol.6, pp.1375-1399.
- Cornish, W.R. & Sealy A.P. (1973). "Juries and Rules of Evidence," Criminal Law Review, Vol.17, pp.208-218.
- Creamer, J.S. (1980). The Law of Arrest, Search, and Seizure. New York: Holt, Rinehart and Winston, 3rd.Ed.
- Cushman, R.E. & Cushman, R.F. (1965). Cases in Constitutional Law. New York: Appleton-Century-Crofts.
- Danet, B. (1980). "Language and the Legal Process," Law & Society Review, Vol.14, pp.447-550.
- Danet, B.; Hoffman, K.B; Kermish, N.C.; Rafn, H.J. & Stayman, D.G. (1980). "An Ethnography of Questioning in the Courtroom," Language Use and the Uses of Language. Eds. R.W. Shuy and A. Shnukal. Washington, DC: Georgetown University Press.

- Davis, J.H. (1969). Group Performance. New York: Addison Wesley.
- \_\_\_\_\_. (1973). "Group Decision and Social Interaction: A Theory of Decision Schemes," Psychological Review. Vol.80, pp.97-125.
- Davis, J.H.; Kerr, N.L.; Holt, R. & Meek, D. (1975). "The Decision Process of 6- and 12-Person Juries Assigned Unanimous and Two-Thirds Majority Rules," Journal of Personality and Social Psychology, Vol.32, pp.1-14.
- Deutsch, M. (1949a). "A Theory of Cooperation and Competition," Human Relations, Vol.2, pp.129-152.
- \_\_\_\_\_. (1949b). "An Experimental Study of the Effects of Cooperation and Competition upon Group Process," Human Relations, Vol.2, pp.629-636.
- Eikema Hommes, H.J. (1979). Major Trends in the History of Legal Philosophy. New York: North-Holland.
- Eldefonso, E. & Coffey, A.R. (1981). Criminal Law: History, Philosophy, Enforcement. New York: Harper & Row.
- Erikson, B.E.; Lind, E.A.; Johnson B.C.; & O'Barr, W.M. (1978). "Speech Style and Impression Formation in a Court Setting: The Effects of Powerful and Powerless Speech," Journal of Experimental and Social Psychology, Vol.14, pp.266-279.
- Feely, N.M. (1983). Court Reform on Trial: Why Simple Solutions Fail. New York: Basic Books.
- Fisher, W.R. (1987). Human Communication as Narration. Columbia, SC: University of South Carolina.
- Frank, J. (1936). Law and the Modern Mind. New York: Tudor Publishing.
- \_\_\_\_\_. (1949). Courts on Trial: Myth and Reality in American Justice. Princeton: Princeton University, 1949.
- Fuller, L. (1966). "An Afterward: Science and the Judicial Process," Harvard Law Review, Vol.79, pp.1604-1628.
- Gaudet, F. (1949). "The Sentencing Behavior of the Judge," Encyclopedia of Criminology. Eds. V.C. Branham and S.V. Kutsch. New York: Philosophical Library, pp.449-461.
- Gilsinan, J.E. (1982). Doing Justice: How the system Works as Seen by the Participants. Englewood Cliffs, NJ: Prentice Hall.

- Goffman, E. (1959). The Presentation of the Self in Everyday Life. New York: Doubleday & Company.
- \_\_\_\_\_. (1967). Interaction Ritual: Essays in Face-to-Face Behavior. Chicago, IL: Aldine.
- Gottfriedson, M.R. & Hindelang, M.J. (1979). "A Study of The Behavior of Law," American Sociological Review, vol.44, pp.3-17.
- Grano, J.D. (1984). "Fruit of the Poisonous Tree Doctrine," The Guide to American Law. Ed. H.W. Chase. St. Paul, MN: West Publishing, Vol.5, pp.316-317.
- Green, S.L. (1985). "Good Faith and the Exclusionary Rule," Trial Lawyers Quarterly, Vol.17, pp.38-42.
- Hanely, J.R. & Schmidt, W.W. (1979). Legal Aspects of Criminal Evidence. Berkeley, CA: University of California, 2nd. Ed.
- Hare, A.P. (1957). "Situational Differences in Leader Behavior," Journal of Abnormal & Social Psychology, Vol. 55, pp.132-135.
- \_\_\_\_\_. (1976). Handbook of Small Group Research. New York: The Free Press, 2nd.Ed.
- Hare, A.P. & Blumberg, H.H. (1988). Dramaturgical Analysis of Social Interaction. New York: Praeger.
- Hastie, R.; Penrod S.; & Pennington, N. (1983). Inside the Jury. Cambridge: Harvard University Press.
- Heffernan, W.C. & Lovely, R.W. (1991). "Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance," University of Michigan Journal of Law Reform, Vol.24, pp.311-370.
- Heinecke, C. & Bales, R.F. (1953). "Developmental Trends in the Structures of Small Groups," Sociometry, Vol.16, pp.7-38.
- Holmes, O.W. (1920). "The Path of the Law," Collected Legal Papers. New York: Harcourt, Brace.
- Homans, G.C. (1950). The Human Group. New York: Harcourt, Brace & World.
- \_\_\_\_\_. (1963). Social Behavior: Its Elementary Forms. New York: Harcourt, Brace & World.

- Jones, E.E. & Pitman, T.S. (1980). "Toward a General Theory of Strategic Self-Presentation," Psychological Perspectives on the Self. Ed. J. Suls. Hillsdale, NJ: Lawrence Erlbaum.
- Kamisar, Y. (1979). "The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than 'An Empty Blessing,'" Judicature, Vol.62, pp.337-350.
- Kamisar, Y.; Lafave, W.R.; & Israel, J.H. (1974). Modern Criminal Procedure. St. Paul, MN: West Publishing, 4th. Ed.
- Katsaris, W.K. (1975). Evidence and Procedure in the Administration of Justice. New York: John Wiley.
- Keeton, R.E. (1973). Trial Tactics and Methods. Boston, MA: Little, Brown.
- Kerr, N.L.; Atkin, R.S.; Stasser, G.; Meek, D.; Holt, R.W.; & Davis, J.H. (1976). "Guilty Beyond a Reasonable Doubt: Effect of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors," Journal of Personality and Social Psychology, Vol.34, pp.282-294.
- Landsberger, H.A. (1955). "Interaction Process Analysis of Professional Behavior: A Study of Mediators in Twelve Labor-Management Disputes," American Sociological Review, Vol.20, pp.566-575.
- LaTour, S.; Houlden, P.; Walker, L.; & Thibaut, J. (1976). "Procedures: Transnational Perspectives and Preferences," Yale Law Journal, Vol.84, pp.258-290.
- Levy, L.W. (1986). "Exclusionary Rule," Encyclopedia of the American Constitution. Eds. L.W. Levy, K.L. Karst, and D.J. Mahoney. New York: MacMillan, Vol.2, pp.662-665.
- Lewin, K. (1947). "Frontiers in Group Dynamics," Human Relations, Vol.1, pp.5-42.
- \_\_\_\_\_. (1948). Resolving Social Conflicts. New York: Harper & Row.
- \_\_\_\_\_. (1952). Field Theory in Social Science. New York: Harper & Row.
- \_\_\_\_\_. (1965). "Group Decision and Social Change," Basic Studies in Social Psychology. Eds. H. Proshansky and B. Seidenberg. New York: Holt, Rinehart, and Winston.
- Lewis, P.W. and Peoples, K.P. (1978). The Supreme Court and the Criminal Process: Cases and Comments. Philadelphia: W.B. Saunders.

- Lind, E.A. (1982) "The Psychology of Courtroom Procedure," Psychology in the Courtroom. Eds. R. Bray and N. Kerr. New York: Academic Press.
- Lind, E.A.; Erickson, B.E.; Conley J.M. & O'Barr, W.M. (1979). "Social Attributions of Conversational Styles in Trial Testimony," Journal of Personality and Social Psychology, Vol.36, pp.1558-1567.
- Lind, E.A.; Erickson, B.E.; Friedland, N. & Dickenberger, M. (1978). "Reactions to Procedural Models for Adjudicative Conflict Resolution," Journal of Conflict Resolution, Vol.22, pp.318-341.
- Lind, E.A.; Kurtz, S.; Musante, L.; Walker, L.; & Thibaut, J. (1980). "Procedures and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest," Journal of Personality and Social Psychology, Vol.39, pp.643-653.
- Lind, E.A. & O'Barr, W.M. (1979). "The Social Significance of Speech in the Courtroom," Language and Social Psychology. Eds. H. Giles and R.N. St. Clair. Baltimore, MD: University Park Press.
- Lind, E.A.; Thibaut, J. & Walker, L. (1973). "Discovery and the Presentation of Evidence in Adversary and Nonadversary Proceedings," Michigan Law Review, Vol.71, pp.1129-1144.
- Llewellyn, K.N. (1930a). "A Realistic Jurisprudence---The Next Step," Columbia Law Review, Vol. 30, 438-453.
- \_\_\_\_\_. (1930b). The Bramble Bush. New York.
- Loh, W.D. (1985). "The Evidence and Trial Procedure: The Law, Social Policy and Psychological Research," The Psychology of Evidence and Trial Procedure. Eds. S.M. Kassin and L.S. Wrightman. Beverly Hills, CA: Sage Publications.
- Marshall, J. (1966). Law and Psychology in Conflict. Indianapolis: Bobbs-Merrill.
- Maynard, D.W. (1984). "The Structure of Discourse in Misdemeanor Plea Bargaining," Law & Society Review, Vol.18, pp.75-104.
- McGrath, J.E. (1984). Groups: Interaction and Performance. New York: Prentice-Hall.
- Mead, G.H. (1934a). On Social Psychology. Chicago: University of Chicago Press.

- \_\_\_\_\_. (1934b). Mind, Self, and Society From the Standpoint of a Social Behaviorist. Ed. C.W. Morris. Chicago: University of Chicago Press.
- Miller, G.R. & Boster, F.J. (1977). "Three Images of the Trial: Their Implications for Psychological Research," Psychology in the Legal Process. Ed. B. Sales. New York: Halstead.
- Mills, T.M. (1967). The Sociology of Small Groups. Englewood Cliffs, NJ: Prentice-Hall.
- Nagel, S. (1962). "Judicial Background and Criminal Cases," Journal of Criminal Law, Criminology, and Police Science, Vol.53 pp.333-339.
- \_\_\_\_\_. (1964). "The Relationship Between the Political and Ethnic Affiliation of Judges and their Decision-Making," Judicial Behavior. Ed. G. Schubert. Chicago: Rand McNally.
- Nemeth, C.J. (1977). "Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules," Journal of Applied Social Psychology, Vol.7, pp.38-56.
- \_\_\_\_\_. (1983). "Sex Differences and Decision Making in Juries," Small Groups and Social Interaction, Eds. H. Blumberg, P. Hare, V. Kent, and M. Davis. New York: John Wiley & Sons, pp.69-77.
- Nemeth, C.J.; Endicott, J. & Wachtler, J. (1976). "From the '50s to the '70s: Women in Jury Deliberations," Sociometry, Vol.39, pp.293-304.
- Nemeth, C.J. & Wachtler, J. (1983). "Creative Problem-Solving as a Result of Majority and Minority Influence," European Journal of Social Psychology, Vol.14, pp.45-55.
- O'Barr, W.M. (1982). Linguistic Evidence: Language, Power and Strategy in the Courtroom. New York: Academic Press.
- O'Barr, W.M. & Conley, J.M. (1985). "Litigant Satisfaction Versus Legal Advocacy in Small Claims Court Narratives," Law and Society Review, Vol. 19, pp.661-701.
- O'Barr, W.M. & Lind, E.A. (1981). "Ethnography and Experimentation---Partners in Legal Research," Perspectives in Psychology and the Law: The trial Process. New York: Plenum Press.
- Oaks, D.H. (1970). "Studying the Exclusionary Rule," University of Chicago Law Review, Vol.37, pp.665-757.

- Olmstead, M. & Hare, A.P. (1978). The Small Group. New York: Random House, 2nd. Ed.
- Parsons, T. (1937). The Structure of Social Action: A Study in Social Theory With Special Reference to a Group of Recent European Writers. New York: McGraw-Hill.
- \_\_\_\_\_. (1951). The Social System. New York: Free Press.
- Parsons, T. & Bales, R.F. (1956). Family: Socialization and Interaction Process. Glencoe: Free Press.
- Parsons, T.; Bales, R.F.; & Shils, E. (1953). Working Papers in the Theory of Action. New York: Free Press.
- Pennington, N. & Hastie, R. (1986). "Evidence Evaluation in Complex Decision Making," Journal of Personality and Social Psychology, Vol.51, pp.242-256.
- Penrod, S. (1986). Social Psychology. Englewood Cliffs, NJ: Prentice-Hall.
- Pound, R. (1908). "Mechanical Jurisprudence," Columbia Law Review, Vol. 8, pp.605-623.
- Probert, W. (1972). Law, Language and Communication. Springfield, IL: Charles C. Thomas.
- Purcell, E.A. (1988). "American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory," American Law and the Constitutional Order: Historical Perspectives. Eds. L.N. Friedman and H.N. Scheiber. Cambridge, MA: Harvard University Press.
- Purdom, E.D. (1983). Dispute Settlement in a Southern Small Claims Court. Ph.D. Diss. Gainesville, FL: University of Florida.
- Rieke, R.D. & Stutman, R.K. (1990). Communication in Legal Advocacy. Columbia, SC: University of South Carolina Press.
- Saks, M. J. (1971). Jury Verdicts: The Role of Group Size and Social Decision Rule. Lexington, MA: D.C. Heath.
- Saks, M.J. & Hastie, R. (1978). Social Psychology in Court. New York: Van Nostrand.
- Schlesinger, S.R. (1977). Exclusionary Injustice: The Problem of Illegally Obtained Evidence. New York: Marcel Dekker.

- Schmidhauser, J.R. (1964). "The Background Characteristics of United States Supreme Court Judges," Judicial Behavior. Ed. G. Schubert. Chicago: Rand McNally.
- Schubert, G. (1963). Judicial Decision-Making. New York: Free Press.
- \_\_\_\_\_. (1964). Judicial Behavior. Chicago: Rand McNally.
- Schur, E.M. (1968). Law and Society: A Sociological View. New York: Random House.
- Sherif, M. (1936). The Psychology of Social Norms. New York: Harper and Row.
- \_\_\_\_\_. (1966). Group Conflict and Cooperation. London: Kegan Paul.
- Singer, R.G. (1984). "Exclusionary Rule," The Guide to American Law. Ed. H.W. Chase. St. Paul, MN: West Publishing, Vol.5, pp.44-45.
- Slater, P.E. (1955). "Role Differentiation in Small Groups," American Sociological Review, Vol.20, pp.43-59.
- \_\_\_\_\_. (1961). "Parental Role Differentiation," American Journal of Sociology, Vol.67, pp.269-311.
- Spiotto, J. (1973). "Search and Seizure: An Empirical Study of the Exclusionary Rule," Journal of Legal Studies, Vol.2, pp.243-257.
- Steiner, I.D. (1974). "Whatever Happened to the Group in Social Psychology?" Journal of Experimental Social Psychology, Vol.10, pp.94-108.
- Steinzor, B. (1949). "The Development and Evaluation of a Measure of Social Interaction," Human Relations, Vol.2, No.2 pp.103-122.
- Strick, A. (1977). Injustice for All. New York: G.P. Putman's Sons.
- Strodtbeck, F.L. & Mann, R.D. (1956). "Sex Role Differentiation in Jury Deliberations," Sociometry, Vol.19, pp.3-11.
- Stryker, S. & Statham, A. (1985). "Symbolic Interaction and Role Theory," Handbook of Social Psychology. Eds. G. Lindzey and E. Aronson. New York: Random House, pp.311-379.

- Tanford, S. & Penrod, S. (1984). "Social Influence Model: A Formal Integration of Research on Majority and Minority Influence," Psychological Bulletin, Vol.95, pp.189-225.
- \_\_\_\_\_. (1986). "Jury Deliberations: Discussion Content and Influence Processes in Jury Decision Making," Journal of Applied Social Psychology, Vol.16, pp.322-347.
- Tannenhaus, J. (1966). "The Cumulative Scaling of Judicial Decisions," Harvard Law Review, Vol. 79, pp.1582-1594.
- Thibaut, J. & Walker, L. (1975). Procedural Justice: A Psychological Analysis. Hillsdale, NJ: Lawrence Erlbaum.
- Toulmin, S.E. (1958). The Uses of Argument. Cambridge: Cambridge University Press.
- \_\_\_\_\_. (1972). Human Understanding. Princeton, NJ: Princeton University Press.
- Tuner, J.C. (1982). "Towards a Cognitive Redefinition of the Social Group," Social Identity and Intergroup Relations. Ed. H. Tajel. Cambridge: Cambridge University Press.
- Turner, J.C. & Giles, H. (1981). Intergroup Behavior. Oxford: Basil Blackwell.
- Turner, J.H. (1988). A Theory of Social Interaction. Stanford: Stanford University.
- Vera Institute. (1977). Felony Arrests and Dispositions in New York City's Courts. New York: Vera Institute.
- Walker, A.G. (1982). "Patterns and Implications of Cospeech in a Legal Setting," Linguistics and the Professions. Norwood, NJ: Albex.
- Walker, L.; LaTour, S.; Lind, E.A. & Thibaut, J. (1974). "Reactions of Participants and Observers to Modes of Adjudication," Journal of Applied Social Psychology, Vol.4, pp.295-310.
- Waxler, N. & Mishler, E. (1966). "Scoring and Reliability Problems in Interaction Process Analysis: A Methodological Note," Sociometry, Vol. 29, No.1, pp.28-40.
- Weber, M. (1957). The Theory of Social and Economic Organization. Trans. and eds. A.M. Henderson and T. Parsons. Glencoe, IL: Free Press of Glencoe.
- Wigmore, J.H. (1937). The Science of Judicial Proof. Boston: Little, Brown & Co.

- Wilkey, M.R. (1979). "A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak," Judicature, Vol.62. pp.351-356.
- Winick, C.; Gerver, I.; & Blumberg, A. (1960). "The Psychology of Judges" Legal and Criminal Psychology: Ed. H. Toch, Michigan State University: Holt, Rinehart and Winston.
- Witt, E. (1988). The Supreme Court and Individual Rights. Washington: Congressional Quarterly, 2nd Ed.
- Young, J.V. (1993). Landmark Constitutional Law Decisions: Briefs and Analyses. Lanham, MD: University Press, of America.