

Are There Unconscious Influences on Judicial Decisions?

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Abstract

The critique by Newell and Shanks (BBS, 2014) of much past work regarding unconscious influences on decision making is favorably discussed, generally speaking, in this opinion article. However, the authors' unfortunate analytical omission of judicial decision making is critically highlighted from the standpoints of methodological feasibility, ecological validity, social importance, and the ready availability of a large quantitative-data and conceptual base on the behavior of many essential categories of legal decision makers, which was developed by V. J. Konečni and E. B. Ebbesen at the University of California, San Diego, in the period 1973-2000.

Keywords: Unconscious influences on judicial decisions; Unconscious influences; Conscious will; Judicial decisions; Judicial intuition; Sentencing decisions; Judicial decision making; Legal decision makers; Psychology of law; Legal psychology

Recently Newell and Shanks [1, herefrom N&S] published a major article in which they critically addressed the issue of unconscious influences in human decision making, which is a theoretical and research problem of considerable importance from several standpoints. In philosophical terms, it touches on the notion of the existence of conscious will. In terms of psychology and neuroscience, it concerns the brain/mind question with regard to the neural versus the consciously intentional determination of action. Finally, the problem potentially has immense implications in socially significant decision making – which is the key concern of the present opinion article.

It is difficult to disagree with the negative slant of the review by N&S concerning the evidence that had been claimed to favor unconscious influences in decision making. Careful methodologists appreciate the authors' thorough argumentation in debunking the frequently unreplicable, and sometimes trite, allegedly counter-intuitive experimental results from the sensationalist wing of "social cognition" in psychology. As just two of the many possible examples, there is, first, the careful examination by N&S of the accumulated negative evidence concerning the startling claim by Nisbett and Wilson [2] that people ("actors") are no more aware of the "true causes" of their behavior than are the mere *observers* of that behavior. The second example is the N&S collation of the rather definitive empirical challenges to Wegner's [17] weakly supported claims that people's decisions, instead of being caused by conscious intention, are the result of "unconscious processes that may simultaneously produce illusory experiences of conscious will" [1, p. 16]. To Wegner, conscious will is only an epiphenomenon – and N&S strongly disagree, in a measured and documented manner.

Nevertheless one is somewhat disappointed by the N&S article because its range is far too narrow. The authors spend a great deal of time in the research quagmire that they deplore at the expense of what are arguably deeper and broader issues. It does not do to demonstrate only occasionally an awareness of ecological-validity problems, for instance in the discussion of decisions by experienced medical doctors versus novice physicians versus undergraduates concerning the *hypothetical* prescription of lipid-lowering drugs [1, p. 7]. This is insufficient, particularly if one keeps in mind that ecological validity was a prime concern of Egon Brunswik around whose "lens model" the authors' critical analysis is usefully structured [1, Figure 1, p.3].

What is unfortunately missing is any discussion of the role – if

any – of the unconscious in the decision making of judges and other key participants in both the criminal and civil legal spheres. It is worth examining in some detail why this omission significantly restricts the applicability of the valuable work by N&S. In the law, more perhaps than in any other area (including the medical and financial decision making), there is the exciting potential of studying the behavior of real-world, highly relevant, categories of decision makers, which are located at key nodes in a causal information-and-decision network. Many of the relevant decisions are in the public domain and the alternatives among which the decision makers choose (options that are legally available to them) are publicly known. The types of information available to the decision makers (case facts, prior record of the accused, reports from other, previous decision makers in the information chain of a given case) are for the most part legally prescribed and also publicly known (or procedurally discoverable by qualified researchers). Moreover, most of the information is available for coding and analysis (assuming the appropriate amount and range of researchers' technical skills). In addition, both general and individual policy decision rules are obtainable, in part because the real-world decision makers in the judicial system are under considerable implicit sociopolitical pressure to provide data to qualified researchers (unlike, for example, physicians, insurance experts, stockbrokers, and bankers). Perhaps most significantly, decisions by the various participants in the legal system have enormous moral, social, and political importance and, when erroneous, entail huge human cost. In short, one has little doubt that N&S would concede that legal decisions are a remarkable research milieu and that the decisions mentioned above, and the conditions in which they occur, are almost ideally suited for the exploration of some of the key issues that their article addresses.

An important additional fact is that an integrated data base comprising a large number of relevant legal decisions, by various categories of decision makers in the criminal and civil legal systems, already exists in the almost thirty-year research program conducted by Konečni and Ebbesen [3-13, 16]. In order to illustrate the breadth and

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depth of this program, some representative books and articles are listed in the References.

The question then is: why have N&S failed to refer to this data base? The most compelling possible reason is that N&S have observed that in the legal domain, unlike the areas that they have addressed, both the judges and the public explicitly hold the view that every case is different (the so-called “individualized justice”) and that many factors are *consciously, in a duty-bound manner*, taken into account: Public scrutiny and the demands of high office allegedly largely preclude (or even prohibit) unconscious influences. However, what the public, and some researchers perhaps do not realize is that for most judges individualized justice stands for a comparatively free rein being given to intuition and to an “instinctive” (in the sense of unconscious) synthesis of information [14-15]. Moreover, what the judges and the public usually do not realize is that in a broad range of judicial decisions that were studied by Ebbesen and Konečni a very small number of factors accounts for judicial decisions. For example, in sentencing for felonies, one proximal factor and two distal ones accounted for about 95% of the variance. This was based on some 1,200 archival cases and 400 sentencing hearings that were coded and analyzed by Konečni and Ebbesen [8].

In addition, and this is the central point in the argument that judicial decisions are bypassed at one’s peril when discussing unconscious influences on decisions: Judges’ decisions, both individually and on a group basis, differed sharply from what these same judges specified in interviews and structured questionnaires concerning their sentencing policies and habits. Many complications arise when these issues are probed carefully and this may have put N&S off. But this is too rich and socially significant area to ignore. Consider, as just one example, that it is possible and useful to distinguish among (a) what judges *publicly say* they do, (b) what they *privately think* they do, and (c) what they *actually do* (possibly influenced, at least in part, by intuitive-unconscious processes). To give a vivid example [10] : A sentencing judge may believe that he or she is taking – prejudicially, intentionally – a defendant’s race into account; the judge would of course never publicly admit to these prejudices and behavioral intentions; but the actual sentencing decision, which usually relies on very few factors, may completely disregard race (as it should)! In other words, the closet racist and the public civil libertarian may behaviorally be neither.

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